ORAL ARGUMENT IS NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 08-1390

MISSOURI COALITION FOR THE ENVIRONMENT AND MISSOURI PARKS ASSOCIATION,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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STATEMENT REGARDING ORAL ARGUMENT

Respondent Federal Energy Regulatory Commission agrees with Petitioners Missouri Coalition for the Environment and Missouri Parks Association that oral argument will assist the Court in deciding the issue raised in this appeal.

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GLOSSARY

AmerenUE	Union Electric Company, doing business as AmerenUE
Commission or FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
Missouri Coalition	Petitioners Missouri Coalition for the Environment and Missouri Parks Association
NEPA	National Environmental Policy Act
Rehearing Order	*AmerenUE*, 121 FERC ¶ 61,270 (2007), R. 226, P. App. 47-57

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Assuming jurisdiction, whether the Federal Energy Regulatory Commission ("Commission" or "FERC"), in approving an application to rebuild a portion of a damaged hydroelectric project, satisfied the requirements of the National Environmental Policy Act ("NEPA") when it concluded that possible future operation of the hydroelectric project under a new license did not require additional environmental analysis at this time.

COUNTERSTATEMENT OF JURISDICTION

Petitioners invoke this Court's jurisdiction under Section 313(b) of the Federal Power Act ("FPA"), 16 U.S.C. § 825*l*(b). As explained more fully *infra* (*see* pp. 16-17), Petitioner Missouri Parks Association did not seek party status in the agency proceedings below, and did not file a request for rehearing with the Commission. As a result, it may not obtain judicial review of the Commission's orders under FPA § 313(b), 16 U.S.C. § 825*l*(b).

Second, both Petitioners fail to satisfy the constitutional requirements for standing. As discussed in more detail *infra* (*see* pp. 17-20), Petitioners have not demonstrated that they have suffered any concrete "injury in fact" and, in particular, have not alleged any environmental harms resulting from the Commission's actions in this case, which are limited to the reconstruction (not the future relicensing) of the damaged hydroelectric project. Accordingly, the petition for review should be dismissed.

STATUTES AND REGULATIONS

The relevant statutes and regulations are contained in the Addendum to this brief.

STATEMENT OF THE CASE

This case concerns the Commission's approval of a request filed by Union Electric Company, doing business as AmerenUE ("AmerenUE"), to rebuild the

upper reservoir of the Taum Sauk Pumped Storage Project, a hydroelectric generating plant located on Proffit Mountain in Reynolds County, Missouri. On December 14, 2005, a severe breach of the upper reservoir allowed water to escape the reservoir and flow down the side of the mountain, significantly damaging the project and adjoining properties. This incident rendered the Taum Sauk project inoperable.

The issue raised in this appeal concerns the scope of the environmental analysis performed by FERC, pursuant to NEPA, of AmerenUE's request to reconstruct the upper reservoir and return the Taum Sauk project to operation under the terms of its existing hydroelectric license. FERC staff, in preparing a Draft Environmental Assessment pursuant to NEPA procedures, analyzed the environmental impacts associated with AmerenUE's construction activities. In comments on the Draft, certain parties argued that since AmerenUE's current license to operate the Taum Sauk project expires on June 30, 2010, staff should also evaluate the environmental impacts of continued operation of the project under a new license. Staff rejected these arguments, and issued a Final Environmental Assessment evaluating only the impacts associated with AmerenUE's reconstruction of the upper reservoir. This document concluded, under NEPA, that the reconstruction would have no significant impact on the environment.

Following FERC staff's finding of no significant impact, the agency's Director of the Office of Energy Projects, acting pursuant to delegated authority, issued a letter order approving AmerenUE's request to rebuild the upper reservoir. *See* R. 144, P. App. 79-84.[1] This approval was conditioned on AmerenUE complying with a list of environmental requirements recommended by staff in the Final Environmental Assessment.

Missouri Coalition for the Environment, a Petitioner here along with Missouri Parks Association (collectively, "Missouri Coalition"), joined two other parties to file a motion to formally intervene in the FERC proceedings, and a request for rehearing of the Director's letter order. They argued that relicensing of the Taum Sauk project was a "reasonably foreseeable future action," and thus the environmental consequences of future operation of the project under a new license must be studied as a "cumulative impact" of the proposed reconstruction of the upper reservoir. The Commission denied rehearing and affirmed staff's decision to analyze, at this time, only the impacts associated with the reconstruction of the upper reservoir. *AmerenUE*, 121 FERC ¶ 61,270 (2007), R. 226, P. App. 47-57 ("Rehearing Order").

[1] "R." refers to a record item. "P. App." refers to the Petitioners' Appendix page number. "R. App." refers to the Respondent's Appendix page number. "P" refers to the internal paragraph number within a FERC order.

STATEMENT OF FACTS

I. Statutory and Regulatory Background

Part I of the Federal Power Act ("FPA"), § 4 *et seq*., 16 U.S.C. § 797 *et seq*., constitutes "a complete scheme of national regulation" to "promote the comprehensive development of the water resources of the Nation." *First Iowa Hydro-Electric Coop. v. FPA*, 328 U.S. 152, 180 (1946). Under this Part, the Commission is authorized to issue licenses for the construction, operation and maintenance of hydroelectric projects on jurisdictional waters, and to oversee those licenses. *See, e.g., Coal. for the Fair and Equitable Regulation of Docks on the Lake of the Ozarks v. FERC*, 297 F.3d 771, 774-75 (8th Cir. 2002).

FPA § 10(c), 16 U.S.C. § 803(c), is particularly relevant to this appeal. This section requires the holder of a hydroelectric license issued by the Commission to "maintain the project works in a condition or repair adequate . . . for the efficient operation of said works in the development and transmission of power, [and to] make all necessary renewals and replacements." *Id*.; *see also* Rehearing Order at P 12, P. App. 51 (explaining applicability of FPA § 10(c)).

The Commission's substantive licensing and compliance responsibilities under the FPA, to the extent they implicate environmental issues, are informed by the procedural requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq. See, e.g., Friends of the River v. FERC*, 720 F.2d 93, 95

(D.C. Cir. 1983). NEPA requires federal agencies to adhere to certain procedural requirements, "with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004); *see also Olmsted Citizens for a Better Community v. Bureau of Prisons*, 793 F.2d 201, 204 (8th Cir. 1986) ("[NEPA], while embodying substantive goals for the preservation of our physical environment, imposes basically procedural obligations in pursuit of these goals"). Under NEPA, a federal agency must "'take a hard look at the environmental consequences' of a major federal action before approving such action." *Mayo Found. v. Surface Transp. Bd.*, 472 F.3d 545, 549-50 (8th Cir. 2006) (citing *Baltimore Gas & Elec. Co. v. Natural Res. Defense Council, Inc.*, 462 U.S. 87, 97 (1983)).

II. The Taum Sauk Hydroelectric Facility

The Taum Sauk Pumped Storage Project is located on the East Fork of the Black River in Reynolds County, Missouri. The project consists of an upper reservoir, located atop Proffit Mountain, and a lower reservoir. Water flowing from the upper reservoir to the lower reservoir drives two hydroelectric generating units to produce electric energy. During periods when the facility is not generating electricity, water is pumped from the lower reservoir back into the upper reservoir. *See FPC v. Union Elec. Co.*, 381 U.S. 90, 92-93 (1965) (describing operation of

the Taum Sauk project); *see also* Final Environmental Assessment at 1, R. 142, P. App. 97, and Notice of Intent, P. App. 536-38 (describing the principal project works).

The Taum Sauk project was originally granted a license by the Federal Power Commission (the predecessor agency to FERC) in 1965, for a term expiring on June 30, 2010. Rehearing Order at P 2, P. App. 47 (citing *Union Elec. Co.*, 34 FPC 598 (1965), *on reh'g*, 35 FPC 316 (1966)). At the time the orders challenged in this appeal were issued, AmerenUE had filed notice of its intent to apply for a new license, *see* P. App. 535-40, but had not yet filed an application for a new license. Rehearing Order at P 2, P. App. 47. (Later, on June 24, 2008, AmerenUE filed a complete application for a new license.)

III. December 2005 Upper Reservoir Breach

The Taum Sauk project and adjacent properties, including a state park and campground, were significantly damaged on December 14, 2005, when the upper reservoir of the project failed. That morning, water began overtopping the upper reservoir when the facility's pumps failed to shut off. Once this overtopping started, the parapet wall and rockfill dike holding water in the upper reservoir began eroding. As the erosion progressed, sections of the parapet wall were lost, and a large breach eventually formed in the rockfill dam. The breach allowed the water in the upper reservoir to escape, flowing down the west side of Proffit

Mountain into the East Fork of the Black River. The entire reservoir emptied within 25 minutes. The flows destroyed the home of the state park superintendent, flooded motorists on a nearby highway, and significantly damaged a campground and other adjacent properties before entering the lower reservoir. Fortunately, no fatalities resulted. *See* Rehearing Order at P 3, P. App. 47-49; Final Environmental Assessment at 3, P. App. 99 (describing December 14, 2005 breach).

The Commission's Office of Enforcement and Office of Energy Projects subsequently conducted an investigation of the upper reservoir breach. Following that investigation, the Office of Enforcement and AmerenUE entered into a stipulation and consent agreement. This stipulation and agreement required AmerenUE to pay a $10 million civil penalty (the largest ever imposed by FERC in a hydroelectric matter), and to pay $5 million into an escrow account to fund certain project enhancements (including an advanced emergency management system, economic development and quality of life enhancements for persons living near the project, and environmental, educational and recreational enhancements). These amounts were over and above the costs incurred by AmerenUE to remediate the environmental and property damage caused by the breach. The Commission approved the stipulation and agreement on October 2, 2006. *See AmerenUE*, 117 FERC ¶ 61,001 (2006), R. App. 3-7, and News Release, "AmerenUE Agrees to

Pay $15 Million to Settle Matters Relating to December 2005 Dam Breach," Oct. 2, 2006, R. App. 1-2.

IV. FERC Proceedings Concerning Repair Of The Facility

On February 5, 2007, AmerenUE submitted to FERC a request to rebuild the upper reservoir of the Taum Sauk project, including detailed design plans and an environmental report. *See* P. App. 397.[2] AmerenUE proposed to rebuild the upper reservoir in the same location and of the same shape and size as the previous reservoir, and did not propose to enlarge the facility or otherwise change its operation. *See* Final Environmental Assessment at 6 (describing AmerenUE's proposal), P. App. 102.

A. Environmental Review

Following this submittal, FERC staff issued notice of its intent to prepare an environmental analysis concerning AmerenUE's proposal to rebuild the upper reservoir. R. 13 (Feb. 13, 2007). Subsequently, on February 21, 2007, staff released a scoping document to advise the public as to the proposed scope of its environmental analysis, and to seek additional information regarding the issues that would be analyzed. R. 16, R. App. 8-31. Commission staff then held two public

[2] Under Commission regulations, the detailed design specifications are considered confidential information. As a result, only the public portions of AmerenUE's application and supporting materials (including the environmental report), without objection by Petitioners are included in the documents provided to the Court.

meetings to receive comments on the scoping document, one at a state resource agency in Jefferson City, Missouri, and one in Lesterville, Missouri, near the Taum Sauk project. Written comments were also received.

Taking into account the comments received, Commission staff issued a Draft Environmental Assessment. R. 101, P. App. 262. The Draft Environmental Assessment concluded that with certain mitigation measures recommended by both AmerenUE and FERC staff, AmerenUE's proposed reconstruction of the upper reservoir "would not constitute a major federal action significantly affecting the quality of the human environment." Draft Environmental Assessment at 91-92, P. App. 362-63. Of note for purposes of this appeal, the Draft Environmental Assessment focused on "the impacts associated specifically with the licensee's proposal for rebuilding of the upper reservoir," and did not evaluate future operation of the Taum Sauk project, "as that is being evaluated under the Commission's relicensing proceeding." *Id*. at 4, P. App. 275.

After receiving comments on the Draft Environmental Assessment, *see* R. 101, P. App. 260 (June 7, 2007) (FERC notice inviting comments), FERC staff issued a Final Environmental Assessment on August 14, 2007. *See* R. 142, P. App. 87-237. That document maintained the conclusion in the Draft that AmerenUE's proposed reconstruction of the Taum Sauk project's upper reservoir, with certain mitigation measures recommended by AmerenUE and FERC staff, "would not

constitute a major federal action significantly affecting the quality of the human environment." Final Environmental Assessment at 96-97, P. App. 192-93. As in the Draft, the Final Environmental Assessment focused on the impacts associated specifically with the proposed rebuild of the upper reservoir, and left consideration of the impacts of future operation of the Taum Sauk project under a new license for evaluation in a subsequent relicensing proceeding. *Id.* at 4, P. App. 100. In Appendix A to the Final Environmental Assessment, FERC staff responded in detail to comments submitted on the Draft Environmental Assessment, including comments asserting that the agency should consider the impacts of future operation of the Taum Sauk project in this reconstruction proceeding, rather than in the future relicensing proceeding. *See id.* at A-1 to A-4, P. App. 198-201.

B. Challenged Orders

Following the completion of staff's environmental analysis, the Director of the Commission's Office of Energy Projects, acting pursuant to delegated authority, issued a letter order approving AmerenUE's request to reconstruct the upper reservoir. P. App. 79-84. The Director's approval was contingent upon AmerenUE obtaining Commission approval of various engineering and safety plans. Letter Order at 1, P. App. 79. Additionally, the Director's order included a list of environmental requirements, based on the recommendations in the Final

Environmental Assessment, that AmerenUE must comply with during reconstruction of the upper reservoir. *Id.* at 3 & Enclosure, P. App. 81 & 82-84.

Missouri Coalition, the Sierra Club, and American Rivers collectively filed a motion for late intervention in the FERC proceedings, as well as a request for rehearing of the Director's Letter Order. R. 170, P. App. 60-77. As relevant to this appeal, their request for rehearing argued that relicensing of the Taum Sauk project is a "reasonably foreseeable future action" and, as a result, the Commission was required under NEPA to consider the "cumulative impacts" to the environment of future operation of the project. Rehearing Request at 10, P. App. 70.

The Commission granted the request to intervene of Missouri Coalition, the Sierra Club, and American Rivers, but denied their request for rehearing. R. 226, P. App. 47-57. FERC explained that the repair of the upper reservoir proposed by AmerenUE in this proceeding is a compliance matter governed by FPA § 10(c), 16 U.S.C. § 803(c), as well as the terms of its existing license, and is separate and apart from proceedings concerning the future relicensing of the Taum Sauk facility. Rehearing Order at PP 12-14, P. App. 51-53. Further, the Commission explained that irrespective of AmerenUE's decision to rebuild the upper reservoir now, in a future relicensing proceeding – where the agency, under the FPA and NEPA, must broadly examine the issues surrounding continued project operation – FERC could order major changes to the project facilities, direct new environmental

measures, or perhaps even determine that the project should no longer be operated. *Id.* at P 14, P. App. 53. As a result, the Commission found no basis for concluding that relicensing should be considered a "reasonably foreseeable future action," and held that the scope of the Final Environmental Assessment was properly restricted to the impacts associated with reconstructing the upper reservoir. *Id.*

The instant petition for review followed.

SUMMARY OF ARGUMENT

Petitioner Missouri Parks Association lacks standing under Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b), to obtain judicial review of the challenged orders. Missouri Parks Association neither became a party to this proceeding nor sought rehearing from the Commission, as the FPA requires. Further, both it and Missouri Coalition for the Environment (collectively "Missouri Coalition") fail to satisfy the constitutional requirements for standing. Missouri Coalition has not identified any concrete "injury in fact;" in particular, it has failed to demonstrate any precise environmental harms that it contends will result from the Commission orders (concerning project reconstruction, not relicensing) challenged in this appeal. Accordingly, the Court lacks jurisdiction and the petition for review should be dismissed.

Assuming jurisdiction, the Commission fully satisfied its National Environmental Policy Act obligations in this proceeding. AmerenUE's request to

reconstruct the damaged upper reservoir of the Taum Sauk hydroelectric project – in the same shape and size as the previous reservoir – is a matter of compliance with its existing license under FPA § 10(c), 16 U.S.C. § 803(c), separate and apart from matters concerning future relicensing of the project. In relicensing proceedings, other sections of the FPA, along with NEPA, require FERC to fully re-examine continued operation of the project, including the environmental impacts of such operation.

Given this statutory structure, the Commission reasonably concluded that the potential environmental impacts of continued operation of the Taum Sauk project do not require analysis in the instant compliance proceedings. Since the statutes require FERC to fully evaluate the environmental and other impacts of continued operation of the project at the time a relicense application is submitted, the agency reasonably concluded here that relicensing is not a "reasonably foreseeable future action" requiring analysis at this juncture as a "cumulative impact" of reconstruction of the upper reservoir. For this reason as well, the agency did not impermissibly "segment" the rebuild proposal from relicensing, and was under no obligation to view the contemplated (but at that time not yet proposed) relicensing as a "cumulative impact." Since the statutes require a complete review of continued operation at the time relicensing is proposed, approving the

reconstruction of the upper reservoir now does not "irretrievably commit" the agency to relicensing the project later.

Finally, the Commission's conclusion here was fully consistent with judicial precedent. Where an action simply retains or restores the environmental status quo, a full-blown Environmental Impact Statement is not required. FERC's approval of AmerenUE's proposal to rebuild the upper reservoir in the same location as the previous reservoir, with no changes in its shape, volume or operation, only restored the status quo that existed prior to the December 2005 breach incident. In these circumstances, the agency's Environmental Assessment of the proposed project rebuild provided ample (and legally sufficient) environmental review.

ARGUMENT

I. Petitioners Fail To Adequately Demonstrate Their Standing To Obtain Judicial Review Of The Challenged Orders

To obtain judicial review of a FERC order, a party must both satisfy FPA § 313(b), 16 U.S.C. § 825*l*(b), and meet the requirements of Article III standing. *See, e.g., Pub. Util. Dist. No. 1 of Snohomish County v. FERC*, 272 F.3d 607, 613 (D.C. Cir. 2002) (party is not "aggrieved" within the meaning of FPA § 313(b), 16 U.S.C. § 825*l*(b), unless it can establish constitutional and prudential standing). Petitioner Missouri Parks Association lacks standing under FPA § 313(b), while both it and Missouri Coalition for the Environment fail to demonstrate that they

meet the requirements of Article III standing. Accordingly, the Court lacks jurisdiction, and the instant petition for review should be dismissed.

A. Missouri Parks Association Lacks Standing Under The Federal Power Act To Petition For Review Of The Challenged Orders

Under FPA § 313(a), 16 U.S.C. § 825*l*(a), only a "party" may petition the Commission for rehearing of any order from which it is "aggrieved." *See also* 18 C.F.R. §§ 385.214 (FERC rules governing intervention as a party) and 385.713 (rules governing filing of request for rehearing). Similarly, under FPA § 313(b), 16 U.S.C. § 825*l*(b), only a "party" to a FERC proceeding who is "aggrieved" by the Commission's rehearing order may file a petition for review in the Court of Appeals. This statute provides further that "[n]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing." *Id.*; *see also Coal. for the Fair and Equitable Regulation of Docks on the Lake of the Ozarks*, 297 F.3d at 777 (declining to review for lack of jurisdiction, under FPA § 313, arguments not raised to agency in petitioner's rehearing request).

Missouri Parks Association fails to satisfy the requirements for obtaining judicial review under this statute, as it was not a party to the FERC proceedings underlying the challenged orders, and did not file a request for rehearing of the Director's Letter Order. To be sure, Missouri Parks Association did submit comments during the Commission's NEPA scoping process. *See* P. App. 368, 376.

It did not, however, seek formal intervention as a party in the Commission proceedings or file a request for rehearing, as Missouri Coalition for the Environment did. *See* P. App. 60. For these reasons, Missouri Parks Association is not a proper petitioner in this court under FPA § 313(b), 16 U.S.C. § 825*l*(b).

FERC does not object to Missouri Parks Association proceeding in this appeal as an intervenor in support of Petitioner Missouri Coalition for the Environment. However, having failed to preserve its legal arguments in a petition for rehearing presented to the FERC, or to otherwise obtain party status before the Commission, Missouri Parks Association cannot advance to this Court any issue not advanced by Missouri Coalition for the Environment. *See Process Gas Consumers Group v. FERC*, 912 F.2d 511, 512-16 (D.C. Cir. 1990) (under identical jurisdictional provision in the Natural Gas Act, entity that was not a party to the agency proceedings and did not seek rehearing may not "assume the role of petitioner and obtain judicial review").

B. Missouri Coalition Has Not Satisfied The Requirements Of Article III Standing

The "irreducible constitutional minimum" for Article III standing generally requires the petitioner to have suffered (1) an "injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical," (2) that has a "causal connection" with the challenged agency action, and (3) that likely "will be redressed by a favorable

decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal citations and quotation marks omitted); *see also, e.g., Bennett v. Spear*, 520 U.S. 154, 162 (1997); *Sierra Club v. Robertson*, 28 F.3d 753, 757-58 (8th Cir. 1994) (citing *Lujan*).

Missouri Coalition fails to demonstrate that it has suffered any "injury in fact;" it offers no demonstration that the challenged orders invade "a legally protected interest which is . . . concrete and particularized." *Lujan*, 504 U.S. at 560 (citations and internal quotation marks omitted); *Sierra Club v. Robertson*, 28 F.3d at 758. While "[c]omplaints of environmental and aesthetic harm are sufficient to lay the basis for standing," *Sierra Club v. Robertson*, 28 F.3d at 758, the opening brief does not identify any environmental harm that will result from the Commission's orders in this case, dealing with project reconstruction, not project licensing.

Missouri Coalition raises no issues regarding the substance of FERC's finding in the Final Environmental Assessment that the reconstruction of the upper reservoir of the Taum Sauk project, with recommended mitigation measures, does not constitute a major federal action significantly affecting the environment. While the project reconstruction does have some environmental consequences, which the Commission analyzed, *see, e.g.*, Rehearing Order at PP 17-18, P. App.

54-55 (concerning clearing of 13.2 acres of forest), Missouri Coalition nowhere claims any harm from these precise consequences.

Further, Missouri Coalition does not articulate any environmental harms that will result from the agency's decision to assess the environmental impacts of future operation of the Taum Sauk project in a future relicensing proceeding, rather than in the instant compliance proceeding concerning repair of the facility. Moreover, both previously before FERC and now before this Court, Missouri Coalition does not assert that the Taum Sauk project should be shut down permanently, "or that authorizing the reconstruction of the project will preclude the imposition of any particular environmental measure in a new license." Rehearing Order at P 15, P. App. 53. Having failed to show that FERC's action here will cause environmental injury, Missouri Coalition lacks Article III standing. *See Cent. South Dakota Coop. Grazing Dist. v. U.S. Dep't of Agric.*, 266 F.3d 889, 897 (8th Cir. 2001) (holding that where party failed to show that agency action would "cause environmental injury to itself or its members," it lacked Article III standing to pursue NEPA claim).

To be sure, this Court has indicated that in cases where the petitioner asserts a procedural injury, standing can be established "'without meeting all the normal standards for redressability and immediacy.'" *City of Clarkson Valley v. Mineta*, 495 F.3d 567, 569 (8th Cir. 2007) (quoting *Lujan v. Defenders of Wildlife*, 504

U.S. at 572 n.7). Nonetheless, in such cases the petitioner still bears the burden of showing that "'the procedures in question are designed to protect some threatened concrete interest . . . that is the ultimate basis of [its] standing.'" *City of Clarkson Valley*, 495 F.3d at 569 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. at 573 n.8). Thus, even if Missouri Coalition were to claim a procedural injury under NEPA, its failure to identify any precise injury to a "threatened concrete interest" fatally undermines its claim to standing. *Id.*

II. Standard of Review

Turning to the merits, FERC orders are reviewed under the deferential "arbitrary and capricious" standard of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A). Under that standard, "[t]he Commission's decision may not be set aside unless it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Mid-Continent Area Power Pool v. FERC*, 305 F.3d 780, 782 (8th Cir. 2002). The Court accepts the Commission's findings of fact if they are supported by substantial evidence, and defers to the agency when it "makes determinations within its area of administrative expertise." *Mobil Oil Corp. v. FERC*, 886 F.2d 1023, 1028 (8th Cir. 1989).

This deferential standard is also applied to an administrative agency's determinations in NEPA cases, including an agency's decision not to issue an Environmental Impact Statement after it prepares an Environmental Assessment

and issues a finding of no significant impact. *See, e.g.*, *Cent. South Dakota Coop. Grazing Dist.*, 266 F.3d at 894-95; *Goos v. ICC*, 911 F.2d 1283, 1292 (8th Cir. 1990) (both citing *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989)). The Court is not to "substitute its judgment for that of the agency as to the environmental consequences of its actions" – "[t]he only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976). Additionally, an agency's resolution of issues regarding the possible cumulative environmental impacts of proposed actions is entitled to deference. *Id.* at 412-414.

III. FERC's Analysis Of The Environmental Impacts Associated With Repairing The Taum Sauk Project Fully Satisfied The Agency's NEPA Obligations

As noted above, NEPA is an "action-forcing" statute, "requir[ing] federal agencies to take a 'hard look' at the environmental consequences of major federal actions before they are taken." *Sierra Club v. U.S. Army Corps of Engineers*, 446 F.3d 808, 815 (8th Cir. 2006); *see also Sierra Club v. U.S. Forest Serv.*, 46 F.3d 835, 837 (8th Cir. 1995) (describing Environmental Assessment and Environmental Impact Statement procedures under NEPA regulations). "NEPA's obligations are procedural; the statute does not mandate any particular result." *Id.* Under the statute, an agency must "adequately consider[] and disclose[] the

environmental impact of its actions." *Baltimore Gas & Elec. Co.*, 462 U.S. at 97-98 (describing goals of NEPA).

FERC's review of the potential environmental impacts of rebuilding the upper reservoir of the Taum Sauk project satisfied its obligations under NEPA. As noted elsewhere in this brief, AmerenUE proposed in these proceedings to repair and reconstruct the upper reservoir, in the same size and shape as it previously existed, to return the project to operation under the terms of its existing license. FERC staff prepared a detailed Final Environmental Assessment concluding that approving this request would not constitute a major federal action impacting the environment. In so doing, the agency reasonably determined, consistent with both the FPA and NEPA, that it would consider the environmental impacts of possible future operation of the project under a new license when it later acts on an application for a new license, rather than now as a cumulative impact of reconstruction of the upper reservoir.

A. Under The Federal Power Act, Reconstruction Is A Compliance Matter, Separate From Relicensing

In these proceedings, AmerenUE proposed to reconstruct the upper reservoir of the Taum Sauk project, to return the project to operation under the terms of its existing license. AmerenUE proposed to rebuild the upper reservoir in the same location and of the same size and capacity as the previous upper reservoir, and did not propose any changes to the project boundary, the size of its generating units, or

to project operations. *See* Final Environmental Assessment at 6, P. App. 102 (describing proposed action).

As the Commission explained in the Rehearing Order, this proposed action is a compliance matter subject to FPA § 10(c), 16 U.S.C. § 803(c), Article 21 of the license for the Taum Sauk project, and Part 12 of the Commission's regulations, 18 C.F.R. Part 12. Rehearing Order at PP 12, 21, P. App. 51-52, 55-56. Under FPA § 10(c), a licensee (such as AmerenUE in this case) is required to keep the licensed project safe and operational: "the licensee shall maintain the project works in a condition or repair adequate . . . for the efficient operation of said works in the development and transmission of power, [and] shall make all necessary renewals and replacements." 16 U.S.C. § 803(c) (quoted in Rehearing Order at P 12, P. App. 51). Under Article 21 of the Taum Sauk project license, failure to meet these obligations could subject AmerenUE to possible enforcement action (in addition to the action already taken, *see supra* pp. 8-9), or result in the involuntary termination of the project license. Rehearing Order at P 12, P. App. 51-52; *see also id.* at n.12 (quoting license Article 21); *Clifton Power Corp. v. FERC*, 88 F.3d 1258, 1261-62 (D.C. Cir. 1996) (upholding, in relevant respects, FERC's enforcement judgment that licensee failed to comply with license conditions).

Under the FPA, such compliance and safety matters are wholly separate and apart from matters regarding the licensing or relicensing of a hydroelectric project, which are governed by several other provisions, including FPA § 4(e), 16 U.S.C. § 797(e), and FPA § 10(a)(1), 16 U.S.C. § 803(a)(1). When deciding whether to license or relicense a project, the FPA requires FERC to consider and balance many public interest factors. Rehearing Order at PP 14, 21, P. App. 53, 55-56. FPA § 10(a)(1), 16 U.S.C. § 803(a)(1), requires the agency to ensure that a hydroelectric project "is best adapted to a comprehensive plan for improving or developing a waterway or waterways." The factors the Commission considers include not only the "power and development purposes for which licenses are issued," but also energy conservation, protection of fish and wildlife habitats, protection of recreational opportunities, and preservation of environmental quality. FPA § 4(e), 16 U.S.C. § 797(e); *see also Coal. for the Fair and Equitable Regulation of Docks on the Lake of the Ozarks*, 297 F.3d at 774-75.

FERC is not required by the FPA, however, to engage in such a comprehensive licensing-like analysis in "post-licensing matters such as project repairs, reconstruction, or compliance filings." Rehearing Order at P 21, P. App. 55-56. In sum, as the Commission explained here, "[i]n contrast to a repair application, in a relicense proceeding both the FPA and NEPA require the Commission to examine whether the renewed commitment of a public resource to

hydroelectric generation will be best adapted to the comprehensive development of the waterway for beneficial public purposes." *Id.* at P 14, P. App. 53.

B. FERC Reasonably Concluded That Relicensing Of The Taum Sauk Project Is Not A Reasonably Foreseeable Future Action Requiring Analysis Now

Missouri Coalition asserts that FERC violated NEPA by improperly "segmenting" the repair of the Taum Sauk facility proposed in this case from future operation of the project under a new license (P. Br. at 17-22), and by failing to evaluate future operation of the project as a "cumulative" impact of reconstructing the upper reservoir (P. Br. at 22-26). Given the structure of the FPA, however, with its distinction between actions to comply with an existing hydroelectric project license and actions to license or relicense a project (discussed *supra* pp. 22-25), the Commission reasonably concluded that relicensing of the Taum Sauk project is not a "reasonably foreseeable consequence" of authorizing the repair and reconstruction of the upper reservoir, and need not be included in the agency's analysis of the cumulative environmental effects of that authorization. *See* Rehearing Order at P 14, P. App. 53.

1. FERC Did Not Impermissibly "Segment" The Proposal To Reconstruct The Upper Reservoir From Future Operation Of The Taum Sauk Project Under A New License

First, contrary to Missouri Coalition's arguments here, the Commission did not "segment" anything in conducting its NEPA analysis. AmerenUE proposed in

the instant proceedings only to reconstruct the upper reservoir of the Taum Sauk project in the same footprint as the previous reservoir (with no changes in operation or power output), and the Commission fully analyzed that proposal in the Final Environmental Assessment. *See* Final Environmental Assessment at 5-6, P. App. 102-103 (describing proposed action). At the time of FERC's orders here, AmerenUE had only filed a notice of its intent to seek a new license for the continued operation of the Taum Sauk project, but had not yet filed a formal relicense application. (A formal application was not filed until June 24, 2008). As a result, FERC could not have "segmented" the proposal to repair the project from continued operation of the project under a new license, since no proposal to relicense the project was pending. *See Kleppe*, 427 U.S. at 406, 410 n.20 (NEPA does not require analysis of merely contemplated actions).

In any event, even if FERC had "segmented" its analysis of the repair of the upper reservoir from future operation of the project under a new license, it would not have been unreasonable. "A segmentation is improper when the segmented project 'has no independent justification, no life of its own, or is simply illogical when viewed in isolation.'" *One Thousand Friends of Iowa v. Mineta*, 364 F.3d 890, 894 (8th Cir. 2004) (citing *Save Barton Creek Ass'n v. Fed. Highway Admin.*, 950 F.2d 1129, 1139 (5th Cir. 1992)). As the court stated in *Save Barton Creek*:

> "Segmentation" or "piecemealing" is an attempt by an agency to divide artificially a "major Federal action" into smaller components to

> escape the application of NEPA to some of its segments. . . . Segmentation becomes suspect, however, only after an evaluation of such factors as whether the proposed segment (1) has logical termini; (2) has substantial independent utility; (3) does not foreclose the opportunity to consider alternatives; and (4) does not irretrievably commit federal funds for closely related projects.

950 F.2d at 1140; *see also One Thousand Friends of Iowa*, 364 F.3d at 894 ("A state improperly segments a project when it seeks to escape the reach of NEPA").

Here, the Commission made clear that it was not attempting to avoid application of NEPA to either the reconstruction of the upper reservoir or any future proceeding to relicense the Taum Sauk project. FERC engaged in a full NEPA review of AmerenUE's repair proposal before making its finding of no significant impact, and explicitly stated that it would, at the appropriate time, engage in a full NEPA analysis to examine the potential environmental impacts of relicensing the Taum Sauk project. Rehearing Order at P 14, P. App. 53; *see also One Thousand Friends of Iowa*, 364 F.3d at 894 (upholding agency where it did not segment a project in an effort to avoid NEPA requirements).

Moreover, repair of the upper reservoir of the project has independent utility. *See One Thousand Friends of Iowa*, 364 F.3d at 894, and *Save Barton Creek*, 950 F.2d at 1139 (each noting that segmentation is not improper where project at issue has "substantial independent utility"). As FERC explained, AmerenUE "has the right to operate its project in a manner consistent with the terms of its license." Rehearing Order at P 13, P. App. 52. As a result, AmerenUE has the right (and in

fact obligation) to rebuild the upper reservoir to allow its project to return to operation under the terms of its existing license, independent of whether the project will eventually be relicensed. *Id.* at P 14, P. App. 53 (noting that AmerenUE assumes the risk that the rebuilt project will not be relicensed, or that a new license will involve major changes to the rebuilt project or its operations).

Finally, analyzing only AmerenUE's proposed reconstruction of the upper reservoir at this point, and leaving the analysis of future operation under a new license to the future relicensing proceeding, does not foreclose any "opportunit[ies] to consider alternatives," nor does it "irretrievably commit" the Commission to any course of action regarding relicensing of the Taum Sauk project. *Save Barton Creek*, 950 F.2d at 1139. In a future proceeding addressing the potential relicensing of the project, the Commission must, under both the FPA and NEPA, reconsider all of the issues surrounding continued operation:

> [I]n a relicense proceeding both the FPA and NEPA require the Commission to examine whether the renewed commitment of a public resource to hydroelectric generation will be best adapted to the comprehensive development of the waterway for beneficial public purposes. This could involve major changes in project facilities or operation, new environmental measures that may substantially alter project economics, or in rare cases, perhaps even a determination that the project should no longer be used for power generation.

Rehearing Order at P 14, P. App. 53 (citations omitted); *see also id.* at P 16, P. App. 53-54 (authority to require project changes "is inherent in the relicensing process").

2. FERC Reasonably Determined That The Final Environmental Assessment Did Not Need To Analyze Future Operation As A Cumulative Impact

For many of the same reasons, the Commission's determination that the Final Environmental Assessment was not deficient for failing to include future operation of the Taum Sauk project under a new license in its analysis of cumulative impacts should be upheld. As noted above (*supra* pp. 22-24), given the distinction in the FPA between compliance matters like AmerenUE's proposal to repair the upper reservoir of the Taum Sauk project, and licensing matters like the potential future relicensing of the Taum Sauk project, FERC stated that "there is no legal or factual basis for concluding . . . that relicensing should be a considered a reasonably foreseeable consequence of the reconstruction authorization." Rehearing Order at P 14, P. App. 53. Accordingly, the Commission held that a cumulative effects analysis of potential future operation of the project under a new license was not required. *Id.*

The regulations implementing NEPA define "cumulative impact" as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7; *see also Sierra Club v. U.S. Forest Serv.*, 46 F.3d at 839 n.7 (citing regulation); *Kleppe*, 427 U.S. at 410 (where several proposals "that will have cumulative or synergistic environmental impact . . . are pending concurrently

before an agency, their environmental consequences must be considered together"). The need for a comprehensive statement addressing cumulative impacts "depends on the facts of each case." *Minnesota Pub. Interest Research Group v. Butz*, 541 F.2d 1292, 1306 (8th Cir. 1976). "The critical question is whether the actions are essentially independent or interdependent and whether each action involves an irretrievable commitment of resources beyond what is actually expended on each project." *Id.* The determination of cumulative impacts "is a task assigned to the special competency of the appropriate agenc[y]," and is not disturbed "[a]bsent a showing of arbitrary action." *Kleppe*, 427 U.S. at 412-414; *see also Arkansas Wildlife Fed'n v. U.S. Army Corps of Engineers*, 431 F.3d 1096, 1102 (8th Cir. 2005) (determination of "reasonably foreseeable action" is left to the agency in the first instance).

Contrary to the claims of Missouri Coalition (*see* P. Br. at 21), FERC's approval of the reconstruction of the upper reservoir in the instant proceeding does not result in an "irretrievable commitment of resources" or "firmly commit[]" the agency to any particular course of action regarding a potential future application to relicense the Taum Sauk project. As noted elsewhere in this brief, the Commission explained here that regardless of its approval of AmerenUE's request to repair the upper reservoir and return the project to operation under the terms of its existing license, the agency will address in a future relicensing proceeding the full range of

environmental impacts associated with future operation of the project. Rehearing Order at P 14, P. App. 53. In fact, the relevant statutes themselves – the FPA and NEPA – require FERC to undertake this complete analysis, and require the agency to direct any changes to the project facilities or its operation that are necessary to meet statutory requirements, including "perhaps even a determination that the project should no longer be used for power generation." *Id.*; *see also id.* at P 16, P. App. 53-54. Thus, declining to immediately analyze, in this compliance proceeding, the environmental impacts of future operation of the project will not result in future knowledge of such impacts "prov[ing] irrelevant" to the Commission's decision on a future request to relicense the project, as Missouri Coalition contends. *See* P. Br. at 21.

Moreover, at the time the Commission was considering AmerenUE's request to repair the Taum Sauk project, no concrete proposal to relicense the project was before the agency. AmerenUE had only indicated that it intended to seek a new license, and entered into various pre-application consultation procedures required before submitting a formal relicensing application. Rehearing Order at P 2, P. App. 47. (AmerenUE did not file a formal application for a new license until June 24, 2008). In such circumstances, where the action in question is merely "contemplated" but has not reached the status of a *proposed* action, the Commission is not required to analyze that action. *See National Wildlife Fed'n v.*

FERC, 912 F.2d 1471, 1477-1478 (D.C. Cir. 1990) (where the contemplated second phase of a proposed hydroelectric project was not presently before the Commission, the agency was not required to evaluate its possible environmental effects); *Kleppe*, 427 U.S. at 406, 410 n. 20 (NEPA does not require agencies to consider impact of merely "contemplated" actions). Moreover, as the Commission thoroughly explained (*see* Rehearing Order at PP 14, 16, P. App. 53, 53-54), its approval of the reconstruction of the upper reservoir did not in any way "bind itself to approve" relicensing the project. *National Wildlife Fed'n*, 912 F.2d at 1478.

Finally, it is important to note that the Commission has not ignored the potential for environmental impacts from continued operation of the Taum Sauk project under a new license. Rather, FERC simply concluded that those impacts were best addressed in a future proceeding concerning an application to relicense the project. *See Arkansas Wildlife Fed'n*, 431 F.3d at 1102 (upholding agency's environmental analysis where it did not "completely ignore" possible cumulative impact of future projects); *see also, e.g., Friends of Richards-Gebaur Airport v. Federal Aviation Admin.*, 251 F.3d 1178, 1190 (8th Cir. 2001) (where a future project would be "subject to appropriate environmental review when proposed," possibility of that future project was "an insufficient basis" to find agency's environmental review arbitrary).

3. Missouri Coalition's Arguments Rest Entirely On Unfounded Assumptions

Missouri Coalition bases its entire case, both previously before FERC and now before this Court, on the unfounded assumption that by authorizing AmerenUE to repair the Taum Sauk project now, the Commission has effectively prejudged any future application by AmerenUE for a new project license. *See, e.g.*, P. Br. at 21 (quoting Comments of East Ozarks Audubon Society, P. App. 371); Rehearing Request, P. App. 69-70 ("Staff's repeated insistence that its decision here will not affect the Commission's future licensing decision is unpersuasive. . . . It is inconceivable to think that the Commission would allow a licensee to construct a project and operate it for a single year (or less) only to deny the project a new operating license or issue a license that requires substantially different design or operational requirements"). To support its assumption, Missouri Coalition's brief relies primarily on comments submitted to the agency in response to the Draft Environmental Assessment, and its reading of statements in AmerenUE's environmental report (submitted with its request to rebuild the upper reservoir). *See* P. Br. at 18-19, 24 (quoting Comments of U.S. Forest Service) and 18, 23 (quoting AmerenUE's environmental report).

Again, as demonstrated above, FERC addressed these comments and statements in the Rehearing Order. Approval of the reconstruction of the upper reservoir does not prejudice consideration of a future relicense application, FERC

explained, because the statutory structure of the FPA (as well as the application of NEPA) requires the Commission to fully re-evaluate continued operation of the Taum Sauk project under a new license, when a relicensing application is filed, regardless of AmerenUE's decision to rebuild the project now. Rehearing Order at PP 14, 16, P. App. 53, 53-54. The assertions of Missouri Coalition and the other parties seeking rehearing provided "no legal or factual basis for concluding . . . that relicensing should be considered a reasonably foreseeable consequence of the reconstruction authorization." *Id.* at P 14, P. App. 53.

Missouri Coalition provides no "legal or factual basis" before this Court, either, and fails to even address FERC's conclusion that the FPA and NEPA require it to fully review the environmental impacts of a future relicense application, preventing any possible prejudgment. *Id.* While Missouri Coalition speculates that "'[i]t will be a practical impossibility'" to later deny AmerenUE a new license or to grant a new license requiring significant changes in project facilities or operations (*see* P. Br. at 21), such conclusory allegations do not satisfy its burden to show that FERC's NEPA review was arbitrary and capricious. *See Kleppe*, 427 U.S. at 412 (requiring a showing of arbitrary action to overturn agency decision as to cumulative impacts); *see also Sierra Club v. U.S. Forest Serv.*, 46 F.3d at 839 (complaining party "cannot simply doubt" agency determination without pointing to more than speculation).

C. In The Circumstances Of This Case, Where The Proposed Action Merely Restores The Status Quo, FERC Reasonably Concluded That No Environmental Impact Statement Was Required

As described above, AmerenUE's proposed action in these proceedings was to rebuild the upper reservoir of the Taum Sauk project, to return the project to operation consistent with the terms of its existing license. AmerenUE proposed to rebuild the reservoir in the same location, occupying the existing footprint of the previous reservoir, and did not propose any changes in the size and shape of the project, its operation, or its power output. *See* Final Environmental Assessment at 6, 96-97, P. App. 102, 192-93. In short, the proposed action would restore the status quo, returning the Taum Sauk project to its condition prior to the December 2005 incident. In these circumstances, contrary to Missouri Coalition's argument here, the agency's Environmental Assessment was sufficient, and no Environmental Impact Statement was required.

In similar cases addressing the repair and reconstruction of existing facilities, courts have held that an Environmental Impact Statement is not required where the project or facility in question is repaired or reconstructed to restore it to essentially its pre-existing condition and footprint. *Sierra Club v. Hassell*, 636 F.2d 1095 (5th Cir. 1981), is analogous to the instant case. There, the Fifth Circuit considered whether an Environmental Impact Statement was required for a proposal to reconstruct a bridge destroyed by a hurricane. The Court held that no

Environmental Impact Statement was required; the new bridge did not "significantly alter the status quo" since, while incorporating an improved design, it was "essentially on the same alignment as the previous . . . bridge." *Id.* at 1099. The Court found the decision not to prepare an Environmental Impact Statement reasonable, since "the reconstruction project will only restore an environmental situation that had existed for twenty-four years." *Id.* (citing *City & County of San Francisco v. United States*, 615 F.2d 498 (9th Cir. 1980)). *See also, e.g., Citizens for the Scenic Severn River Bridge v. Skinner*, 802 F. Supp. 1325, 1332-33 (D. Md. 1991) (upholding decision to exclude from Environmental Impact Statement requirement a bridge replacement project where proposed new bridge was not "distinct" from existing bridge).

Similarly, the reconstructed upper reservoir proposed by AmerenUE will be located in the same footprint as the damaged existing upper reservoir, and will have a "similar shape and volume of water." Final Environmental Impact Statement at 6, 96-97, P. App. 102, 192-93. Moreover, AmerenUE did not propose any changes in the operation of the project or in its power output, meaning that, after reconstruction, the Taum Sauk project will operate exactly as it did previously. *Id.* Thus, the reconstruction "will only restore an environmental situation that . . . existed" prior to the December 2005 breach incident. *Sierra Club v. Hassell*, 636 F.2d at 1099.

More generally, this and other Courts have held that where the proposed action does not change the status quo as it existed prior to the activities in question, no Environmental Impact Statement is required. For example, in *South Dakota v. Andrus*, 614 F.2d 1190 (8th Cir. 1980), this Court concluded that the issuance of a mineral patent is not a major federal action requiring an Environmental Impact Statement, since the patent does not allow its holder to actually begin mining operations. Similarly, in *Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309 (8th Cir. 1981), this Court held that no Environmental Impact Statement was required for an agency regulation that changed the method of allocation of slots for takeoffs and landings from an airport, but did not increase the number of slots (and therefore amount of air traffic). And in *Sierra Club v. FERC*, 754 F.2d 1506 (9th Cir. 1985), the Ninth Circuit held that FERC was not required to prepare an Environmental Impact Statement when it issued a preliminary permit for a proposed hydroelectric project, since a preliminary permit does not allow the holder to actually enter federal lands to conduct tests that might harm the environment. *See also, e.g., Comm. for Auto Responsibility v. Solomon*, 603 F.2d 992, 1002-1003 (D.C. Cir. 1979); *Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d 115, 116 (9th Cir. 1980).

Like those cases, in the instant case the Commission only allowed AmerenUE to reconstruct the upper reservoir to return the Taum Sauk project to its

pre-existing condition. As the Commission's order makes clear, approving the repair of the project does not grant a new license to AmerenUE, or even allow it to operate the project after its existing license expires. Rehearing Order at P 14, P. App. 53. This future operation, which is the focus of Missouri Coalition's claims here, will require FERC consideration and approval of an application for relicensing. *Id.* at PP 14, 16, P. App. 53, 53-54. That application will be subject to NEPA review when it is filed. *Id*. at P 14, P. App. 53; *see also South Dakota*, 614 F.2d at 1195 (while no Environmental Impact Statement was required for issuance of mineral patent, "this is not to say that at some later date an [Environmental Impact Statement] will not be required") (citing *Kleppe*, 427 U.S. at 401 n.12, 406).

The cases relied on by Missouri Coalition (*see* P. Br. at 25-26 & n.5 (citing cases)) are inapposite. Those cases all concern proposals for *new* construction of a facility or project, or an addition or improvement to an existing facility or project. Those cases do not concern the repair or reconstruction of an existing facility or project to return it to its original condition and size, as is the case in this proceeding, and thus have little relevance here.

CONCLUSION

For the reasons stated, the petition for review should be dismissed for lack of jurisdiction. Alternatively, the petition should be denied and the Commission's orders should be upheld in all respects.

Respectfully submitted,

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June 30, 2008

Missouri Coalition for the Environment and Missouri Parks Association v. FERC **Docket No. P-2277**
8th Cir. No. 08-1390

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), and Circuit Rule 28A(c), I certify that the Brief of Respondent Federal Energy Regulatory Commission was prepared using Microsoft Word 2003, and contains 8,811 words, not including the tables of contents and authorities, the certificates of counsel, or the addendum.

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June 30, 2008

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CERTIFICATE OF SERVICE

I hereby certify that I have, this 30th day of June, 2008, served the foregoing by causing copies of it to be mailed to the counsel listed below.

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