

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Nos. 05-1206, 06-1141, and 06-1429 (consolidated)

**ENERGIE GROUP, LLC, ELAINE HITCHCOCK, APPALACHIAN
RIVERS RESOURCE ENHANCEMENT, LLC, AND CHARLES MIEREK,
PETITIONERS,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

**ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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COMMISSION
WASHINGTON, D.C. 20426**

AUGUST 24, 2007

FINAL BRIEF: SEPTEMBER 28, 2007

CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

The following are parties before this Court:

Case No. 05-1206:

Energie Group LLC
Federal Energy Regulatory Commission

Case No. 06-1429:

Energie Group LLC
Elaine Hitchcock
Federal Energy Regulatory Commission

Case No. 06-1141:

Appalachian Rivers Resource Enhancement, LLC
Charles Mierek
Federal Energy Regulatory Commission

The following were parties, intervenors, and amici before the Federal Energy Regulatory Commission in the underlying dockets:

Docket No. P-12454:

Energie Group LLC

Docket No. P-12684:

Energie Group LLC
Elaine Hitchcock

Docket No. P-12563:

Appalachian Rivers Resource Enhancement, LLC
Clifton Power Corporation
Jackson County, North Carolina

Docket No. P-12570:

Appalachian Rivers Resource Enhancement, LLC
Alcoa Power Generating, Inc.
Clifton Power Corporation
Jackson County, North Carolina
Duke Power Company

Docket No. P-12587:

Appalachian Rivers Resource Enhancement, LLC
Clifton Power Corporation
Charles Mierek

B. Rulings Under Review

D.C. Cir. No. 05-1206:

1. Order Denying Application for Preliminary Permit, *Energie Group*, Docket No. P-12454, 109 FERC ¶ 62,225 (2004) (“Energie Permit Order”), E.R. 36, JA 22; and
2. Order Denying Rehearing, *Energie Group LLC*, Docket No. P-12454, 111 FERC ¶ 61,072 (2005) (“Energie Permit Rehearing Order”), E.R. 44, JA 35.

D.C. Cir. No. 06-1429:

3. Letter Order re: Rejection of License Application, *Energie Group LLC*, Docket No. P-12684 (June 19, 2006) (“Energie License Order”), E.R. 49, JA 173;
4. Order Denying Rehearing, *Energie Group LLC*, Docket No. P-12684, 116 FERC ¶ 61,220 (2006) (“Energie License Rehearing Order”), E.R. 62, JA 73; and
5. Order Rejecting Request for Rehearing and Denying Reconsideration, *Energie Group, LLC*, Docket No. P-12684, 117 FERC ¶ 61,124 (2006), E.R. 70, JA 89.

D.C. Cir. No. 06-1141:

6. Order Denying Preliminary Permit Application, *Appalachian Rivers Resource Enhancement*, Docket No. P-12570, 113 FERC ¶ 61,043 (2005) (“Appalachian Permit (Cheoah) Order”), A.R. 8, JA 92;
7. Order Denying Preliminary Permit Application, *Appalachian Rivers Resource Enhancement, LLC*, Docket No. P-12563, 113 FERC ¶ 62,100 (2005), A.R. 9, JA 97;
8. Order Denying Preliminary Permit Application, *Appalachian Rivers Resource Enhancement, LLC*, Docket No. P-12587, 113 FERC ¶ 62,098 (2005), A.R. 10, JA 99; and
9. Order Denying Rehearing, *Appalachian Rivers Resource Enhancement, LLC*, Docket Nos. P-12570, P-12563, and P-12587, 114 FERC ¶ 61,145 (2006) (“Appalachian Permits Rehearing Order”), A.R. 23, JA 163.

C. Related Cases

These cases have not previously been before any other court. Counsel is not aware of any related cases pending before this or any other court.

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Appalachian	Petitioner Appalachian Rivers Resource Enhancement, LLC
Appalachian Permit (Cheoah) Order	Order Denying Preliminary Permit Application, <i>Appalachian Rivers Resource Enhancement</i> , FERC Docket No. P-12570, 113 FERC ¶ 61,043 (2005), A.R. 8, JA 92
Appalachian Permits Rehearing Order	Order Denying Rehearing, <i>Appalachian Rivers Resource Enhancement, LLC</i> , FERC Docket Nos. P-12570, P-12563, and P-12587, 114 FERC ¶ 61,145 (2006) A.R. 23, JA 163
Br.	Petitioners' Brief
Commission or FERC	Federal Energy Regulatory Commission
E.R.	Record item in the combined Certified Index to the Record filed in Case Nos. 05-1206 and 06-1429
Energie	Petitioner Energie Group LLC
Energie License Order	<i>Energie Group LLC</i> , FERC Docket No. P-12684 (June 19, 2006) (unpublished letter order), E.R. 49, JA 173
Energie License Rehearing Order	Order Denying Rehearing, <i>Energie Group LLC</i> , FERC Docket No. P-12684, 116 FERC ¶ 61,220 (2006), E.R. 62, JA 73

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Energie Permit Order	Order Denying Application For Preliminary Permit, <i>Energie Group</i> , FERC Docket No. P-12454, 109 FERC ¶ 62,225 (2004), E.R. 36, JA 22
Energie Permit Rehearing Order	Order Denying Rehearing, <i>Energie Group LLC</i> , FERC Docket No. P-12454, 111 FERC ¶ 61,072 (2005), E.R. 44, JA 35
FPA	Federal Power Act
License Rehearing Request	Energie's Request For Reinstatement Of License, Or In The Alternative, Request For Rehearing, FERC Docket No. P-12684 (filed July 18, 2006), E.R. 51, JA 50
PURPA	Public Utility Regulatory Policies Act of 1978

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Nos. 05-1206, 06-1141, and 06-1429 (consolidated)

**ENERGIE GROUP, LLC, ELAINE HITCHCOCK, APPALACHIAN
RIVERS RESOURCE ENHANCEMENT, LLC, AND CHARLES MIEREK,
PETITIONERS,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

**ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission (“Commission” or “FERC”) reasonably denied a hydropower license and preliminary permits to applicants who have extensive records of violating conditions of hydropower authorizations and failing to comply with FERC’s statutory enforcement authority.

STATEMENT REGARDING JURISDICTION

On August 8, 2005, the Commission moved to dismiss the appeal in Case No. 05-1206 for lack of jurisdiction, based on Petitioner Energie Group LLC’s

(“Energie”) lack of a cognizable injury resulting from denial of a permit. By order dated December 12, 2005, the Court referred the motion to the merits panel.

Because the Energie permit and license denials are both before the Court in these consolidated appeals, the Commission no longer pursues its motion to dismiss.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

INTRODUCTION

This case concerns the Commission’s statutory responsibility to determine whether it would be in the public interest to grant new hydropower licenses or permits. The FERC orders at issue do not impose any penalty or otherwise exercise the Commission’s enforcement authority as to existing licenses and permits.

Here, the Commission declined to grant initial license and permit authorizations to entities that are controlled by individuals who have repeatedly refused to follow the requirements of the Federal Power Act (“FPA”), FERC’s regulations, conditions of authorizations, and FERC compliance orders and orders imposing penalties. Petitioner Elaine Hitchcock has an extensive record of repeated, serious violations at four hydropower projects — including public safety hazards at the same dam that is at issue here — that resulted in a previous, unchallenged finding of unfitness to hold a license. Petitioner Charles Mierek has,

as the sole owner and president of a licensee, refused to pay a final and unappealable civil penalty arising from past noncompliance with license conditions; even now, he justifies that refusal as a mere “corporate decision.”

Based on these records of noncompliance, the Commission denied applications by Energie, in which Ms. Hitchcock is a shareholder and agent, for a preliminary permit to study a potential project and for a license to construct and operate that project. *Energie Group*, FERC Docket No. P-12454, 109 FERC ¶ 62,225 (2004) (denying permit), E.R. 36, JA 22, *reh’g denied*, 111 FERC ¶ 61,072 (2005), E.R. 44, JA 35, *on appeal in* Case No. 05-1206; *Energie Group LLC*, FERC Docket No. P-12684 (June 19, 2006) (denying license), E.R. 49, JA 173, *reh’g denied*, 116 FERC ¶ 61,220, E.R. 62, JA 73, *recons. denied*, 117 FERC ¶ 61,124 (2006), E.R. 70, JA 89, *on appeal in* Case No. 06-1429.¹

The Commission likewise denied three applications by Appalachian Rivers Resource Enhancement, LLC (“Appalachian”), of which Mr. Mierek is the president and sole member, for permits to study proposed projects. *Appalachian Rivers Resource Enhancement*, FERC Docket No. P-12570, 113 FERC ¶ 61,043

¹ “E.R.” refers to a record item in the combined Certified Index to the Record filed in the Energie appeals, Nos. 05-1206 and 06-1429. “A.R.” refers to a record item in the Certified Index to the Record filed in the Appalachian appeal, No. 06-1141. “JA” refers to the Joint Appendix page number. “P” refers to the internal paragraph number within a FERC order.

(2005), A.R. 8, JA 92; FERC Docket No. P-12563, 113 FERC ¶ 62,100 (2005), A.R. 9, JA 97; and FERC Docket No. P-12587, 113 FERC ¶ 62,098 (2005), A.R. 10, JA 99; *reh'g denied*, 114 FERC ¶ 61,145 (2006), A.R. 23, JA 163, *on appeal in Case No. 06-1141*.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

Part I of the Federal Power Act constitutes “a complete scheme of national regulation” to “promote the comprehensive development of the water resources of the Nation” *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 180 (1946). The FPA requires the Commission, in addition to hydropower and development purposes, to “give equal consideration” to the purposes of, *inter alia*, protection of fish and wildlife, recreational opportunities, and “other aspects of environmental quality.” FPA § 4(e), 16 U.S.C. § 797(e). The FPA also authorizes the Commission to issue rules “for the protection of life, health, and property.” FPA § 10(c), 16 U.S.C. § 803(c). *See generally* 18 C.F.R. Part 12 (2007) (FERC safety regulations).

In general, the FPA requires that anyone seeking to construct, operate or maintain any jurisdictional hydropower facility must obtain a license from the Commission. *See* FPA § 23(b), 16 U.S.C. § 817. The FPA also authorizes the Commission to grant exemptions and preliminary permits. Before taking any

action, and balancing its comprehensive responsibilities under the statute, the Commission must consider all relevant factors, including the “general fitness of the license-applicant” and its past compliance history. *See Cooley v. FERC*, 843 F.2d 1464, 1471 (D.C. Cir. 1988).

Licenses. Before issuing a license, FERC must decide that, in its judgment, an approved project “will be best adapted to a comprehensive plan for improving or developing a waterway or waterways . . . for the improvement and utilization of water-power development, for the adequate protection, mitigation and enhancement of fish and wildlife . . . , and for other beneficial public uses” FPA § 10(a)(1), 16 U.S.C. § 803(a)(1). In addition, a license “shall be conditioned upon acceptance by the licensee of all the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe” FPA § 6, 16 U.S.C. § 799. Such conditions include provisions for the protection, mitigation, and enhancement of fish and wildlife affected by the project, based on recommendations received from specified state and federal resource agencies. FPA § 10(j)(1)-(2), 16 U.S.C. § 803(j)(1)-(2); *see also, e.g., American Rivers v. FERC*, 201 F.3d 1186, 1202 (9th Cir. 2000). The Commission will grant a license to the applicant whose proposal “is best adapted to serve the public interest” FPA § 15(a)(2), 16 U.S.C. § 808(a)(2). The Commission should consider, “in addition to the requirements of [16 U.S.C. §] 803” and other enumerated criteria,

id., “[s]uch other factors as the Commission may deem relevant” *Id.*

§ 808(a)(2)(G).

Exemptions. The Public Utility Regulatory Policies Act of 1978 (“PURPA”), as amended, also gives the Commission discretion to grant exemptions from certain FPA requirements to operators of small hydroelectric projects at the site of existing dams that meet certain environmental prerequisites. *See* PURPA §§ 405, 408, 16 U.S.C. §§ 2705, 2708. Prior to issuing such an exemption, the Commission must consult with federal and state agencies charged with administering fish and wildlife resources and must include in any exemption all terms and conditions that those agencies determine to be appropriate to “ensure protection for fish and wildlife as well as other environmental concerns.” PURPA § 405(d), 16 U.S.C. § 2705(d); *see Swanson Mining Corp. v. FERC*, 790 F.2d 96, 98 (D.C. Cir. 1986).

Permits. A company wishing to investigate an area to determine whether it is suitable for hydroelectric development may request a preliminary permit, giving it the right to study the site and a preference, lasting up to three years, over other companies that may wish to develop the project. *See* FPA § 5, 16 U.S.C. § 798; 18 C.F.R. § 4.80 (2007). A permit does not, however, grant the right to construct or operate the project; the company still must apply for and obtain a license. *See* FPA § 5, 16 U.S.C. § 798; *Marseilles Land & Water Co. v. FERC*, 345 F.3d 916, 917

(D.C. Cir. 2003).

Enforcement. In addition to its discretion to grant hydropower licenses, exemptions, and permits, the Commission has enforcement authority in connection with those authorizations. Under FPA § 31(a), the Commission can monitor and investigate compliance with such authorizations, and require compliance by order. 16 U.S.C. § 823b(a). The Commission also may, after notice and opportunity for a hearing, impose penalties against any licensee, exemptee, or permittee failing to comply with Commission regulations, terms and conditions of authorizations, or compliance orders, including revocation of a license or exemption and assessment of fines. FPA § 31(b)-(d), 16 U.S.C. § 823b(b)-(d).

II. The Commission Proceedings And Orders

A. Energie Permit Application (Case No. 05-1206)

1. Energie Permit Order

Petitioner Energie Group LLC is a limited liability company with three shareholders: Elaine Hitchcock, Stacy Harriott, and Peter Burno. *See* Br. 8. In April 2003, Energie filed an application for a preliminary permit for a proposed project at the site of the existing Williams Dam, on the East Fork of the White River in Indiana. E.R. 1; *see* Br. 4. Williams Dam was built in 1910, and was at one time operated under a license held by Energy Alternatives of North America, Inc., of which Ms. Hitchcock was president. (As discussed further *infra* at page 22, the license was terminated in 1994.).

On December 21, 2004, Commission Staff, acting under delegated authority, issued an Order Denying Application For Preliminary Permit, *Energie Group*, FERC Docket No. P-12454, 109 FERC ¶ 62,225 (2004) (“Energie Permit Order”), E.R. 36, JA 22. That Order determined that, “[b]ased on Elaine Hitchcock’s poor compliance record . . . the issuance of a permit to Energie would not be in the public interest.” *Id.* at 6, JA 27.

The Order found that Ms. Hitchcock, “as an agent for Energie,” is responsible for Energie’s management and decisions. *Id.* It pointed to Ms. Hitchcock’s involvement as president of Energy Alternatives, which the Commission had previously found to have “failed to remedy four public safety hazards at the project which could have resulted in serious bodily injury or death” — at the very same project site. *Id.* at 3, JA 24. The Order went on to detail a “history of compliance problems leading to the issuance of compliance orders and civil penalties,” involving several other hydropower projects in which Ms. Hitchcock was the permittee, exemptee, and/or a principal party of the permittee or exemptee. *Id.* at 3-5, JA 24-26; *see also* Argument Section II.A.1, *infra*. It further explained that, as a result of that record, Ms. Hitchcock had been found “unfit to hold a license” in a 1994 proceeding. Energie Permit Order at 6 (citing *Carl E. Hitchcock, Elaine Hitchcock, & Energie Dev. Co.*, 69 FERC ¶ 61,382 (1994) (“1994 Unfitness Order”)), JA 27. For those reasons, Commission

Staff denied Energie's permit application. *Id.*

2. Energie Permit Rehearing Order

Energie filed a timely request for rehearing, signed and submitted on its behalf by Ms. Hitchcock. E.R. 41, JA 29. On April 18, 2005, the Commission issued an Order Denying Rehearing, *Energie Group LLC*, FERC Docket No. P-12454, 111 FERC ¶ 61,072 (2005) ("Energie Permit Rehearing Order"), E.R. 44, JA 35. The Commission agreed with Staff's analysis and conclusions, rejecting Energie's arguments to the contrary, and held that "issuance of a preliminary permit to Energie is not in the public interest." *Id.* at P 20, JA 43.

The petition in Case No. 05-1206 followed. Upon Energie's motion, this Court held the petition in abeyance pending the outcome of Energie's license application, discussed *infra*.

B. Energie License Application (Case No. 06-1429)

1. Energie License Order

In November 2003, while its permit application was pending, Energie also filed an application for a license for the proposed Williams Dam project. E.R. 8. Commission Staff, acting pursuant to delegated authority, rejected the application as patently deficient in February 2004, due to Energie's failure to comply with FERC regulations concerning pre-filing consultations. In June 2006, Energie submitted a revised license application, which Commission Staff rejected, citing the prior determination in the 1994 Unfitness Order that "Ms. Hitchcock, or any

entity in any way under her control or direction, is unfit to hold a license.” *Energie Group LLC*, FERC Docket No. P-12684 (June 19, 2006) (unpublished letter order) (“Energie License Order”), E.R. 49, JA 173.

2. Energie License Rehearing Order

Energie and Ms. Hitchcock filed a timely request for rehearing. *See* Request For Reinstatement Of License, Or In The Alternative, Request For Rehearing (filed July 18, 2006) (“License Rehearing Request”), E.R. 51, JA 50. The Commission again agreed with Staff’s determination; on September 6, 2006, it issued an Order Denying Rehearing, *Energie Group LLC*, FERC Docket No. P-12684, 116 FERC ¶ 61,220 (2006) (“Energie License Rehearing Order”), E.R. 62, JA 73. The Commission determined that “Energie provides no evidence or argument that causes us to question our prior conclusions on this matter.” *Id.* at P 11, JA 76. The Commission addressed Energie’s various legal challenges, *see* Argument Section III, *infra*, and determined that an evidentiary, trial-type hearing was not required. Energie License Rehearing Order at PP 9-21, 22, JA 75-80.

3. Energie License Reconsideration Order

Within 30 days after the Energie License Rehearing Order, Energie and Ms. Hitchcock submitted several filings to FERC requesting rehearing of that order and “reconsideration and reinstatement” of the license application. *See* Reconsideration Request – Request For Reinstatement (filed Oct. 5, 2006),

E.R. 66, JA 85; E.R. 63 (Letter, dated Sept. 20, 2006, from Ms. Hitchcock to FERC Secretary), JA 81; E.R. 64 (Letter, dated Sept. 20, 2006, from Ms. Hitchcock to FERC Chairman), JA 83. On October 30, 2006, the Commission issued an Order Rejecting Request For Rehearing And Denying Reconsideration, *Energie Group, LLC*, FERC Docket No. P-12684, 117 FERC ¶ 61,124 (2006), E.R. 70, JA 89. To the extent Energie sought rehearing of the Energie License Rehearing Order, the Commission rejected the filing because that order “did not reach a different result” from the Energie License Order. *Id.* at P 5, JA 90. To the extent Energie sought reconsideration, the Commission denied the request because Energie “simply reiterate[d]” its prior arguments, which the Commission had already addressed. *Id.* at P 6, JA 90.

The petition in Case No. 06-1429 followed.

C. Appalachian Permit Applications (Case No. 06-1141)

1. Appalachian Permit Orders

Petitioner Appalachian Rivers Resource Enhancement, LLC

(“Appalachian”) is a limited liability corporation. Charles Mierek is its sole shareholder and president. *See* Br. 9. In January 2005, Appalachian filed an application for a permit to study a proposed project on the Cheoah River in North Carolina. A.R. 4. On October 14, 2005, the Commission issued an Order Denying Preliminary Permit Application, *Appalachian Rivers Resource Enhancement*,

FERC Docket No. P-12570, 113 FERC ¶ 61,043 (2005) (“Appalachian Permit (Cheoah) Order”), A.R. 8, JA 92. The Commission discussed its experience with another company owned and controlled by Mr. Mierek, Clifton Power Corporation (“Clifton Power”), a licensee with a record of noncompliance, including serious violations of a compliance order and a continuing refusal to pay the resulting fine. *Id.* at PP 7-10, JA 94-96. Based on that history, the Commission determined that Mr. Mierek “lacks the necessary fitness to receive any additional licenses or exemptions from licensing.” *Id.* at P 10, JA 96. Following the precedent of the Energie Permit Orders (*see id.* at P 5 & n.8, JA 94), the Commission concluded that, because it “would not issue a license to Mr. Mierek or any entity that is any way under his control or direction,” it would be “equally inappropriate to issue a preliminary permit to such an entity.” *Id.* at P 6, JA 94.

On November 3, 2005, the Commission Staff, acting pursuant to delegated authority, denied Appalachian’s permit applications for two other proposed projects on the same grounds. Order Denying Preliminary Permit Application, *Appalachian Rivers Resource Enhancement, LLC*, FERC Docket No. P-12587, 113 FERC ¶ 62,098 (2005) (denying application, filed in May 2005, for permit to study project at the W. Kerr Scott Dam on the Yadkin River in North Carolina), A.R. 10, JA 99; Order Denying Preliminary Permit Application, *Appalachian Rivers Resource Enhancement, LLC*, FERC Docket No. P-12563, 113 FERC ¶ 62,100

(2005) (denying application, filed in December 2004, for permit to study project at the Dillsboro Dam on the Tuckasegee River in North Carolina), A.R. 9, JA 97.

2. Appalachian Permits Rehearing Order

Appalachian filed timely rehearing requests in all three cases. A.R. 13 (filed in FERC Docket Nos. P-12570 & P-12563), 15 (filed in FERC Docket No. P-12587), JA 110, 137. Clifton Power filed timely motions to intervene and rehearing requests in all three cases. A.R. 11, 14, JA 101, 132. Mr. Mierek filed a timely motion to intervene and rehearing request in the Scott Dam proceeding. A.R. 16, JA 158.

On February 16, 2006, the Commission issued an Order Denying Rehearing, *Appalachian Rivers Resource Enhancement, LLC*, FERC Docket Nos. P-12570, P-12563, & P-12587, 114 FERC ¶ 61,145 (2006) (“Appalachian Permits Rehearing Order”), A.R. 23, JA 163. The Commission explained that it was reasonable to consider Clifton Power’s noncompliance because Mr. Mierek’s sole responsibility for Clifton Power’s conduct necessarily reflected poorly on Appalachian’s fitness: “Mr. Mierek is president of both entities For our purposes here, Mr. Mierek is both Clifton and [Appalachian].” *Id.* at PP 8-9, JA 165-66. The Commission also addressed Appalachian’s various legal challenges, *see* Argument Section III, *infra*, and determined that an evidentiary hearing was not required. *Id.* at PP 11-24, JA 167-72.

The petition in Case No. 06-1141 followed.

SUMMARY OF ARGUMENT

The Commission reasonably determined that it would not be in the public interest to grant hydroelectric licenses or preliminary permits to Energie and Appalachian, as they are under the control of individuals with records of serious noncompliance.

The Commission's findings are well-supported by the record. Substantial evidence in the record supports the findings that Elaine Hitchcock controls Energie and that Charles Mierek controls Appalachian. Ms. Hitchcock accumulated a track record of serious safety and environmental violations at several hydropower projects, and repeatedly disregarded the Commission's enforcement efforts, resulting in a prior determination that she was unfit to hold a license. Similarly, Mr. Mierek has a history of serious environmental violations by a licensee under his control, and continues to refuse to pay the resulting civil penalty.

The Commission's denials of authorizations in these consolidated cases are a reasonable exercise of its statutory discretion, are consistent with its policy, and are reasonable on these particular facts. Based on Ms. Hitchcock's and Mr. Mierek's histories of flouting the Commission's enforcement authority, the Commission reasonably concluded that it would not be in the public interest to depend on their future compliance.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC hydroelectric licensing decisions to determine whether they are “arbitrary and capricious” and whether the underlying factual findings are supported by substantial evidence. *Rhineland Paper Co. v. FERC*, 405 F.3d 1, 4 (D.C. Cir. 2005); *North Carolina v. FERC*, 112 F.3d 1175, 1189 (D.C. Cir. 1997). “In both cases, the review is quite deferential.” *Id.*; *Brady v. FERC*, 416 F.3d 1, 5 (D.C. Cir. 2005) (“In both regards, the scope of our review is quite limited”). So long as the Commission “provide[s] a ‘reasoned explanation supported by a stated connection between the facts found and the choice made,’” the Court “will defer to the agency’s expertise.” *North Carolina*, 112 F.3d at 1189 (quoting *U.S. Dep’t of Interior v. FERC*, 952 F.2d 538, 543 (D.C. Cir. 1992)).

The Commission’s factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825l(b). The substantial evidence standard “requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.” *FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002).

II. THE COMMISSION’S FACTUAL DETERMINATIONS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

The Commission does not dispute that its decisions to deny the permits and license sought in the underlying proceedings were unusual. Also unusual here —

indeed, unprecedented — was the degree of unfitness and noncompliance exhibited over the years by the applicants. The Commission’s extensive experience with Elaine Hitchcock and Charles Mierek (who control Energie and Appalachian, respectively) in connection with other hydropower projects — specifically, their records of earlier violations; the Commission’s repeated, often fruitless, efforts to enforce compliance; and the impact on the Commission’s ability to carry out its fundamental responsibilities — is central to the reasonableness of its decisionmaking in the instant cases. *Cf. Cooley*, 843 F.2d at 1471 (“The Commission is charged with considering all relevant factors . . . [including the] general fitness of the licensee-applicant”); *Clifton Power Corp. v. FERC*, 88 F.3d 1258, 1269-70 (D.C. Cir. 1996) (“[H]ere we do not question the Commission’s authority . . . to consider a violation serious even if no actual harm occurs or if the risk turns out, in the end, to be slight.”).

A. The Commission’s Determinations Regarding Elaine Hitchcock Are Supported By Substantial Evidence

1. The Record Supports The Commission’s Finding That Elaine Hitchcock Is Unfit To Hold A License Or Permit

Ms. Hitchcock’s well-documented track record involving several hydropower authorizations — a license, exemptions, and a permit — more than adequately supported the Commission’s finding that it would not be in the public interest to grant her, or any entity that is in any way under her direction, another

authorization. Petitioners gloss over Ms. Hitchcock’s trail of violations as long past and trivial even at the time, or as “successfully challenged or cured.” *See* Br. 8, 17, 23-24; License Rehearing Request at 8-10, JA 57-59. They also try to downplay Ms. Hitchcock’s responsibility for those violations. *See* Br. 8, 17 (“tangential” involvement), 23 (“minor role”). But these efforts to discredit the Commission’s prior findings are “collateral attacks on long-final orders.” *Energie Permit Rehearing Order* at P 9, JA 38. *See Sacramento Mun. Util. Dist. v. FERC*, 428 F.3d 294, 299 (D.C. Cir. 2005) (attempt to challenge prior order, for which time to seek judicial review had passed, “amounts to an impermissible collateral attack”); *Georgia Indus. Group v. FERC*, 137 F.3d 1358, 1364 (D.C. Cir. 1998) (“the court lacks jurisdiction to consider” such a collateral attack).

Petitioners’ characterization of those prior orders also is misleading. For that reason, this section provides some of the details, drawn from the prior FERC orders upon which the Commission relied below, documenting Ms. Hitchcock’s history of disregarding the requirements of FERC’s regulations and hydropower authorizations, and the Commission’s largely futile efforts to enforce such requirements using its powers under FPA § 31, 16 U.S.C. § 823b. This overview also highlights the nature of the violations — including public safety hazards, actual and potential environmental damage, and construction and operation of a hydropower project without FERC authorization — each of which the Commission

found had thwarted its ability to carry out its own essential statutory responsibilities under the Federal Power Act and other statutes. Long-settled findings in those past proceedings firmly establish Ms. Hitchcock's involvement in, and responsibility for, such noncompliance. Finally, this overview refutes Petitioners' claims that the previous enforcement actions were "successfully challenged or cured."

These prior cases also are outlined in a chart (with cross-references to the relevant pages in this section), included in the Addendum to this Brief.

a. 1994 Unfitness Order

The Commission had already found Ms. Hitchcock unfit to hold a hydropower license nearly a decade before Energie filed its permit application for the Williams Dam project. *See Carl E. Hitchcock, Elaine Hitchcock, & Energie Dev. Co.*, 69 FERC ¶ 61,382 (1994) ("1994 Unfitness Order"), *cited in* Energie Permit Order at 6 & n.28, JA 27, *and* Energie Permit Rehearing Order at P 13 & nn.20, 22, JA 39-40. In 1994, Carl Hitchcock, Elaine Hitchcock, and Energie Development Company, Inc., of which Elaine Hitchcock was the president (69 FERC at 62,444), applied for a license to operate the Oconto Falls Project on the Oconto River in Wisconsin. The Commission denied the application because it found that "*both Carl and Elaine Hitchcock lack the requisite fitness to hold the requested license.*" *Id.* n.4 (emphases added).

The Commission, as in the FERC Orders challenged here, recapped the history (to that date) of the Hitchcocks’ repeated failures to comply with FERC requirements, *see id.* at 62,444-46, and attributed responsibility to both of the Hitchcocks, who, “jointly or individually, are principals in all of these companies.” *Id.* at 62,445. The Commission made clear that its finding applied equally to both: “[Their record] demonstrates a *long-term and pervasive pattern* of Carl and Elaine Hitchcock’s non-compliance with, and apparent disregard of, the requirements of the FPA, the terms of their project authorizations, and the directives in Commission orders. In light of this track record, we find Carl and Elaine Hitchcock unfit to be licensees” *Id.* at 62,447 (emphases added).

The 1994 Unfitness Order became final and unappealable with no challenge.² Though Petitioners argue that Ms. Hitchcock neglected to challenge that order because she somehow failed to appreciate the ramifications of its findings (*see* Br. 24) — despite the Commission’s extensive discussion and unequivocal declarations that she personally was responsible and thus “unfit” — they cite no case that would excuse, on such grounds, collateral attacks on the

² Carl Hitchcock filed an untimely request for rehearing, which the Commission properly rejected without considering. *Carl E. Hitchcock, et al.*, 70 FERC ¶ 61,200 (1995). *See Moreau v. FERC*, 982 F.2d 556, 562-63 (D.C. Cir. 1993) (30-day statutory deadline for seeking rehearing under 16 U.S.C. § 825l(a) is strictly construed and preclusive of jurisdiction).

Commission's long-settled findings, or require the Commission to hold an evidentiary hearing to relitigate the issue.

In any event, the FERC Orders challenged here did not stop at citing the 1994 Unfitness Order. Rather, the Commission here specifically recounted the numerous prior violations on which the Commission had earlier based its 1994 finding, as well as further proceedings and orders issued after 1994.

b. Williams Dam: Public Safety Hazards

As noted *supra* at pages 7-8, Energy Alternatives of North America held a license for the Williams Dam site from 1992 until 1994, during which time its ongoing noncompliance with safety requirements led the Commission to propose revocation of the license. *See* Energie Permit Rehearing Order at P 3 n.3 (noting earlier project was located at same site as project proposed here), JA 36.

Notwithstanding her current protestations of blamelessness, Elaine Hitchcock was the president of Energy Alternatives. *See id.*; 1994 Unfitness Order, 69 FERC at 62,445 & n.15 (citing 1994 Wisconsin Domestic Corporation Annual Report).³

In February 1993, Commission Staff found Energy Alternatives “in violation of” FERC’s regulations. *Energy Alternatives*, 62 FERC ¶ 62,079 at 63,101 (1993),

³ In addition, in one order concerning Williams Dam, the Commission described numerous filings, letters, and notifications to FERC from Ms. Hitchcock, on behalf of Energy Alternatives, regarding FERC’s directives to implement safety measures. *Energy Alternatives*, 69 FERC ¶ 61,163 at 61,617-18 (1994).

cited in Energie Permit Order at 3 & n.6, JA 24. Staff had previously directed the licensee to install specified safety devices and make a specified repair, all deemed necessary for public safety. 62 FERC at 63,101-02 & n.1. The order invoked enforcement powers under FPA § 31(a), 16 U.S.C. § 823b(a).

In August 1994, the Commission proposed revocation of the license for continuing violations of FERC regulations and multiple compliance orders. *Energy Alternatives*, 68 FERC ¶ 61,196 at 61,969 (1994), *cited in* Energie Permit Order at 3 & n.7, JA 24. The Commission described the licensee’s failure to implement the necessary safety measures, despite repeated admonitions by Commission Staff and state officials, spanning from 1992 through 1994. 68 FERC at 61,968-69. The Commission found Energy Alternatives to have “knowingly violated” the February 1993 compliance order “by failing to take any of the four safety actions identified” in that order, and further determined that “[t]he violations endangered persons” *Id.* at 61,970.⁴ The Commission cited its revocation

⁴ Specifically, “[t]he violations endangered persons because the safety devices reduce the hazards associated with the open overflow spillway, warn and protect the public regarding a hazardous area at the tailrace, and prevent the public from entering the gallery in the spillway. Moreover, the two to three foot void in the dam can cause erosion and instability of the bank and endanger persons who fish near it.” *Id.*

Even the licensee’s minimal responses to officials’ warnings fell short. Instead of installing a proper boat barrier, Energy Alternatives twice installed a cable between two trees on opposite sides of the floodway; the first time,

authority under FPA § 31(b), 16 U.S.C. § 823b(b). 68 FERC at 61,967.

Ultimately, Commission Staff terminated the license on other grounds, because Energy Alternatives had failed to begin construction of the project as required by a license condition. *Energy Alternatives*, 69 FERC ¶ 62,194 (1994). Though Energy Alternatives had requested additional time to begin construction, the Commission had found an extension “contrary to the public interest” — largely based on the noncompliance with safety requirements, but also because:

Energy Alternatives displays similar disregard for the other requirements of its license. It has never paid its annual charges on time, and was even late with a payment plan that it had agreed to. It only attempted to comply with [other license conditions] after threat of penalties from Commission staff. *We are in fact unable to find a single license requirement with which Energy Alternatives complied in a timely manner.*

Energy Alternatives, 69 FERC ¶ 61,163 at 61,620-21 (1994) (emphasis added), *quoted in* 1994 Unfitness Order at 62,446 & n.28, *and cited in* Energie Permit Order at 3 & n.8, JA 24. *See also* 69 FERC at 61,120 (“The licensee’s recalcitrance in almost all aspects of project development . . . is extraordinary.”).

c. Sheboygan Falls: Unauthorized Operation

In 1987, Elaine Hitchcock obtained a preliminary permit for the Sheboygan

Commission Staff found the fix not merely inadequate but in fact hazardous to boaters, and the second time, Indiana officials found it could pose a danger to downstream fishermen (because the cable, suspended at water level, accumulated river debris that could sweep downstream if it broke). *Id.* at 61,968, 61,969.

Falls Project on the Sheboygan River in Wisconsin. In 1991, the Commission invoked its FPA § 31(c) authority, 16 U.S.C. § 823b(c), to impose a fine on Carl and Elaine Hitchcock for operating the project without an exemption or license. *See Elaine Hitchcock*, 71 FERC ¶ 61,395 at 62,550 (1995), *cited in* Energie Permit Order at 3 & n.11, JA 24. (As explained *supra* at page 6, a permittee may conduct studies and receive a preference at licensing, but a permit does not authorize any construction or operation of project facilities.) Following a hearing, an administrative law judge determined that Ms. Hitchcock had violated not only the terms of the permit but also FPA §§ 5 and 23(b)(1), 16 U.S.C. §§ 798, 817(1). *See* 71 FERC at 62,550.

There, as here (*see* Br. 8, 23), Ms. Hitchcock argued that she should not be held responsible, because the project had been constructed, owned, and operated by Carl Hitchcock. *See* 71 FERC at 62,549, 62,551. The Commission rejected that argument:

The permit was issued to Elaine Hitchcock Elaine Hitchcock cannot now disown all responsibility for her husband's activities in constructing and operating the project as if they were performed by an unknown, unauthorized trespasser. As the permittee, she was fully responsible for the activities of her designated agent, Carl Hitchcock. Thus, she is fully responsible for his activities in operating the project during the term of the permit. Those activities constitute a violation of Article 5 of the permit, and Elaine Hitchcock, as the permittee, is responsible for that violation.

Id. at 62,551; *see id.* at 62,550 (describing similar findings of judge), *cited in*

Energie Permit Rehearing Order at P 10 & n.12, JA 38.

Though the judge imposed a penalty of \$7,500, the Commission raised it to \$15,000, due to the “the central gravamen of the offense.” 71 FERC at 62,552 (emphasizing “the seriousness and significance of the violation”). Ms. Hitchcock’s unauthorized operation of the project “effectively precluded the Commission from taking the requisite close, hard look at the potential impact of those activities *before* they occurred,” thereby “shortcircuiting and evading our licensing processes” *Id.* For that reason, the violation went to the heart of the Commission’s regulatory mission:

Engaging in unreviewed and unreviewable construction or operation activities under color of a preliminary permit that authorized solely pre-construction and pre-operation studies constitutes *an egregious breach of the integrity of the Commission’s regulatory processes . . . a breach that seriously undermines the ability of the Commission to perform its statutory responsibilities to protect the public interest and the environment.*

Id. (emphases added).

Ms. Hitchcock did not pay the fine. In 2001, she and Commission Staff reached a settlement resolving the Sheboygan Falls and Upper Watertown (*see* below) penalties. *See Rough and Ready Hydro Co.*, 94 FERC ¶ 61,312 at 62,146 (2001) (“Elaine Hitchcock did not pay the [\$15,000] civil penalty. [Commission Staff] has been attempting to collect the civil penalty since 1995.”). The settlement allowed Ms. Hitchcock to pay \$1,000 for the Sheboygan Falls violation, due only

to her financial condition. *Id.* (noting that she had recently filed for Chapter 13 personal bankruptcy protection; finding that settlement of Sheboygan Falls fine was “in the public interest because of Elaine Hitchcock’s financial condition”).

d. Eau Galle: Environmental Violations

In 1987, Carl and Elaine Hitchcock obtained an exemption for the Eau Galle Hydro Project on the Eau Galle River in Wisconsin. *See* Energie Permit Order at 3 & n.10 (citing 38 FERC ¶ 62,128 (1987)), JA 24. As required (*see supra* page 6), the exemption included terms and conditions prescribed by the Wisconsin Department of Natural Resources for the protection of fish and wildlife. *See Carl & Elaine Hitchcock*, 67 FERC ¶ 61,264 at 61,913 (1994) (notice of proposed penalty, describing conditions and noncompliance therewith), *cited in* 1994 Unfitness Order, 69 FERC at 62,445 n.20, *and* Energie Permit Order at 4 n.15, JA 25. Specifically, the exemption required the project to be operated on a run-of-river basis to preserve the river’s natural flow conditions, and required installation of certain gauges and other equipment to monitor flows and powerhouse discharges. 67 FERC at 61,913. In 1992, shortly before the project began operation, Commission Staff reminded the Hitchcocks to review those requirements and submit a plan and schedule for implementation. They began operation, but did not file a plan. *Id.*

The following year, the Wisconsin Department of Natural Resources filed a

complaint with the Commission, alleging that the Hitchcocks had failed to comply with the run-of-river condition and caused environmental, recreational, and property damage in the project area. *See id.*⁵ Following issuance of two compliance orders⁶ and other correspondence by Commission Staff, the Commission issued a notice of proposed penalty. *Id.* at 61,912. An administrative law judge found the Hitchcocks in violation of conditions of their exemption and ordered them to pay a penalty of \$6,063, pursuant to FPA § 31(c). *Carl & Elaine Hitchcock*, 72 FERC ¶ 63,016 at 65,162-63 (1995). The judge noted, in assessing the factors for determining the amount of the penalty, that “the Hitchcocks have a history of previous violations at other Projects.” *Id.* at 65,159 (citing orders concerning Upper Watertown, Williams Dam, and Sheboygan Falls).

Nevertheless, Petitioners point to this as a “favorable ALJ decision,” and further claim that Ms. Hitchcock “successfully challenged” this penalty before the

⁵ Specifically, the state agency’s complaint alleged shutoff of downstream flows that caused aquatic habitat dewatering and fish stranding at least twice; lowered water levels that seriously degraded use of public boat ramps and private docks and grounded docked boats; and disruption of fishing and ice fishing. *See id.* at 61,913 n.6. The agency asserted that it had received numerous complaints from the local officials and citizens regarding the exemptees’ violations. *See Carl & Elaine Hitchcock*, 72 FERC ¶ 63,016 at 65,152 (1995) (describing complaint).

⁶ *Carl & Elaine Hitchcock*, 64 FERC ¶ 62,045 (1993) (invoking FPA § 31(a)); *Carl & Elaine Hitchcock*, 66 FERC ¶ 62,193 (1994) (same), both cited in *Energie Permit Order* at 4 nn.13, 14, JA 25.

Commission. Br. 8, 23. But the Commission not only affirmed the penalty, but in fact rejected the judge's characterization of the violations as de minimis. *Carl & Elaine Hitchcock*, 80 FERC ¶ 61,355 at 62,220 (1997), *cited in* Energie Permit Rehearing Order at P 11 & n.15, JA 39. To the contrary, the Commission emphasized that “we regard the violations as obvious and serious” 80 FERC at 62,220. “The run-of-river and staff gauge requirements are integral elements of a unitary regulatory scheme.” *Id.* The run-of-river requirement is “designed to protect the riverine environment in which the project operates,” while the gauge requirement assists FERC, federal and state agencies, and the exemptees “in monitoring whether the project is being operated in an environmentally sound manner” *Id.*

And, contrary to Petitioners' implication that the Commission's reduction of the penalty to \$5,000 reflected its view of the merits (*see* Br. 23), the Commission explained its decision was “*solely* because the [Hitchcocks] are financially incapable of paying the penalty proposed by [Commission Staff], and *not because of any perceived lack of seriousness* of the violations.” 80 FERC at 62,220 (emphases added).

Notably, the Hitchcocks “did not contest [Ms. Hitchcock's] ownership and control of the project” in the course of the Eau Galle proceeding. Energie Permit Rehearing Order at P 11. Indeed, Ms. Hitchcock's claim, in the instant FERC

proceeding, that she “was not involved” in operating the Eau Galle project is difficult to reconcile with her testimony at the 1995 hearing, in which she appeared knowledgeable about the project operation and decisionmaking:

At the hearing . . . Elaine Hitchcock acknowledged that the exemptees did not install the gauges until 485 days after they were required to be in place. She stated that “this is a microproject and economically, it is not feasible to put sophisticated data equipment in,” but she acknowledged that the exemptees did not appeal the gauging requirement as too expensive.

80 FERC at 62,219 (citing hearing transcript). *Contra License Rehearing Request* at 9 (“The Eau Galle Project was operated by the Eau Galle Corporation in which Ms. Hitchcock was not involved . . .”), JA 58.

Nor did the Hitchcocks’ noncompliance at the Eau Galle project end with the Commission’s 1997 decision. For example, in 1998, Commission Staff issued a compliance order based on the Hitchcocks’ violation of the terms of the exemption, due to their failure to file required data measured by the flow gauging equipment. *Carl & Elaine Hitchcock*, 85 FERC ¶ 62,180 at 64,411 (1998) (“This [information] is particularly important as the Eau Galle Dam has a history of violations for failing to operate the project in a run-of-river mode and failure to install and maintain streamflow ga[u]ges.”).

e. Upper Watertown: Safety And Environmental Violations

In 1989, the Commission granted an exemption to Rough and Ready Hydro

Company (“Rough and Ready”), owned by Elaine Hitchcock, for the Upper Watertown Project on the Rock River in Wisconsin. *See* Energie Permit Order at 4, JA 25; License Rehearing Request at 9 (acknowledging Ms. Hitchcock was sole owner), JA 58. As the Commission explained in the instant proceeding, “[f]rom the commencement of project operation, Rough and Ready repeatedly violated the terms and conditions of its exemption and failed to comply with several compliance orders” Energie Permit Order at 5, JA 26.

i. Safety Violations

In March 1994, the Commission issued a notice of proposed penalty for safety violations occurring in 1993. *Rough and Ready Hydro Co.*, 66 FERC ¶ 61,294 (1994), *cited in* 1994 Unfitness Order, 69 FERC at 62,445-46, *and* Energie Permit Order at 4-5 & n.20, JA 25-26. The Commission, invoking its FPA § 31(a) authority, explained that, by not removing the spillway stop logs when the water level rose to a specified level, as required by a term and condition of the exemption, “the exemptee endangered persons and property. Failure or overtopping of the east embankment could cause damage to property and could strand fish and other aquatic animals. In addition, failure of the Upper Watertown Dam could jeopardize a second project located . . . downstream” 66 FERC at 61,844. The violations were not a concern only of Commission Staff; the notice described the active engagement of state and local officials involved in dam safety,

water management, engineering, emergency response, and law enforcement, including an armed confrontation at the project site. *Id.* at 61,843-44.

Ultimately, the violations were resolved by a Stipulation and Consent Agreement in which Rough and Ready “admit[ted] that it violated Article 2 of the exemption” and agreed to pay \$8,000 over two years. *Rough and Ready Hydro Co.*, 70 FERC ¶ 61,028 at 61,095 (1995). Elaine Hitchcock signed the agreement on behalf of Rough and Ready, listing her title as “President” and warranting that she was its authorized representative. *Id.* at 61,097 (settlement attached to order). Rough and Ready made two partial payments totaling \$1,400. *Energie Permit Order* at 5 & n.23 (citing *Carl & Elaine Hitchcock*, 77 FERC ¶ 61,278 at 62,218 (1996)), JA 26.

ii. Environmental Violations

Again, however, the violations did not end there. In January 1999, the Commission proposed revocation of Rough and Ready’s exemption for “knowingly violating” two compliance orders, issued in 1997 and 1998, that had ordered it to cease project operations, and also “violating several terms and conditions . . . of the exemption, including the run-of-river requirement.” *Rough and Ready Hydro Co.*, 86 FERC ¶ 61,003 at 61,009 (1999), *cited in* *Energie Permit Order* at 5 n.25, JA 26; *id.* n.24 (citing compliance orders issued in 1994, 1996,

1997, and 1998), JA 26.⁷

The Commission had, as required, included conditions in the exemption that federal and state natural resources agencies had determined to be necessary for preservation of fish and wildlife species and habitat. 86 FERC at 61,009-10 & n.1. Rough and Ready had “frequently violated the run-of-river requirement,” resulting in surges in downstream flow and even “dewater[ing] the downstream streambed,” which “reduced habitat for aquatic biota and increased their susceptibility to predation.” *Id.* at 61,010, 61,011. In fact, one of the compliance orders had found that an endangered type of fish had been eliminated from the reach below the dam as a direct consequence of Rough and Ready’s noncompliance. *Id.* at 61,011 (discussing *Rough and Ready Hydro Co.*, 80 FERC ¶ 62,020 (1997)). In addition, the Commission found that Rough and Ready continued to operate the project in violation of two compliance orders and numerous letters directing it to cease operations, continued to violate the run-of-river requirement, and continued to disregard several reporting and recordkeeping requirements mandated by the exemption. 86 FERC at 61,011-15; *see also id.* at 61,016.

Accordingly, the Commission proposed revocation under FPA § 31(b):

The exemptee’s long-standing non-compliance with many of those

⁷ Petitioners wrongly claim that the Energie Permit Order cited only violations that occurred before 1995. Br. 23 n.19.

conditions [of its exemption] *has caused environmental harm*. The exemptee *has not shown a willingness to operate within the parameters of its exemption*, nor has it obeyed orders to cease operating. Revocation is proposed because such violations directly affect the Commission's ability to protect the public interest.

Id. at 61,015-16 (emphases added). The revocation proceeding was terminated when Rough and Ready subsequently entered into a settlement with Commission Staff under which the exemption would be surrendered or transferred. *Rough and Ready Hydro Co.*, 94 FERC ¶ 61,312 at 61,146 (2001), *cited in* Energie Permit Order at 5 & n.26. Again, Elaine Hitchcock signed the settlement as Rough and Ready's president and authorized representative (as well as on her own behalf). 94 FERC at 62,148, 62,150 (settlement attached to order).

2. The Record Supports The Commission's Finding That Energie Is Under Elaine Hitchcock's Control Or Direction

Based on this record of serious noncompliance at projects in which Ms. Hitchcock played a variety of roles — as president, owner, named permittee and/or exemptee — the Commission reasonably concluded “that Ms. Hitchcock, or any entity in any way under her control or direction, is unfit to hold a license.” Energie License Order, JA 173; *accord*, Energie Permit Rehearing Order at P 7 (“[I]t is inappropriate to issue a preliminary permit to her or an entity that is in any way under her control or direction.”), JA 37.

Moreover, the Commission's finding that Energie is “in any way” under the control or direction of Ms. Hitchcock is supported by substantial evidence. First,

there is no dispute that Ms. Hitchcock is one of Energie's three shareholders. *See* Br. 8. (Petitioners simply note that the other two owners were not involved in Ms. Hitchcock's earlier projects. Br. 22.) Furthermore, all three owners signed a letter stating that "Mr. Burno, Ms. Harriott, and Ms. Hitchcock have full responsibility for the corporation [Energie Group LLC]." Letter to FERC Chairman (July 12, 2006), E.R. 50, JA 44.

Moreover, the record in this case is rife with evidence that Ms. Hitchcock has been actively involved in Energie's regulatory activities. She, together with Ms. Harriott, submitted the revised permit application in June 2003, with a cover letter referencing her participation in a previous discussion with Commission Staff and meetings with federal and state resource agencies. E.R. 3 at 1, JA 1. Ms. Hitchcock also signed and submitted filings to the Commission as Energie's representative. *See, e.g.*, Petition for Rehearing [of Energie Permit Order] at 4 (Jan. 19, 2005), E.R. 41, JA 29, 32; Reconsideration Request – Request for Reinstatement [regarding Energie License Rehearing Order] at 4 (Oct. 5, 2006), E.R. 66, JA 85, 88; Letter to FERC Secretary (Sept. 20, 2006), E.R. 63, JA 81-82; Letter to FERC Chairman (Sept. 20, 2006), E.R. 64, JA 83-84; Letter to FERC Secretary (Aug. 10, 2006), E.R. 60, JA 71-72; Letter to FERC Secretary (July 20, 2006), E.R. 55, JA 69; Letter to FERC Secretary (May 19, 2004), E.R. 28, JA 21. *Cf.* 1994 Unfitness Order, 69 FERC at 62,445 (relying in part on fact that

correspondence to FERC from companies had been signed by Carl or Elaine Hitchcock, in finding both Hitchcocks responsible for companies' violations).

Energie's license application further provides ample evidence that Ms. Hitchcock was actively involved on its behalf in the required consultations with federal and state agencies in connection with the licensing process. For example, Ms. Hitchcock represented Energie in meetings with federal and state natural resources agencies. *See* November 2003 License Application (Part 4) at 261 (roster of September 16, 2003 meeting with Indiana Department of Natural Resources and U.S. Fish and Wildlife Service, at which Ms. Hitchcock was the sole Energie representative), E.R. 8, JA 19; *id.* at 263 (roster of February 27, 2003 meeting at Williams Dam with, *inter alia*, officials from same agencies), JA 20; *see also* Letter from Indiana Department of Natural Resources to Peter Burno, dated October 10, 2003, referencing October 6, 2003 meeting with Mr. Burno and Ms. Hitchcock, E.R.26, JA 179. In addition, Ms. Hitchcock signed correspondence to numerous federal and state agencies in connection with Energie's FERC license application. *See, e.g.*, letters, dated Feb. 6, 2002, submitting copies of Energie's FERC license application to various agencies, attached to November 2003 License Application (Part 3) at 2-17, E.R. 8, JA 3-18; Letter to Indiana Department of Environmental Management, submitting application for water quality certificate or waiver (March 28, 2002), attached to License Application (Part 2) at 60, JA 2.

Indeed, Energie’s own engineering consultant directed correspondence to Ms. Hitchcock, even addressing her as “President” of Energie, apparently in response to an inquiry from her regarding issues related to the FERC license application. Letter from Reynold A. Hokenson, Project Manager, R.W. Beck, Inc. to Elaine Hitchcock (June 10, 2005), attached to Letter to FERC Chairman (July 12, 2006), E.R. 50, JA 44, 46.

Therefore, the record before the Commission offered far “more than a scintilla” of evidence (*FPL Energy*, 287 F.3d at 1160) to support the findings that Ms. Hitchcock, “as an agent for Energie[,] is responsible for the management of the company and its decisions,” and that Energie “is under the control and direction of Elaine Hitchcock.” Energie Permit Order at 6, JA 27; Energie License Order, JA 173.⁸

B. The Commission’s Determinations Regarding Charles Mierek Are Supported By The Record

There is no dispute that Charles Mierek controls Appalachian; he is its

⁸ Nothing in Ms. Hitchcock’s declaration contradicts that finding, as Petitioners claim (Br. 22). The declaration states that Ms. Hitchcock is “one of three shareholders in Energie” and that “it was decided” that Mr. Burno “would assume responsibility for construction, operation and maintenance” of the project. Affidavit of Elaine Hitchcock at 1, attached to License Rehearing Request, JA 65. Ms. Hitchcock presents nothing, however, that counters the Commission’s finding, supported by substantial record evidence discussed above, that Ms. Hitchcock is an agent for Energie and is involved in the management of the company and its decisions.

president and sole member. Br. 9; Appalachian (Cheoah) Permit Order at P 6, JA 94. Mr. Mierek’s record of noncompliance has similarly impeded the Commission’s statutory responsibilities and demonstrated disregard for its enforcement authority — and his noncompliance continues through the present.

The Commission’s finding of unfitness is based on Mr. Mierek’s conduct as the president and sole shareholder of Clifton Power, a hydropower licensee. *See id.* at P 7, JA 94; Appalachian Permits Rehearing Order at P 8, JA 166; Br. 9, 24. In 1995, the Commission upheld a determination that Clifton Power had violated a compliance order directing it to install and report data from flow gauges, as required by a condition of its license. *Clifton Power Corp.*, 69 FERC ¶ 61,087 (1995).⁹ The validity of the compliance order and the Commission’s findings of violations were upheld by this Court. *See Clifton Power Corp. v. FERC*, 88 F.3d 1258, 1262 (D.C. Cir. 1996) (“[W]e uphold the Commission’s conclusions that Clifton violated its license and the Compliance Order”). The Court remanded

⁹ Clifton Power’s violation of this important license condition was not its first instance of noncompliance. In granting the license 20 years ago, the Commission considered several compliance problems involving Mr. Mierek’s companies — including Clifton Power’s commencement of operation before receiving the license — and decided to give him the benefit of the doubt, backed by the availability of FERC’s enforcement powers: “[T]he questions of past conduct are troubling and do show less than a fully acceptable standard of past conduct There are compliance procedures available to us, and we will use these procedures in appropriate situations.” *Clifton Power Corp.*, 39 FERC ¶ 61,117 at 61,456 (1987), *aff’d*, *Cooley*, 843 F.2d 1464.

to the Commission to reconsider, and “to explain more clearly,” the amount of the penalty imposed. *Id.* at 1272.

On remand from this Court, the Commission assessed a civil penalty of \$15,000, which became administratively and judicially final in 2001.¹⁰ On February 4, 2003, the Commission issued an order directing Clifton Power to pay the penalty within 30 days. *Clifton Power Corp.*, 102 FERC ¶ 61,121 (2003). The order warned that failure to make a timely payment would violate a final FERC order and might subject Clifton Power to additional action under the Commission’s enforcement authority under FPA § 31, 16 U.S.C. § 823b. Clifton Power requested rehearing of that order, which the Commission denied in May 2003 (*Clifton Power Corp.*, 103 FERC ¶ 61,141 (2003)), but did not seek judicial review.

Clifton Power has never paid the fine. After a letter demanding payment received no response, the Commission referred the penalty to the U.S. Department of the Treasury for collection. *See Appalachian Permit (Cheoah) Order* at P 9, JA 95. When contacted by a collection agent, Mr. Mierek stated that he had no

¹⁰ Clifton Power initially challenged the penalty, seeking rehearing, which the Commission denied (94 FERC ¶ 61,071 (2001)), and then judicial review, which this Court dismissed as incurably premature because Clifton Power had filed a second request for rehearing before the Commission. *Clifton Power Corp. v. FERC*, 294 F.3d 108, 111 (D.C. Cir. 2002). After the Commission denied the second rehearing request (94 FERC ¶ 61,346 (2001)), however, Clifton Power did not seek judicial review. *See Appalachian Permit (Cheoah) Order* at P 8, JA 95.

intention of paying the fine. *Id.*; *see also* Appalachian Permits Rehearing Order at P 20 (noting documents in record, including collection agent’s notes), JA 171.

Petitioners not only admit that the penalty remains unpaid, but in fact defend the “corporate decision not to pay” (Br. 25) — a corporate decision necessarily made by Mr. Mierek himself, as Clifton Power’s president and sole owner.

Petitioners cite Mr. Mierek’s unilateral determination that the penalty, though final, is not “due” because the Commission has not filed a lawsuit to compel payment.

Br. 25; *see also* Br. 27 (acknowledging that “the penalty became final five years ago”). Mr. Mierek, however, is wrong: “A licensee or exemptee’s obligation to

pay a civil penalty attaches when the penalty becomes administratively and

judicially final. . . . [Appalachian] confuses the obligation to pay the penalty with

the means provided by [the FPA] for the Commission to collect the debt when the

licensee is delinquent.” Appalachian Permits Rehearing Order at P 10 & n.17,

JA 167; *see also id.* n.17 (“[T]here has been final agency action and the debt is

legally enforceable as is.”); *id.* at P 20 (evidentiary hearing is unnecessary because

Appalachian “does not dispute the essential fact” that Clifton Power has not paid

penalty), JA 170-71.

Accordingly, substantial evidence in the record supports the Commission’s finding that Clifton Power’s original, “serious” noncompliance with environmental requirements, combined with Mr. Mierek’s present, continuing refusal to pay the

resulting penalty, renders him, and thus his other solely-owned corporation, Appalachian, unfit to receive any further hydropower authorizations. Appalachian (Cheoah) Permit Order at P 10, JA 96; Appalachian Permits Rehearing Order at P 17 (given that the Charles Mierek-controlled Clifton Power “shows no sign of recognition of the seriousness of its action or any intent to alter its pattern of behavior . . . [i]t is not possible for us to conclude that any entity under Mr. Mierek’s control would be a good steward of the public’s resources.”), JA 169-70.¹¹

III. THE COMMISSION’S DECISIONS TO DENY LICENSES AND PERMITS IN THESE CASES WERE REASONABLE

Based on these facts, the Commission reasonably determined that the public interest would not be served by depending on Ms. Hitchcock and Mr. Mierek to comply with the requirements of licenses or permits. That determination represents no departure from policy. Nor is it unprecedented in the context of licensing. That such denials for fitness are rare suggests only that few, if any,

¹¹ Petitioners point to the fact that other companies owned by Mr. Mierek have been granted authorizations since the initial finding of Clifton Power’s noncompliance in 1993. *See* Br. 9 (citing licenses granted in 1999 and 2000 and permit granted in 1996). (Considering that all three authorizations were granted *after* Clifton Power challenged its penalty in court, Petitioners’ suggestion that the Commission’s unfitness findings are retaliatory, *see* Br. 29, is specious.) The three permit applications denied in the FERC proceedings now on appeal, however, were the first to consider Mr. Mierek’s fitness since Clifton Power’s penalty became final and unappealable in 2001 and payment was demanded in 2003.

applicants have such records of demonstrating that their compliance cannot be secured by available enforcement methods.

A. The Commission Appropriately Considers Fitness As A Factor In Its Public Interest Analysis

As discussed *supra* at pages 5-6, the FPA requires the Commission to consider the public interest in granting hydropower licenses, exemptions, and permits. *See generally* FPA §§ 10(a)(1), 15(a)(2), 16 U.S.C. §§ 803(a)(1), 808(a)(2). The statute gives the Commission broad discretion to consider, in addition to criteria enumerated in those provisions, “[s]uch other factors as the Commission may deem relevant” *Id.* § 808(a)(2)(G).

In exercising that discretion, the Commission has long considered fitness of the applicant, and past compliance in particular, as one such factor:

In determining whether . . . a proposed project will be best adapted to a comprehensive plan for developing a waterway for beneficial public purposes, the Commission must consider all aspects of the public interest.[] Among the relevant public interest issues is the fitness of the license applicant to operate the hydroelectric project.[] A poor compliance record . . . is relevant in determining the applicant’s fitness to receive a new project authorization, since it bears on the applicant’s ability to reliably carry out the requirements of the license and the FPA, requirements that might involve public safety and that typically concern protection of important natural resources.

Turbine Indus., Inc., 68 FERC ¶ 61,127 at 61,610-11 (1994) (internal footnotes omitted), *cited in* Energie License Rehearing Order at P 20 n.29, JA 79, and Appalachian Permits Rehearing Order at P 11 n.19, JA 168; *see also* *Cook Indus.*,

Inc., 72 FERC ¶ 61,115 at 61,669 (1995); *Clifton Power*, 39 FERC at 61,456 (“Fitness of an applicant is certainly a relevant matter to be considered in deciding whether to issue a license . . .”), *aff’d*, *Cooley*, 843 F.2d 1464.

Indeed, this Court has long recognized the Commission’s discretion in this regard. *See Cooley*, 843 F.2d at 1471 (holding Commission had not abused its discretion by granting license to Clifton Power, despite concerns about Mr. Mierek’s past noncompliance¹²). Based on the statute’s “general public interest criteria” and the Commission’s discretion under FPA § 10(a)(1), the Court held that: “The Commission is charged with considering *all of the relevant factors The general fitness of the licensee-applicant is one of these factors*” 843 F.2d at 1471 (emphases added) (internal citations omitted), *cited in Turbine*, 68 FERC at 61,610 n.6.

The Commission has likewise long considered fitness in granting preliminary permits. *See Robert P. Wilson*, 28 FPC 571, 575 (1962) (“Under an application for a preliminary permit, the Commission is concerned with the general fitness of the applicant”) (citation omitted); *John M. Jordan*, 27 FERC ¶ 61,435 at 61,806 (1984) (“In each instance, we scrutinize the fitness of the applicant *and* its ability to finance and develop its project.”) (emphasis added).

¹² *See supra* note 9 (discussing *Clifton Power*, 39 FERC ¶ 61,117).

B. The Commission's Denials For Unfitness Were Consistent With Its Policy And Precedent

The Commission's denial of Energie's license application was not unprecedented, as it had previously denied a license on the same grounds in the 1994 Unfitness Order — as it happens, to Ms. Hitchcock herself. *See supra* Section II.A.1.a. Though the Commission's denial of Energie's permit application on grounds of unfitness was indeed a first (a distinction Appalachian does not share, as the orders denying its permit applications followed the Energie precedent), “[t]he fact that there is no precedent for denying a preliminary permit on fitness grounds is no bar to the Commission doing so in this proceeding.” Energie Permit Rehearing Order at P 6, JA 37. In any event, the Commission has now denied applications for unfitness in two license cases and one permit case involving Ms. Hitchcock, and four permit applications involving Mr. Mierek.¹³

Moreover, while the Commission has a general policy of issuing a permit unless there is a permanent legal bar to granting a license, another court has upheld orders diverging from that policy. *See Symbiotics, LLC*, 99 FERC ¶ 61,100 (denying permit because Commission had previously found adverse environmental effects at same site), *reh'g denied*, 100 FERC ¶ 61,004 (2002), and *Symbiotics*,

¹³ The fourth case is not before this Court. The Commission likewise denied a permit application by another of Mr. Mierek's companies in *Savannah River Resource Enhancement*, 117 FERC ¶ 61,013 (2006). *See* Br. 9-10 & n.13.

LLC, 100 FERC ¶ 61,010 (2002) (same), *both aff'd sub nom. Symbiotics, L.L.C. v. FERC*, Case Nos. 02-9541, *et al.*, 2004 U.S. App. LEXIS 19596 (10th Cir. Sept. 21, 2004), *cited in* *Energie Permit Rehearing Order* at P 6 n.7, JA 37.

Here, the Commission explained that, because it would not issue a license to these applicants, neither would it grant them permits. *See id.* at PP 7, 20, JA 37, 43; *Appalachian Permit (Cheoah) Order* at P 6, JA 94. First, the purpose of a permit is to study a proposed project and to obtain a preference over other potential license applicants (*see supra* page 6); where the Commission finds an applicant unfit to obtain a license, issuing a permit is pointless. *Cf., e.g., Green Island Power Auth.*, 110 FERC ¶ 61,034 at P 15 (2005) (if applicant cannot obtain a license, “it would serve no purpose to issue a preliminary permit to study the project”). And doing so could deter other potential applicants who do not have such records of noncompliance. *Energie Permit Rehearing Order* at P 7 n.9, JA 37. Second, compliance is relevant to the permit itself. Because the Commission routinely attaches terms and conditions to permits, and relies on its powers under FPA § 31 to enforce them, Ms. Hitchcock’s and Mr. Mierek’s past violations of such terms and conditions and disregard of enforcement measures are directly relevant to their fitness to receive permits.

Petitioners claim that the Commission has issued licenses and permits to even less fit applicants. *See* Br. 28. Of course, “[e]ach case is decided on the basis

of its individual merits.” Appalachian Permits Rehearing Order at P 14, JA 169.

“That the Commission did not deny [a] license application based on the facts of [a prior] proceeding hardly establishes a policy.” Energie License Rehearing Order at P 18, JA 77. Nevertheless, the Commission distinguished cases in which it had granted authorizations despite concerns about past noncompliance. In *City of Augusta*, 72 FERC ¶ 61,114 at 61,594 (1995), and *Cook*, 72 FERC at 61,669, the applicants had admitted their violations and paid the penalties. See Energie License Rehearing Order at P 18, JA 77-78; Appalachian Permits Rehearing Order at PP 14, 16, JA 169. And in *Village of Gresham*, 46 FERC ¶ 61,067 (1989), which involved a relicensing proceeding where there were no competing applications, the Commission weighed the potential shutdown of an existing project against the question of whether denial would serve any purpose, as the licensee had already come into compliance. See Appalachian Permits Rehearing Order at P 15, JA 169.

In contrast, these individuals’ intransigence sets them apart. Ms. Hitchcock has a history of committing safety and environmental violations and flouting compliance orders and penalties, and even now continues to downplay or deny the violations. See Energie License Rehearing Order at P 18, JA 78. Mr. Mierek has previously violated environmental conditions and a compliance order and now refuses to pay a long-final penalty. See Appalachian Permits Rehearing Order at

PP 14, 16, JA 169.

Finally, though Petitioners hold up FPA § 31 as providing adequate “other means to secure compliance” short of denial (Br. 3, 19), Ms. Hitchcock’s and Mr. Mierek’s histories show that the Commission’s enforcement efforts — running the gamut from flurries of sternly worded letters from Commission Staff under FPA § 31(a) to repetitive compliance orders by the Commission under the same provision, from civil penalties under FPA § 31(c) to proposed revocation under FPA § 31(b) — have demonstrably failed to secure their compliance.¹⁴

Accordingly, the Commission was understandably skeptical that it could do so in the future. Therefore, the Commission reasonably concluded that granting new permits or licenses to these applicants would not serve the public interest.

C. The Commission Reasonably Considered Ms. Hitchcock’s and Mr. Mierek’s Records In Evaluating The Present Applicants

The Commission also followed longstanding policy in considering Ms. Hitchcock’s and Mr. Mierek’s records of noncompliance in connection with other entities under their control. Petitioners contend that the Commission strayed from a “strict policy” of observing separate legal identities in other contexts. Br. 21, 24

¹⁴ Cf. *Harbor Ins. Co. v. Schnabel Found. Co.*, 946 F.2d 930, 937 n.5 (D.C. Cir. 1991) (“It reminds us of the legal definition of chutzpah: chutzpah is a young man, convicted of murdering his parents, who argues for mercy on the ground that he is an orphan.”).

(citing decisions regarding deadlines, permit priority, and imposition of fines). But the Commission has never so limited its consideration of an applicant's fitness to operate a hydropower project: "We do not separate the identities of partners and partnerships where matters of fitness to receive a license are concerned. In fact, we have consistently examined the conduct of the persons controlling and directing licenses and exemptees in this context" *Energie License Rehearing Order* at P 20 & n.29 (citing cases), JA 78-79; *Appalachian Permits Rehearing Order* at P 11 n.19 (citing cases), JA 168. Indeed, the Commission did just that in the 1994 Unfitness Order, finding Ms. Hitchcock unfit based on the records (to that date) of violations by various entities — the very same array of companies and projects discussed again in the orders challenged here. *See* 69 FERC at 62,443-47; *supra* pages 20-32.

Moreover, the Commission's approach makes sense: "A poor compliance record *attributable to the persons that would control* a project's operations is relevant in determining the applicant's fitness . . . since it bears on the applicant's ability to reliably carry out the requirements of the license and the FPA" *Turbine*, 68 FERC at 61,611 (emphasis added) (considering that applicant's president also ran two other entities that had violated FERC's regulations and requirements of exemptions); *see also id.* at 61,613 ("poor compliance records" of entities under same management "cast serious doubt on [applicant's] fitness to be a

licensee”), *cited in* Energie License Rehearing Order at P 20 n.29, JA 79, *and* Appalachian Permits Rehearing Order at P 11 n.19, JA 168.¹⁵

Indeed, rigidly adhering to the corporate form in this context, as Petitioners insist, would defeat the Commission’s obligation to the public interest. *See* Appalachian Permits Rehearing Order at P 17 (“As the agency charged by Congress with regulating and safeguarding the nation’s hydropower resources, we cannot turn a blind eye to any applicant’s record in considering a new application. . . . [To disregard past actions] would be to shirk our responsibilities.”), JA 169-70.

This Court’s decision in *Clifton Power* is not to the contrary, because the instant case is not about penalties under FPA § 31 for violations of *existing* permits or licenses. *See* Energie Permit Rehearing Order at P 14, JA 40; Energie License Rehearing Order at PP 12-13, 21, JA 76, 79; Appalachian Permits Rehearing Order

¹⁵ Ultimately, the other entities admitted noncompliance, and agreed to pay a penalty and to implement a compliance program. Based on those concessions and the particular facts of that case, the Commission granted the license. *Cook*, 72 FERC at 61,669. Though Petitioners point to this “second chance” as inconsistent with their treatment here (*see* Br. 19, 28), the Commission reasonably distinguished the circumstances in these cases. *See* Energie License Rehearing Order at P 16 (considering “the extensive history of non-compliance at projects under Ms. Hitchcock’s control and direction,” a show cause proceeding “would serve no purpose”), JA 77; Appalachian Permits Rehearing Order at P 16 (unlike in *Cook*, Mr. Mierek’s other corporation “continues to be in violation of the order to pay the civil penalty”), JA 169.

at P 18, JA 170; *cf.* *Clifton Power*, 88 F.3d at 1267 (noting that amount of fine imposed under FPA § 31(c)-(d) should not be based on violations by another of Mr. Mierek’s companies). Rather, the Commission simply denied new permit and license applications “in the context of an ordinary notice and comment proceeding” *Energie Permit Rehearing Order* at P 14 (citing *Symbiotics*, *supra* pages 43-44), JA 40.

In any event, Petitioners undermine their own argument. Petitioners cite *Clifton Power*’s “corporate decision” not to pay its penalty — a decision that was, *a priori*, made by its president and sole shareholder — Charles Mierek. Br. 9. Of course, *Appalachian*’s compliance with any FERC enforcement order would likewise be subject to the corporate decisionmaking of its president and sole shareholder — Mr. Mierek again. *Cf.* *Appalachian Permits Rehearing Order* at P 8 (“Mr. Mierek is president of both entities, and it would be irresponsible of us not to consider his actions in his capacity as president of Clifton [Power] when considering the fitness of [Appalachian] as a potential licensee.”), JA 166.

As for Elaine Hitchcock, Petitioners insist that the Commission must focus only on *Energie*, as the named applicant, and ignore Ms. Hitchcock’s involvement as its co-owner and agent (*see* Br. 22) — even as Petitioners themselves blur such distinctions in denying Ms. Hitchcock’s decisionmaking role in companies of which she was president (*Williams Dam* licensee and *Upper Watertown* exemptee)

and disowning her responsibility for authorizations that she obtained *under her own name* (Sheboygan Falls permit and Eau Galle exemption). *See* Br. 8, 23-24.

D. The Commission Was Not Required To Hold Evidentiary Hearings

Finally, Petitioners claim the denial of licenses and permits constitute a “debarment” that entitles them to heightened process. *See* Br. 7 (“[T]he Commission has forever barred Mierek and Hitchcock from ever doing business before the Commission, thus depriving them of their economic livelihood . . .”), 30. But these FERC proceedings were not about the applicants’ careers — the only question before the Commission was whether it would be in the public interest to grant the permit and license applications before it:

The only purpose for which we may license the use of waterpower resources is to serve the public interest.[] No private individual, no private company, no municipality or State, no one other than the people of the United States has any right or claim to the use or benefit of these resources. *A license under the Federal Power Act is a privilege conferred, not for the benefit of the licensee, but for the benefit of the public.* Before any license can issue, the benefit to the public must be shown.

Public Util. Dist. No. 1 of Skamania County, 32 F.P.C. 444, 446 (1964) (emphasis added) (internal footnote omitted). *Accord, Turbine*, 68 FERC at 61,611 n.6 (“A license is a privilege, not a right.”) (citing *Skamania*).

Nevertheless, the Commission did afford the applicants sufficient process, fully considering their legal and factual arguments — though without allowing

Energie and Ms. Hitchcock to relitigate long-final orders, *see supra* pages 18-32. *See* Energie License Rehearing Order at P 22, JA 79-80; *see also* Appalachian Permits Rehearing Order at P 20, JA 170-71 (evidentiary hearing unnecessary because Appalachian did not dispute Clifton Power’s failure to pay fine). *See, e.g., Moreau*, 982 F.2d at 568 (Commission “need not conduct an evidentiary hearing” when there is no disputed issue of material fact that cannot be “adequately resolved on the written record”).

CONCLUSION

For the reasons stated, the petitions for review should be denied and the challenged FERC Orders should be affirmed in all respects.

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