

**ORAL ARGUMENT HAS NOT BEEN SCHEDULED**

---

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

---

**Nos. 05-1421, *et al.***

---

**DUNCAN'S POINT LOT OWNERS ASSOCIATION INC., *ET AL.*  
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**

---

**CYNTHIA A. MARLETTE  
GENERAL COUNSEL**

**ROBERT H. SOLOMON  
SOLICITOR**

**SAMUEL SOOPPER  
ATTORNEY**

**FEDERAL ENERGY REGULATORY  
COMMISSION  
WASHINGTON, DC 20426**

**JULY 10, 2007**

**FINAL BRIEF: NOVEMBER 16, 2007**

## CIRCUIT RULE 28(a)(1) CERTIFICATE

### A. Parties and Amici:

All parties in this Court are listed in Petitioner's brief.

Parties intervening below were:

Union Electric Company d/b/a/ AmerenUE  
Pebble Creek Development, LLC  
Pebble Creek Homes Association, Inc.  
Jim Hoerl Construction Company

### B. Rulings Under Review:

1. Order Denying Complaint, *Duncan's Point Lot Owners Association, Inc., et al. v. Union Electric Co. d/b/a AmerenUE*, 111 FERC ¶ 61,190 (2005), JA 157;
2. Order Denying Rehearing, *Duncan's Point Lot Owners Association, Inc., et al. v. Union Electric Co. d/b/a AmerenUE*, 112 FERC ¶ 61,289 (2005), JA 260;
3. Letter Order, Project No. 459 (September 1, 2005), JA 256;
4. Order Denying Rehearing, *Union Electric Co. d/b/a AmerenUE*, 114 FERC ¶ 61,038 (2006), JA 304;
5. Letter Order, Project No. 459 (March 28, 2006), JA 319; and
6. Order Denying Rehearing, *Union Electric Co. d/b/a AmerenUE*, 116 FERC ¶ 61,045 (2006), JA 336.

**C. Related Cases:**

This case has not previously been before this Court or any other court.

Counsel is not aware of any other related cases pending before this or any other court.

---

Samuel Soopper  
Attorney

November 16, 2007

## TABLE OF CONTENTS

	<b>PAGE</b>
STATEMENT OF THE ISSUES.....	1
STATUTORY AND REGULATORY PROVISIONS.....	2
INTRODUCTION.....	2
STATEMENT OF THE FACTS.....	6
I. Statutory and Regulatory Background.....	6
A. Federal Power Act.....	6
B. Other Federal Statutes.....	8
II. Factual Background.....	10
A. Earlier Project No. 459 Compliance Proceedings.....	10
1. The September 2004 Compliance Order.....	10
2. The February 2005 Compliance Order.....	14
B. The Complaint Proceeding.....	15
1. The Association’s Complaint.....	15
2. The Complaint Order.....	17
3. The Complaint Rehearing Order.....	17
C. Subsequent Project No. 459 Compliance Proceedings.....	18
1. The September 2005 Compliance Order.....	18
2. January 2006 Rehearing Order.....	20

## TABLE OF CONTENTS

	<b>PAGE</b>
3. The March 2006 Compliance Order.....	22
4. The July 2006 Rehearing Order.....	23
SUMMARY OF ARGUMENT.....	25
ARGUMENT.....	27
I. STANDARD OF REVIEW.....	27
II. THE COMMISSION PROPERLY FULFILLED ITS STATUTORY OBLIGATION TO ENFORCE THE TERMS OF THE OSAGE PROJECT HYDROELECTRIC LICENSE....	28
A. The Commission Reasonably Exercised Its Remedial Authority Under The FPA In Resolving The Association’s Claims Against Ameren.....	29
B. The Commission Reasonably Determined That The Licensee’s Actions Were Not Subject To NEPA.....	35
C. The Commission And Its Licensee Complied With The Relevant Provisions Of The Clean Water Act.....	39
D. The Commission Fully Complied With The National Historic Preservation Act.....	42
III. THE COMMISSION FULLY AFFORDED THE ASSOCIATION AND ITS MEMBERS THEIR DUE PROCESS RIGHTS IN ADJUDICATING ISSUES ARISING FROM THEIR DISPUTE WITH AMEREN.....	47
CONCLUSION.....	51

## TABLE OF AUTHORITIES

<b>COURT CASES:</b>	<b>PAGE</b>
<i>Alabama Power Co. v. FERC</i> , 993 F.2d 1557 (D.C. Cir. 1993).....	50
<i>Alabama River Alliance v. FERC</i> , 325 F.3d 290 (D.C. Cir. 2003).....	9
* <i>Atlantic City Electric Co. v. FERC</i> , 295 F.3d 1 (D.C. Cir. 2002).....	29, 45
<i>Brady v. FERC</i> , 416 F.3d 1 (D.C. Cir. 2005).....	29
<i>City of Dania Beach, Florida v. FAA</i> , 485 F.3d 1181, (D.C. Cir. 2007).....	9
<i>City of Nephi v. FERC</i> , 147 F.3d 929 (D.C. Cir. 1998).....	29
<i>Coalition for Fair and Equitable Regulation of Docks on the Lake of the Ozarks v. FERC</i> , 297 F.3d 771 (8 <sup>th</sup> Cir. 2002).....	8, 31
<i>Columbia Gas Transmission Corp. v. FERC</i> , 750 F.2d 105 (D.C. Cir. 1984).....	31
<i>East Kentucky Power Coop., Inc. v. FERC</i> , 489 F.3d 1299 (D.C. Cir. 2007).....	27

---

**\*Cases chiefly relied upon are marked with an asterisk.**

## TABLE OF AUTHORITIES

<b>COURT CASES:</b>	<b>PAGE</b>
<i>Environmental Defense v. EPA</i> , 467 F.3d 1329 (D.C. Cir. 2006).....	28
<i>ExxonMobil Gas Marketing Co. v. FERC</i> , 297 F.3d 1071 (D.C. Cir. 2002).....	27
<i>Fein v. Peltier</i> , 949 F. Supp. 374 (D.V.I. 1996).....	44
<i>FPL Energy Maine Hydro LLC v. FERC</i> , 287 F.3d 1151 (D.C. Cir. 2002).....	27
<i>Friends of the Cowlitz v. FERC</i> , 253 F.3d 1161 (9 <sup>th</sup> Cir. 2001).....	35
<i>Fund for Animals, Inc. v. Thomas</i> , 127 F.3d 80 (D.C. Cir. 1997).....	38
<i>Malta Irrigation District v. FERC</i> , 955 F.2d 59 (D.C. Cir. 1992).....	31
* <i>Moreau v. FERC</i> , 982 F.2d 556 (D.C. Cir. 1993).....	49, 50
* <i>NAACP v. FERC</i> , 425 U.S. 662 (1976).....	28
<i>National Committee for the New River, Inc., v. FERC</i> , 433 F.3d 830 (D.C. Cir. 2005).....	48
<i>Niagara Mohawk Power Corp. v. FPC</i> , 379 F.2d 153 (D.C. Cir. 1967).....	31, 32
* <i>Norton v. Southern Utah Wilderness Alliance</i> , 542 U.S. 55 (2004).....	39

## TABLE OF AUTHORITIES

<b>COURT CASES:</b>	<b>PAGE</b>
<i>Rhineland Paper Co. v. FERC</i> , 405 F.3d 1 (D.C. Cir. 2005).....	4
<i>Robertson v. Methow Valley Citizens Council</i> , 490 U.S. 332 (1989).....	8-9
<i>Rollins Env'tl. Services, Inc. v. EPA</i> , 937 F.2d 649 (D.C. Cir. 1991).....	28
<i>Sacramento Municipal Utility District v. FERC</i> , 474 F.3d 797 (D.C. Cir. 2007).....	49
<i>Save the Bay, Inc. v. United States Corps of Engineers</i> , 610 F.2d 322 (5 <sup>th</sup> Cir. 1980).....	38
<i>Sheridan Kalorama Historical Association v. Christopher</i> , 49 F.3d 750 (D.C. Cir. 1995).....	44
<i>State of North Carolina v. FERC</i> , 112 F.3d 1175 (D.C. Cir. 1997).....	27
<i>Sugarloaf Citizens Association v. FERC</i> , 959 F.2d 508 (4 <sup>th</sup> Cir. 1992).....	36
<i>The Wireless Association v. FCC</i> , 466 F.3d 105 (D.C. Cir. 2006).....	9
<i>U.S. Dep't of Interior v. FERC</i> , 952 F.2d 538 (D.C. Cir. 1992).....	6, 9, 29
<i>Winnebago Tribe of Nebraska v. Ray</i> , 621 F.2d 269 (8 <sup>th</sup> Cir. 1980).....	38



## TABLE OF AUTHORITIES

<b>ADMINISTRATIVE CASES:</b>	<b>PAGE</b>
<i>City of Tacoma, Washington,</i> 109 FERC ¶ 61,318 (2004).....	48
<i>Duncan’s Point Lot Owners Association, Inc., et al. v. Union Electric Company d/b/a AmerenUE,</i> 111 FERC ¶ 61,190 (2005).....	4, 30, 31, 33, 34
<i>Duncan’s Point Lot Owners Association, Inc., et al. v. Union Electric Company d/b/a AmerenUE,</i> 112 FERC ¶ 61,289 (2005).....	4-5, 18, 36, 37, 39-44, 46, 47, 50
<i>Union Electric Company,</i> 15 FERC ¶ 62,038 (1981).....	2, 7, 12
<i>Union Electric Company d/b/a AmerenUE,</i> 114 FERC ¶ 61,038 (2006).....	5, 20, 22, 33, 34, 46 50
<i>Union Electric Company d/b/a AmerenUE,</i> 116 FERC ¶ 61,045 (2006).....	5, 23, 32
<i>Union Electric Company, dba AmerenUE,</i> 118 FERC ¶ 62,247 (2007).....	3, 35, 41

## TABLE OF AUTHORITIES

<b>STATUTES:</b>	<b>PAGE</b>
Clean Water Act	
Section 401(a)&(d), 33 U.S.C. §§ 1341(a)&(d).....	9, 18, 20, 39, 41
Section 404, 33 U.S.C. § 1344.....	39, 41
Federal Power Act	
Section 4(e), 16 U.S.C. § 797(e).....	6
Section 6, 16 U.S.C. § 799.....	7
Section 10, 16 U.S.C. § 803.....	7
Section 31b(a), 16 U.S.C. § 823b(a).....	8
Section 313b, 16 U.S.C. § 825l(b).....	27
National Environmental Policy Act	
Section 102(2)(C), 42 U.S.C. § 4332(2)(C).....	35, 36, 38
National Historic Preservation Act	
Section 106, 16 U.S.C. § 470f.....	9, 17, 42, 44
Section 110, 16 U.S.C. § 470h-2.....	43

**TABLE OF AUTHORITIES**

<b>REGULATIONS</b>	<b>PAGE</b>
18 C.F.R. § 4.41(h)(2).....	4
18 C.F.R. § 380.4(a)(3).....	37
18 C.F.R. § 380.4(b).....	37
18 C.F.R. § 380.4(19).....	36, 37
36 C.F.R. § 800.5(c)(3).....	43
40 C.F.R. § 1501.4.....	36
40 C.F.R. § 1508.18.....	35
40 C.F.R. § 1508.27.....	38

**GLOSSARY**

Complaint Order	Order Denying Complaint, <i>Duncan's Point Lot Owners Association, Inc., et al. v. Union Electric Company d/b/a AmerenUE</i> , 111 FERC ¶ 61,190 (2005), JA 157.
Complaint Rehearing Order	Order Denying Complaint, <i>Duncan's Point Lot Owners Association, Inc., et al. v. Union Electric Company d/b/a AmerenUE</i> , 112 FERC ¶ 61,289 (2005), JA 260.
EIS	Environmental Impact Statement
FPA	Federal Power Act
January 2006 Rehearing Order	Order Denying Rehearing, <i>Union Electric Company d/b/a Ameren UE</i> , 114 FERC ¶ 61,038 (2006), JA 304.
July 2006 Rehearing Order	Order Denying Rehearing, <i>Union Electric Company d/b/a Ameren UE</i> , 116 FERC ¶ 61,045 (2006), JA 336.
March 2006 Compliance Order	March 28, 2006, letter order issued by the Commission to Ameren, JA 319.
NEPA	National Environmental Policy Act
September 2004 Compliance Order	September 7, 2004, letter order issued by the Commission to Ameren, JA 34.
September 2005 Compliance Order	September 1, 2005, letter order issued by the Commission to Ameren, JA 256.

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

---

**Nos. 05-1421, *et al.***

---

**DUNCAN’S POINT LOT OWNERS ASSOCIATION INC., *ET AL.*,  
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 ISSUES**

1. Whether the Federal Energy Regulatory Commission (Commission or FERC) reasonably exercised its remedial authority under the Federal Power Act (FPA), and fulfilled its obligations under other statutes, in enforcing certain conditions of the hydroelectric license issued to Union Electric Company d/b/a AmerenUE (Ameren), governing the operation of the Osage Project in Missouri.
2. Whether the Commission afforded petitioners Duncan’s Point Lot

Owners Association Inc., *et al.* (collectively, the Association)<sup>1</sup> appropriate due process in addressing the Association's objections to the Commission's administration of the Osage Project license, and Ameren's performance thereunder.

## **STATUTORY AND REGULATORY PROVISIONS**

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

## **INTRODUCTION**

The Osage Hydroelectric Project (Project No. 459) was originally licensed by the Commission (then the Federal Power Commission) in 1926. The project consists of the Bagnell Dam and the Lake of the Ozarks, the project reservoir, which is impounded by the dam. *See* Complaint Order P 2, JA 158. The Lake of the Ozarks covers 55,342 acres at its normal maximum pool elevation. *Id.* The project also contains a powerhouse with an installed capacity of 176.2 megawatts. *Id.*

Ameren is the licensee of the Osage Project. During most of the time relevant to this case, it operated the project under a license issued by the Commission in 1981, which expired on February 28, 2006. *See Union Electric Co.*, 15 FERC ¶ 62,038 (1981). Between the expiration of the 1981 license and the

---

<sup>1</sup> The other petitioners are Duncan's Point Homeowners Association Inc., and Duncan's Point residents Nancy A. Brunson, Juanita Brackens, Helen Davis and Pearl Hankins. Nancy A. Brunson is president of both Associations.

issuance of a new license in 2007, project operations continued pursuant to an annual license. The pre-existing license terms and conditions relevant to this case continued in force during this period.

On April 24, 2004, Ameren filed an application for a new license for the project, which was issued by the Commission on March 30, 2007. Order Issuing New License, *Union Electric Co. dba AmerenUE*, 118 FERC ¶ 62,247 (2007).

The Association participated in the new license proceedings. *See id.* at P 4.

Certain of the issues in the present case are related to those resolved in the new license proceeding. However, the Commission's new license order is not before the Court on appeal. Rather, this case involves compliance proceedings under Ameren's prior license, and the Association's complaint concerning the resolution of those proceedings.

The Association represents lot owners, homeowners and residents of the Duncan's Point resort, located on a peninsula between the Lake of the Ozarks and Lick Creek Cove, in Camden County, Missouri. Duncan's Point, founded in 1952 by Daniel Ralph Duncan as an African-American resort, is eligible for listing in the National Register of Historic Places.

The Association's complaints about the project relate to the construction of the Pebble Creek development, a subdivision of homes located on a tract of land adjacent to the Duncan's Point subdivision. (For the Court's convenience, a map

of the Lick Creek Cove area indicating the positions of Duncan's Point and Pebble Creek is attached as Addendum B to this brief.)

Both the Duncan's Point subdivision and the Pebble Creek subdivision are located on a peninsula in the Lake of the Ozarks, outside of the boundary of the Osage Project. Ameren controls only a narrow strip of project land around the lake shoreline, the specific dimension of which varies depending on the terrain.

Complaint Order P 4, JA 158.<sup>2</sup>

The Association challenges three sets of related FERC orders in these appeals. The case formally began with a complaint filed with the Commission by the Association on March 4, 2005, against Ameren, concerning actions taken under Osage Project license. In the first order on review here, Order Denying Complaint, *Duncan's Point Lot Owners Association, Inc., et al. v. Union Electric Co. d/b/a AmerenUE*, 111 FERC ¶ 61,190 (2005), JA 157 (Complaint Order), the Commission denied the Association's complaint on the grounds that the alleged violations had either already been adequately resolved by FERC staff or were beyond the jurisdiction of the agency. In the second order on review, Order Denying Rehearing, *Duncan's Point Lot Owners Association, Inc., et al. v. Union*

---

<sup>2</sup> "Under FERC's regulations, a project boundary 'must enclose only those lands necessary for operation and maintenance of the project and for other project purposes, such as recreation, shoreline control, or protection of environmental resources.'" *Rhineland Paper Co. v. FERC*, 405 F.3d 1, 5 (D.C. Cir. 2005) (quoting 18 C.F.R. § 4.41(h)(2)).



*Electric Co. d/b/a AmerenUE*, 112 FERC ¶ 61,289 (2005), JA 260 (Complaint Rehearing Order), the Commission denied the request by the Association for rehearing of the Complaint Order.

The other two sets of contested orders arise from agency proceedings concerning Ameren's compliance with particular terms and conditions of the Osage Project license. The Association appeals a September 1, 2005, letter order, JA 256 (September 2005 Compliance Order), issued by the Commission to Ameren regarding compliance issues, as well as the Commission's denial of the request for rehearing by the Association of that order. Order Denying Rehearing, *Union Electric Co. d/b/a Ameren UE*, 114 FERC ¶ 61,038 (2006), JA 304 (January 2006 Rehearing Order).

The Association also seeks review of a March 28, 2006, letter order, JA 319 (March 2006 Compliance Order) issued to Ameren on compliance issues, and the agency's subsequent order denying the Association's request for rehearing. Order Denying Rehearing, *Union Electric Co. d/b/a Ameren UE*, 116 FERC ¶ 61,045 (2006), JA 336 (July 2006 Rehearing Order).

In these proceedings, the Association has alleged that Ameren has aided the Pebble Creek developer by violating certain conditions of the Osage Project license. Complaint at 3-4, JA 8-9. The Association further contends that the remedies imposed by the Commission on Ameren for these license violations were

insufficient.

The principal complaints by the Association arise from Ameren's permitting Pebble Creek to build a 300-foot sea wall on project property along the lake,<sup>3</sup> and Ameren's authorizing an easement across project land for an effluent discharge pipe connecting the lake to a wastewater treatment facility operated by Pebble Creek.

Furthermore, despite the Commission's best efforts to administer the Osage Project license and resolve the Association's complaints in a legal, fair and efficient manner, the Association has argued that it has been denied due process by the agency.

## **STATEMENT OF THE FACTS**

### **I. Statutory and Regulatory Background**

#### **A. Federal Power Act**

Under section 4(e) of the FPA, 16 U.S.C. § 797(e), FERC has authority to issue licenses for the construction, operation, and maintenance of hydroelectric projects on federal lands and on waterways that are subject to congressional regulation under the Commerce Clause. *See generally U.S. Dep't of Interior v. FERC*, 952 F.2d 538, 543-545 (D.C. Cir. 1992).

---

<sup>3</sup> While Ameren initially authorized Pebble Creek to build a seawall 2,332 feet long, the Commission halted construction when the wall was 300 feet long. *See Ameren's Answer to Complaint* (March 24, 2005), R. 6 at 5 & n.13, JA 48.

Section 10 of the FPA, 16 U.S.C. § 803, as relevant here, requires the Commission, in issuing hydroelectric licenses, to find that the project approved will be the “best adapted to a comprehensive plan for improving or developing a waterway or waterways” for a number of purposes, such as “the improvement and utilization of water-power development . . . the adequate protection, mitigation and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses,” including recreation.

Additionally, section 6 of the FPA specifies that each hydroelectric 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 in conformity with this chapter . . . .” 16 U.S.C. § 799. These terms and conditions are “expressed in said license.” *Id.*

Once the Commission issues a hydroelectric license, the agency carefully monitors the licensee’s compliance with the various license conditions. To this end, Article 41(e)(4) of Ameren’s Osage Project license states:

The Commission reserves the right to require the Licensee to take reasonable remedial action to correct any violation of the terms and conditions of this article, for the protection and enhancement of the project’s scenic, recreational, and other environmental values.

*Union Electric Co.*, 15 FERC at 63,049.<sup>4</sup>

---

<sup>4</sup> For the Court’s convenience, Article 41 of the Osage Project license

Additionally, in 1986, after the issuance of this license, Congress provided the Commission with specific statutory authority concerning the enforcement of license terms and conditions. Thus, FPA section 31 requires that the Commission “shall monitor and investigate compliance” with those licenses it issues, and “shall conduct such investigations as may be necessary and proper” to enforce their terms. 16 U.S.C. § 823b(a).

Generally, the Commission has “power and discretion” in enforcing the terms of FPA license conditions. *See Coalition for Fair and Equitable Regulation of Docks on the Lake of the Ozarks v. FERC*, 297 F.3d 771, 778 (8th Cir. 2002) (rejecting claims by lakefront property owners that FERC improperly exercised its FPA authority and erroneously interpreted Article 41 of the Osage Project license by authorizing Ameren to impose user fees on boat docks in the lake).

## **B. Other Federal Statutes**

While the Commission’s primary responsibility with respect to the administering of hydroelectric licenses is governed by the FPA, the Commission’s licensing decisions are additionally subject to the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.* (NEPA), which requires federal agencies to follow certain procedures designed to ensure that environmental effects of proposed actions are “adequately identified and evaluated.” *Robertson v. Methow Valley*

---

is reproduced in full in Addendum C to this brief.

*Citizens Council*, 490 U.S. 332, 350 (1989). As relevant here, NEPA requires “federal agencies . . . to prepare an environmental impact statement (“EIS”) for ‘every . . . major Federal action[] significantly affecting the quality of the human environment.’” *City of Dania Beach, Florida v. FAA*, 485 F.3d 1181, 1189 (D.C. Cir. 2007) (quoting 42 U.S.C. § 4332(2)(C)).

The Clean Water Act, 33 U.S.C. § 1341, is also applicable to FERC’s licensing authority. Sections 401(a) and (d) of the Act, 33 U.S.C. §§ 1341(a) and (d), require “an applicant for a FERC hydropower license to obtain a state water quality certification before FERC may approve a license,” and require FERC to make any terms and conditions of such certification terms and conditions of the license. *See U.S. Dep’t of Interior*, 952 F.2d at 548. Accordingly, this Court has determined that “FERC may not alter or reject conditions imposed by the states through section 401 certificates.” *Id.*; *see also Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 292-93 (D.C. Cir. 2003).

Finally, the Association raises a claim under section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f. This section requires “federal agencies to ‘take into account’ the effects of their ‘undertaking[s]’ on historic properties ‘included’ or ‘eligible for inclusion’ in the [National Register of Historic Places].” *CTIA – The Wireless Association v. FCC*, 466 F.3d 105, 106 (D.C. Cir. 2006) (quoting 16 U.S.C. § 470f).

## **II. Factual Background**

### **A. Earlier Project No. 459 Compliance Proceedings**

#### **1. The September 2004 Compliance Order**

Several Commission actions arising from Osage Project compliance proceedings involving Duncan's Point occurred prior to the contested orders, but are relevant to these appeals.

On September 7, 2004, Commission staff, acting on delegated authority, issued a letter order to Ameren concerning the construction of the seawall and wastewater effluent line that were subsequently at issue in the Association's complaint proceeding. R. 1, Ex. 15, JA 34 (September 2004 Compliance Order).

In the letter order, staff advised that these matters were primarily governed by the terms of Article 41 of Ameren's Osage Project license. That article, Commission staff explained, "which is also known as the standard land use article, delegates to the licensee authority to grant permission for certain use and occupancy of project property, including permits for construction of retaining walls, docks and similar structures" designed to protect existing shoreline. September 2004 Compliance Order at 1, JA 34. Under Article 41(b), the staff noted, Ameren's grant of such use and occupancy permits is subject to certain conditions:

Before granting permission for construction of bulkheads or retaining walls, the licensee shall: (1) inspect the site of the proposed

construction, (2) consider whether the planting of vegetation or the use of rip-rap<sup>5</sup> would be adequate to control erosion at the site, and (3) determine that that the proposed construction is needed and would not change the basic contour of the reservoir shoreline.

*Id.* 2, JA 35 (quoting Standard Article 41(b)).

Additionally, the staff indicated, Article 41 provides that “after notice to the Commission, the licensee may grant easements for effluent lines that discharge into project waters.” *Id.* 1, JA 34. However, Article 41 further requires that, before the issuance by the licensee of a permit granting such an easement, “the licensee is responsible . . . for ensuring that a permittee has all the needed Federal, state and local permits.” *Id.* 2-3, JA 35-36.

The September 2004 Compliance Order went on to find that Ameren “did not fully comply with the requirements of Article 41 or its own stated policy” in granting the permits to the Pebble Creek development for the construction of the retaining wall on project property and the discharge pipe crossing the project boundary. *Id.* at 3, JA 36.

With respect to the seawall, the staff found that Ameren had not complied with Article 41 by failing to “consider alternatives to a seawall such as plantings or rip-rap[,]” and not “consider[ing] that a seawall may not have been necessary at the site.” *Id.*

---

<sup>5</sup> Rip rap is the placement of rock and other material on the shoreline to help prevent erosion.

The staff further concluded that the seawall “may have impeded public access” to the Lake of the Ozarks, a violation of Article 18 of the Osage Project license, which “so far as is consistent with the proper operation of the project,” protects public utilization of waters and adjacent project lands “for navigation and for outdoor recreational purposes . . . .” *Id.* at 4, JA 37 quoting Osage License Article 18).<sup>6</sup>

Concerning the discharge pipe, Commission staff found that “[t]he licensee did not notify the Commission pursuant to article 41 prior to permitting” its construction. *Id.* at 3, JA 36. The staff concluded, however, that

the licensee properly authorized the discharge pipe with regard to the needed permits based on information provided by the developer. This information includes the fact that the State of Missouri issued a permit

---

<sup>6</sup> Article 18 of the Osage Project license provides:

So far as is consistent with the proper operation of the project, the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the purpose of full public utilization of such lands and waters for navigation and for outdoor recreational purposes, including fishing and hunting: *Provided.* That the Licensee may reserve from public access such portions of the project waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property.

Standardized Conditions for Inclusion in Preliminary Permits and Licenses Issued Under Part I of the Federal Power Act, 54 FPC 1792, 1975 FPC LEXIS 266\* at \*28-29 (1975), incorporated by reference, *Union Electric Co.*, 15 FERC ¶ 62,038 at 63,046.



for the construction and operation of the wastewater treatment facility. In addition, the developer obtained the necessary permits from the Federal, state, and local authorities.

*Id.* at 3-4, JA 36-37.

The Commission staff went on to find, pursuant to the National Historic Preservation Act, that “the construction of the seawall and discharge pipe has had no adverse effect” on Duncan’s Point. *Id.* at 4, JA 37.

As a result of these findings, the September 2004 Compliance Order directed Ameren to take a number of actions, including the filing of a plan to assure its future compliance with Article 41 of its license. September 2004 Compliance Order at 4, JA 37. The agency also required Ameren to file within 60 days a public access plan to mitigate the impact of the seawall. *Id.* at 5, JA 38.

The licensee was required to include in this plan the

development of a trail and shoreline access area toward the back of Lick Creek Cove, construction of a walkway at the seawall location to provide contiguous access along the shoreline, designation of an area at the crossroads of the Pebble Creek Development and the Duncan’s Point Development as a general public access area, and development of a park.

*Id.* Commission staff went on to make certain specifications about shoreline access, including installation of “a five-foot flat paved walkway, with handrail and steps or ramps at each end, adjacent to the existing seawall,” which must remain open to “general public use.” *Id.*

These measures, FERC staff concluded,

will adequately mitigate the impacts to public access from the construction of the seawall. The public will be able to walk along the shoreline of Lake of the Ozarks as it could prior to the seawall construction. The public will have two formalized access areas, one with parking, to provide additional access.

*Id.* at 6, JA 39.

The Association was given notice of the September 2004 Compliance Order, by a copy served on petitioner Nancy A. Brunson. *See id.* at 6, JA 39. However, the Association did not file a request for rehearing of this order.

## **2. The February 2005 Compliance Order**

On February 23, 2005, the Commission, by delegated authority, issued a further letter order to Ameren, reviewing the licensee's compliance up to that time with the September 2004 Compliance Order. R. 6 Appendix H, JA 123 (February 2005 Compliance Order).

The Commission staff approved Ameren's October 18, 2004, filing of its Article 41 compliance plan,<sup>7</sup> describing the permits issued pursuant to Article 41, as required by the September 2004 Compliance Order. February 2005 Compliance Order at 2, JA 124.

---

<sup>7</sup> Because the administrative record filed in this case is limited to proceedings in which the Association participated directly, certain items, such as Ameren's October 18, 2004, Compliance Plan, are not included in the record. However, such documents are publicly available in the Commission's public record access system.

Commission staff then reviewed Ameren’s public access plan (filed November 15, 2004), which proposed to install a walkway at the seawall location, and two areas giving public access to the shoreline: one trail and shoreline access area toward the back of Lick Creek Cove, to include a park named after Daniel R. Duncan; and a second general public access area located at the crossroads of the Pebble Creek development and Duncan Point development. *Id.* (To avoid confusion, in this brief we will refer to these public access areas as the park public access area and the crossroads public access area, respectively.)

The Commission staff concluded that the plan would “provide appropriate access for the general public at the lake and mitigate any impacts associated with the seawall.” *Id.* The staff further advised Ameren that it “should have these areas open to the public by the start of the 2005 recreation season.” *Id.*

The February 2005 Compliance Order additionally acknowledged that Ameren had filed a copy of the easement for the effluent pipe crossing the project boundary at the Pebble Creek development. *Id.*

The Association was given notice of the February 2005 Compliance Order, by a copy served on petitioner Nancy A. Brunson. *Id.* at 4, JA 126. However, the Association did not request rehearing of this order.

## **B. The Complaint Proceeding**

### **1. The Association’s Complaint**

Instead, on March 4, 2005, the Association filed with the Commission the complaint against Ameren which led to this appeal. R. 1, JA 6. In its complaint, the Association alleged that Pebble Creek had “purchased approximately 38 acres of land, and without notice to the residents commenced plans to build a gated community of 35 beachfront houses within the boundaries” of Duncan’s Point. R. 1 at 3, JA 8. The Association went on to allege that Pebble Creek was “allowed” or “encouraged” by Ameren “to violate federal, state and local laws and regulations, in addition to the Constitutional rights of residents.” *Id.*

In its request for relief, the Association asked, *inter alia*, that the Commission order Ameren “to immediately cease and desist in granting permission for the construction of structures on project boundaries,” and to remove the seawall and the effluent discharge pipe easement, as well as two boat docks, located on project land. R. 1 at 8, JA 13. The Association also requested the Commission to order Ameren to comply with its license provisions, including “federal requirements of the Clean Water Act, the National Environmental Policy Act, the Federal Power Act and the National Historic Preservation Act.” *Id.*

Ameren filed a response to the complaint, denying the Association’s allegations, and asserting that the complainants’ claims with respect to the seawall and discharge pipe on project land had already been resolved in the prior compliance proceedings. R. 6 at 1-2, JA 44-45. Pebble Creek also filed a

response to the complaint, denying the Association's allegations. *See* R. 7, JA 129.

## **2. The Complaint Order**

On May 9, 2005, the Commission issued its order denying the Association's complaint. At the outset, the Commission indicated that the September 2004 Compliance Order had resolved the seawall and discharge pipe issues, having determined that those facilities "had no adverse effect on the historic values of Duncan's Point Resort," and by requiring various mitigation measures. Complaint Order PP 5-6, JA 158-159 (citing R. 1, Exhibit 15, JA 34).

The Commission further observed that "most of the[] alleged violations" of federal, state and local laws described by the Association "are outside the Commission's jurisdiction, and those that are within our jurisdiction have already been adequately resolved by Commission staff." *Id.* P 10, JA 161.

The Commission went on to conclude that the Association had demonstrated no violation of the National Historic Preservation Act, 16 U.S.C. § 470f, NEPA or the Clean Water Act, arising from the licensee's authorization of the seawall or the discharge pipe. Complaint Order PP 12-18, JA 161-164; PP 30-37, JA 168-170.

## **3. The Complaint Rehearing Order**

The Association requested rehearing of the Commission's Complaint Order, which the agency denied on September 15, 2005. The Commission rejected many of the Association's arguments as untimely attacks on matters resolved by the

compliance orders of September 2004 and February 2005. Complaint Rehearing P 4, JA 262. The agency went on to deny the Association’s claim that Commission staff’s bias in favor of the licensee necessitated a trial-type evidentiary hearing. *Id.* P 6-9, JA 263-264.

The Complaint Rehearing Order also disposed of the Association’s various statutory claims. First, the Commission concluded that the authorization of the seawall or the discharge pipe did not constitute a “major federal action” under NEPA. *Id.* PP 12-13, JA 265-266.

Second, the Commission determined that, under the Clean Water Act, because the developer had obtained the necessary permits for its wastewater treatment facility, Ameren “was therefore authorized under its license to grant an easement for the effluent discharge pipe.” Complaint Rehearing Order P 15, JA 266. The Commission also found “nothing in the record to indicate that the licensee’s actions are in violation of section 404” of the Clean Water Act, requiring a permit for dredging or filling wetlands. *Id.* P 18, JA 268.

Finally, the agency denied the Association’s contention that the licensee’s authorization of the seawall and discharge pipe were in violation of the National Historic Preservation Act. *Id.* PP 20-23, JA 269-271.

### **C. Subsequent Project No. 459 Compliance Proceedings**

#### **1. The September 2005 Compliance Order**

On July 11, 2005, Ameren filed a letter addressing its compliance with the September 2004 Compliance Order on the issue of public access at Pebble Creek. On September 1, 2005, Commission staff, pursuant to delegated authority, issued a letter order addressing Ameren's filing. R. 305, JA 256 (September 2005 Compliance Order).

In this order, Commission staff concluded that while Ameren had fulfilled some of the requirements of the September 2004 Compliance Order, it had failed to adequately respond to the directive concerning the walkway providing access along the seawall. September 2005 Compliance Order at 2, JA 257. Based on a site visit, FERC staff determined that the walkway was improperly built with loose and uneven flagstones, was of insufficient width, and lacked steps or ramps. *Id.* Therefore, the staff ordered Ameren to "immediately revise the walkway to meet the specifications of your approved public access plan," including, but not limited to, "widening the walkway, ensuring it is properly maintained, and providing safe access from the adjoining properties, by either ramps or steps, at both ends of the walkway." *Id.* at 2-3, JA 257-258.

Commission staff acknowledged Ameren's completion of the both the park public access area and the crossroads public access area. *Id.* at 3, JA 258. However, the staff reminded Ameren of its obligation to provide safe public access to these areas. *Id.*

Finally, the staff required that by September 30, 2005, Ameren file with the Commission a report on the results of its consultation with the Army Corps of Engineers in order to “clearly identif[y] which areas of Pebble Creek Development, if any, the Corps has designated as wetlands.” *Id.*

## **2. January 2006 Rehearing Order**

On September 30, 2005, the Association filed a request for rehearing of the September 2005 Compliance Order. R. 22, JA 273. On January 19, 2006, the Commission issued its order denying rehearing of the Association’s petition. January 2006 Rehearing Order, JA 304.

At the outset, the Commission rejected the Association’s allegations of discrimination against Duncan’s Point residents and violations of their constitutional rights by FERC and its staff as “unsupported (and, in our view, wholly inappropriate).” *Id.* P 5, JA 306. Similarly, the agency found “no evidence of disparate treatment in this case” in its compliance with either NEPA or the Clean Water Act. *Id.* P 7, JA 307. The Commission also rejected the Association’s contention that the September 2004 Compliance Order had been issued in an improper manner. *Id.* P 8, JA 308.

The Commission then turned to the Association’s arguments concerning the specific findings of the September 2005 Compliance Order. The Commission



rejected the Association’s contention that staff had failed to ensure that the walkway would provide the requisite public access to the shoreline. *Id.* P 13, JA 310. In the Commission’s view, “[b]y finding that the walkway must be widened and properly maintained, Commission staff ensured that the walkway would provide the requisite public access to the shoreline.” *Id.* While agency staff did not require that the walkway be relocated to a minimum of fifteen feet from the seawall in all areas, FERC concluded that these deviations are reasonable, in view of the “purpose of the walkway . . . to ensure public access to the shoreline adjacent to the seawall.” *Id.* Furthermore, the Commission declared, “[r]outing the walkway closer to the seawall in some areas to preserve native trees does not interfere with that purpose.” *Id.* JA 311. The Commission also denied the Association’s complaint that there was no egress or ingress to the walkway from the road to the shoreline: “The shoreline is accessible from either end of the walkway, and we find nothing in the public access plan that would require a connection between the walkway and the road.” *Id.* P 13 n.19, JA 311.

The Commission next rejected the Association’s complaint concerning the adequacy of the park public access area. As the park was intended “to provide public access to the shoreline as partial mitigation for construction of the seawall, rather than to provide for a more elaborate public recreation facility,” the Commission concluded that it was “adequate to meet its intended purpose.” *Id.* P

20, JA 313.<sup>8</sup>

### 3. The March 2006 Compliance Order

On March 28, 2006, the Commission, by delegated authority, issued another letter order to Ameren on the issue of public access at Pebble Creek. March 2006 Compliance Order, JA 319.

In this letter order, Commission staff resolved two issues relevant to this appeal. First, staff acknowledged the January 3, 2006, update filed by Ameren concerning its consultation with the Association concerning a written history to be included in the Lake of the Ozark's shoreline management plan. *Id.* at 2, JA 320. The Commission concluded that this information met the requirements of the September 2004 Compliance Order. *Id.*

Second, FERC staff acknowledged a letter filed by Ameren on November 1, 2005, indicating that all wetlands in the Pebble Creek Development had been identified and would be identified as such on the Lake of the Ozarks Shoreline Management Plan. *Id.* Additionally, the staff noted, the letter indicated "that the parking lot and trail located at Lick Creek Cove did not impact any wetlands." *Id.* The Commission thus concluded that the licensee had fulfilled the requirements of

---

<sup>8</sup> The Commission postponed determining which areas of the Pebble Creek Development, if any, had been designated as wetlands by the Army Corps of Engineers, as it was in the process of reviewing the licensee's most recent filing on the matter. January 2006 Rehearing Order P 26, JA 315.

the September 2004 Compliance Order with respect to this issue.

#### **4. The July 2006 Rehearing Order**

The Association filed a request for rehearing of the March 2006 Compliance Order, R. 245, JA 323, which the Commission denied in its July 2006 Rehearing Order, JA 336. After describing the history of the Association's proceedings before the Commission concerning Ameren's compliance with the Osage Project license, the agency confined its review to "only those arguments that challenge the findings of staff's March 28, 2006 letter or could not have been raised earlier because they are based on new information." July 2006 Rehearing Order P 8, JA 339.

The Commission rejected the Association's contention that Ameren was not in compliance with its license or previous FERC orders because it not yet filed a revised shoreline plan including the history of Duncan's Point. *Id.* P 10, JA 339. Rather, the agency explained, "[i]ssues associated with the shoreline management plan are being evaluated in connection with [Ameren's] relicense application" for the Osage Project. *Id.* P 11, JA 340. The Commission indicated that it expected Ameren's eventual shoreline plan to include the history of Duncan's Point. "However," the agency concluded, "we agree with staff's assessment that, by including that history in its draft shoreline management plan, Ameren[] has complied with the requirement of staff's September 7, 2004 letter." *Id.* Similarly,

the Commission observed that the revised shoreline management plan would accurately include and designate wetlands. *Id.* P 17, JA 342.

With respect to the discharge pipe, the Commission understood the Association to be arguing that the easement could not have been properly permitted in 2004, because the Army Corps of Engineers did not determine until January 13, 2006, that the pipeline was authorized pursuant to a national permit. *Id.* P 13, JA 341. In the Commission's view, the authorization by its staff of the easement for the discharge pipe in the September 2004 Compliance Order was easily explained:

At the time staff made this finding, there was nothing in the record to indicate that a Corps permit was required. Subsequently, the developer filed an application for a Corps permit, and the Corps determined that the completed project is authorized by a nationwide permit. Throughout this proceeding, we have indicated that arguments concerning the Corps' administration of matters within its jurisdiction should be brought to that agency's attention. In light of these considerations, we do not regard the Corps' jurisdictional determination as providing a basis for a finding of noncompliance on the part of the licensee.

*Id.* P 14, JA 341.

Finally, the Commission rejected the Association's allegations about the safety and accessibility of the walkway as "unsupported" and "insufficient to warrant further consideration." *Id.* P 19, JA 343.

## **SUMMARY OF ARGUMENT**

The Commission acted properly under the Federal Power Act and other relevant statutes in enforcing the terms and conditions of the Osage Project license, and in evaluating the Association's allegations. To the extent that the Association raised claims beyond the Commission's jurisdiction, the agency appropriately declined to consider them.

The Commission reasonably exercised its discretion under the FPA in determining an appropriate remedy for the sea wall and the discharge pipe on project property. While the Commission found that neither the seawall nor the discharge pipe had an adverse effect on Duncan's Point, the agency nonetheless limited the seawall to 300 feet, required the licensee to build a walkway around the seawall, and ordered the licensee to establish two areas assuring public access to the lakefront. Also, the Commission ensured that the discharge pipe had received the necessary state permits.

The Commission reasonably concluded that the seawall and discharge pipe were not major federal actions requiring an Environmental Impact Statement under National Environmental Policy Act. The agency's decision in this regard is consistent with the relevant regulations of both FERC and the Council on Environmental Quality, as well as judicial precedent.

The agency properly rejected the Association's contention that the licensee

violated the Clean Water Act because the discharge pipe was allegedly being operated in violation of the developer's permits. Rather, the agency appropriately held, such issues were within the jurisdiction of the state permitting agency, rather than FERC.

The Commission also fully complied with the consultation requirements of the National Historic Preservation Act, requesting comments from appropriate federal and state authorities concerning the seawall and discharge pipe. The agency correctly rejected the Association's theory that the Act gave FERC jurisdiction over the developer.

The Commission afforded the Association ample due process in adjudicating its complaint against Ameren. The notice given to the Association concerning the proceedings was fully in accord with the Commission's regulations. In any event, the record demonstrates that the Association received actual notice of the proceedings, that it was an active participant in all phases of the proceedings, and that the Commission fully considered its claims.

Finally, the Commission reasonably invoked its discretion not to require a trial-type, evidentiary hearing on the Association's complaint, as its claims were primarily legal and could be resolved entirely on the pleadings.

## ARGUMENT

### I. STANDARD OF REVIEW

A court reviews FERC licensing decisions “to determine whether the factual findings underlying the decision were ‘supported by substantial evidence.’ 16 U.S.C. § 825l(b). [This Court] also review[s] Commission licensing decisions to determine whether they were ‘arbitrary and capricious.’ In both cases, the review is quite deferential.” *State of North Carolina v. FERC*, 112 F.3d 1175, 1189 (D.C. Cir. 1997) (citation omitted). *See also, e.g., East Kentucky Power Coop., Inc. v. FERC*, 489 F.3d 1299, 1306 (D.C. Cir. 2007), slip op. 2 (indicating the Court’s “particularly deferential standard of review for the Commission’s decisionmaking”).

Under the arbitrary and capricious standard, a “court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . The court is not empowered to substitute its judgment for that of the agency.” *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071, 1083 (D.C. Cir. 2002) (citations and internal quotation marks omitted). 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) (citation omitted).

## II. THE COMMISSION PROPERLY FULFILLED ITS STATUTORY OBLIGATION TO ENFORCE THE TERMS OF THE OSAGE PROJECT HYDROELECTRIC LICENSE.

At the outset, we observe that in the proceedings before the Commission, the Association alleged generally that Ameren had authorized the developer to build the Pebble Creek subdivision in violation of “federal, state and local laws and regulations” and the “Constitutional rights of residents” of Duncan’s Point. Complaint at 3, JA 8. For example, the Association alleged violations by Ameren of “Title VI of the Civil Rights Act.” *Id.* at 6, JA 11.

In the contested orders, the Commission rejected these claims by the Association as beyond the scope of its FPA authority. *See* Complaint Order P 41 & n. 44, JA 171 (citing *NAACP v. FPC*, 425 U.S. 662 (1976) (Commission has no authority under the FPA to remedy alleged civil rights violations unrelated to its jurisdiction)).

The Association continues to press certain of these claims in its brief on appeal. *See, e.g.*, Pet. Br. 10 (complaining of civil rights violation by the developer, “with the full knowledge of the licensee”).<sup>9</sup> However, the Commission

---

<sup>9</sup> To the extent that the Association has now, in its opening brief, declined to present some arguments that were raised below, or has merely referred to them in passing in its factual description, it has waived these contentions on appeal. *See, e.g., Environmental Defense v. EPA*, 467 F.3d 1329, 1339 n.5 (D.C. Cir. 2006) (“[i]ssues may not be raised for the first time in a reply brief”) (quoting *Rollins Envtl. Services, Inc. v. EPA*, 937 F.2d 649, 653 n.2 (D.C. Cir. 1991)). *See also*



correctly declined to consider matters beyond its jurisdiction. *See, e.g., Atlantic City Electric Co. v. FERC*, 295 F.3d 1, 8-9 (D.C. Cir. 2002) (reminding the agency that it has no jurisdictional authority beyond that expressly delegated by Congress). Alleged violations by developer Pebble Creek or licensee Ameren, outside of the context of the license itself, are properly pursued in other forums.

**A. The Commission Reasonably Exercised Its Remedial Authority Under The FPA In Resolving The Association’s Claims Against Ameren.**

As we explained in some detail above, the Commission carefully evaluated each of the Association’s claims that Ameren had failed to comply with the conditions of its license, ordered an appropriate remedy for those claims that had merit, and rejected those that did not. In so doing, the Commission properly exercised its responsibility under the FPA. *See Brady v. FERC*, 416 F.3d 1, 6 (D.C. Cir. 2005) (rejecting the claim of lakefront homeowner petitioners that FERC, in agreeing to the expansion of a commercial marina on project property, failed to adequately consider both environmental and developmental interests under the FPA; the “judicial role” in reviewing such matters is “‘narrowly circumscribed’”) (quoting *U.S. Dep’t of Interior*, 952 F.2d at 543).

---

*City of Nephi v. FERC*, 147 F.3d 929, 933 n.9 (D.C. Cir. 1998) (petitioner failed to properly raise argument by “merely informing” the Court of it “in its statement of facts in its opening brief”).

Before the Court, the Association nonetheless contends that the Commission violated its FPA responsibilities with respect to a number of issues. In this regard, the Association primarily asserts that the Commission countenanced violations of Articles 18 and Article 41 of the Osage Project license by allowing Ameren to authorize the developer's construction of the seawall. *See* Pet. Br. 4, 9, 11, 22. A related claim by the Association is that the Commission failed to require Ameren to ensure that the seawall did not interfere with public access to the shoreline. *See id.* 15, 19, 21.

As the Commission explained, Article 18 of the Osage Project “directs the licensee ‘to allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the licensee for the purpose of full public utilization of such lands and waters for navigation and for outdoor recreational purposes.’” Complaint Order P 19 & n.27, JA 164 (quoting Form L-3, incorporated by reference in the Osage Project license, 15 FERC at 63,046, Ordering Paragraph D).

The Commission did find that the “seawall may have adversely affected public access to the Lake, in violation of Article 18. . . .” *Id.* P 21, JA 165. However, to mitigate this adverse affect, Commission staff required that the proposed 2,332 footlong seawall be limited to 300 feet, that the licensee develop a public access plan, including “a paved walkway at the seawall location to provide

contiguous access to the shoreline,” and the development and maintenance of the two public access areas, including the park public access area, with a park to be named in honor of Daniel R. Duncan, founder of Duncan’s Point. *Id.*, P 22, JA 165.<sup>10</sup> Additionally, “[s]taff . . . required removal of all signage references to no fishing on Pebble Creek.” *Id.*, JA 166.

As this Court has explained, petitioner’s burden with respect to the Commission’s remedial decisions under the FPA is “onerous, for agency discretion . . . is at [its] zenith when the agency fashions remedies to effectuate the charge entrusted to it by Congress” under the statute. *Malta Irrigation District v. FERC*, 955 F.2d 59, 65 (D.C. Cir. 1992) (quoting *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 109 (D.C. Cir. 1984), and *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967)) (internal quotation marks omitted).

Here, the Association cannot meet this burden, as the Commission took reasonable steps to ameliorate what it viewed as a “minor violation[]” of Article 18. Complaint Order P 23, JA 166. While the Association would have preferred the more drastic remedy of removal of the seawall, it was well within the Commission’s remedial discretion instead to order corrective action assuring the public access contemplated by the terms of the license. *See Coalition for Fair and*

---

<sup>10</sup> The Commission order inadvertently identifies Daniel R. Duncan Park as being at the crossroads public access area.

*Equitable Regulation of Docks on the Lake of the Ozarks*, 297 F.3d at 778 (broad remedial discretion of Commission under FPA noted in court's upholding FERC interpretation of Article 41 of the Osage Project license) (citing *Niagara Mohawk Power Corp.*, 379 F.2d at 158-159).

Furthermore, the Commission found that Ameren had complied with its relevant orders concerning the walkway and the park public access area. Specifically, the agency concluded that both the walkway and steps providing public access around the seawall were in good repair and free of obstructions. July 2006 Rehearing Order at PP 18-19, JA 342-343. The Commission based these conclusions on the staff's memorandum of its January 9, 2006, site visit (R. 59, JA 292), and the May 1, 2006, report by the licensee (R. 252, JA 329), both of which included photographs. Thus, the agency's findings in this regard were supported by substantial evidence in the record.

Similarly, the Commission found that licensee had met the Commission's directive concerning the park public access area:

As discussed in staff's site inspection report, the land next to the Pebble Creek development for public access to the lake has a grass parking area and sign posted. The licensee also designated the Daniel R. Duncan Park public access area to provide public access to the back area of Lick Creek Cove. For the area comprising the park, the licensee constructed a gravel stone walkway and parking area sufficient to accommodate 3 to 4 vehicles. The foot trail is approximately 4 feet wide and 300 feet long, and ends at the lake shoreline. A sign designating this area as Daniel R. Duncan Park is posted in the parking area near the trail head advising of the public

lake access.

January 2006 Rehearing Order P 19, JA 313. This finding, too, is supported by the record evidence of the staff report of its site visit on July 27, 2005. *See* R. 304 at 2, JA 237.

As discussed above, the Commission did find that Ameren's authorization of the seawall was not in compliance with Article 41 of the Osage license because of its failure to adequately consider anti-erosion alternatives. *See* Complaint Order P 20, JA 165. However, the agency determined that Ameren's filing of a compliance plan to ensure that this failure is not repeated was a sufficient remedy under the circumstances. *See id.* P 22, JA 165-166. When taken in conjunction with the fact that the Commission's order limited the planned 2,332 foot wall to 300 feet, the agency's remedy on this matter was reasonable.

The Association also claims that the Commission failed to enforce the September 2004 Compliance Order and the Complaint Order, which the Association believes guaranteed "a survey so that we would know . . . where project boundaries were located." Pet. Br. 20; *see also id.* 14-15, 19, 30.

However, the Association misreads those orders. In the September 2004 Compliance Order, Ameren was ordered, within one year, to "obtain all property below the 664 [foot] contour line within the Pebble Creek Development and include it within the project boundary." September 2004 Compliance Order at 4,

JA 104. The Complaint Order simply acknowledged the issue, indicating that, because Ameren was in the process of complying with this directive, “the matter has already been adequately addressed, and no further remedy is required.” Complaint Order P 29, JA 167. (In its filing of July 11, 2005, Ameren had confirmed that its project boundary and ownership within the Pebble Creek Development was and had been all of the property located below the 664 foot contour line).

In its request for rehearing of the September 2005 Compliance Order, the Association complained that the Commission’s “assessment that Ameren’s project boundary and ownership within the Pebble Creek development” consisted of all of the property within the 664 foot contour line was “grossly in error.” R. 22 at 7, JA 279.

In the January 2006 Rehearing Order, the Commission responded to the Association’s claim. The Commission explained that the Association had misconstrued the relevant staff directive to Ameren that, in order to ensure that the project boundary remained at the 664-foot contour line, Ameren must obtain any such property that the developer might have acquired, place it within the project boundary, and notify the agency when it had done so. January 2006 Rehearing Order P 16, JA 311. As it turned out, the agency observed, the premise of its order to Ameren had been incorrect: “Because Ameren[] never conveyed any project

property to the Pebble Creek developer, the developer never acquired any ownership interest in any project lands.” *Id.*, JA 312. Thus, the Commission determined, Ameren “had no need to reacquire any project property.” *Id.* See *Friends of the Cowlitz v. FERC*, 253 F.3d 1161, 1170-73 (9th Cir. 2001) (Commission decision whether and how to enforce license subject only to abuse of discretion review).

In sum, contrary to the Association’s claim, the Commission never ordered a project boundary survey in these proceedings.<sup>11</sup>

**B. The Commission Reasonably Determined That The Licensee’s Actions Were Not Subject To NEPA.**

Before the Commission, the Association argued that FERC’s authority over Ameren’s construction of the seawall and grant of the easement for the discharge pipe triggered the agency’s responsibility under NEPA. More specifically, the Association contended that, because these actions by the licensee were subject to the Commission’s authority, they constituted “major federal action” under section 102(2)(C), 42 U.S.C. § 4332(2)(C), of the Act and its implementing regulations, 40 C.F.R. § 1508.18, and thus required the preparation of an Environmental Impact Statement (EIS).

In the Complaint Rehearing Order, the Commission acknowledged that,

---

<sup>11</sup> The Commission addressed the question of the appropriate project boundary for the Osage license in the context of Ameren’s relicensing proceeding. See *Union Electric Co.*, 118 FERC ¶ 62,247 PP 19-20, 91-96.

under its environmental regulations, “the actions of our nonfederal licensees can trigger the Commission’s environmental responsibilities.” Complaint Rehearing Order P 12 & n.12, JA 265 (citing 18 C.F.R. Part 380). However, the Commission further explained:

[S]ection 102(2)(C) of NEPA requires an EIS for “major Federal actions significantly affecting the quality of the human environment.” Under [Council on Environmental Quality] regulations, an agency must prepare either an EIS or an [Environmental Assessment] (followed by a finding of no significant impact or an EIS) for all major federal actions that have not been categorically excluded. Thus, a nonfederal action that is subject to the Commission’s responsibility or control must also be sufficiently major in scope to trigger the requirement to prepare either an [Environmental Assessment] or an EIS.

*Id.* (footnote omitted) (citing 40 C.F.R. § 1501.4).

Here, the Commission concluded, “[t]he actions in this case, authorization of a seawall and an effluent discharge pipe, are neither major nor significant.” *Id.* P 13, JA 265-266. Rather, the Commission explained, such actions are considered “sufficiently insignificant that the Commission permits its licensees, pursuant to its standard land-use article, to authorize them without prior Commission approval.”

*Id.* Such actions, the agency observed, are “categorically excluded under our regulations from the requirement to prepare an environmental review document.”

*Id.* & n.14 (citing 18 C.F.R. § 380.4(19)). *See Sugarloaf Citizens Association v. FERC*, 959 F.2d 508 (4th Cir. 1992) (upholding Commission determination that its



certification of an incinerator under the Public Utility Regulatory Policies Act was excluded from the regulations and thus not a major federal action for NEPA purposes).

Before this Court, the Association reiterates its contention that the Commission's authority over Ameren's approval of the seawall and the grant of the pipe easement "triggered FERC's environmental evaluation responsibilities under NEPA." Pet. Br. 27. However, the Association does not specifically address the Commission's conclusion that neither the seawall nor the effluent discharge pipe was major or significant for NEPA purposes.

In any event, the Commission's determination is legally sound. First, the Commission complied with its own relevant regulations. As the Commission observed, structures such as retaining walls and discharge pipes are excluded from the requirement of an EIS or an Environmental Assessment. Complaint Rehearing Order P 13 & n.14, JA 265-266 (citing 18 C.F.R. § 380.4(19)).

The Commission's regulations further categorically exclude compliance matters from the scope of NEPA. 18 C.F.R. § 380.4(a)(3). The regulations do go on to provide that even in a compliance matter, the agency and its staff "will independently evaluate environmental information supplied . . . in comments by the public," and determine whether an action is "major" and "significantly affect[s] the quality of the human environment." 18 C.F.R. § 380.4(b). This is exactly what

the Commission did in this case, finding that the seawall and discharge pipe did not qualify for such treatment.

The Commission's determination on this issue is also consistent with the Council on Environmental Quality regulations implementing NEPA, which indicate that an agency should consider both the "context and intensity" of an action to determine whether it is major and "significantly" affects the quality of the human environment. 40 C.F.R. § 1508.27. Here, the Commission reasonably followed this standard in concluding that the seawall and discharge pipe were not significant in the context of the Osage Project. (In contrast, the Commission's issuance of the license for the Osage Project itself was a major federal action subject to NEPA).

Finally, the Commission's decision is in harmony with relevant judicial precedent. This Court has made clear that, under section 102 of NEPA, "the EIS requirement is triggered only by a 'major Federal action[.]' Thus, where there is no such action, there is no EIS obligation." *Fund for Animals, Inc. v. Thomas*, 127 F.3d 80, 83 (D.C. Cir. 1997) (quoting 42 U.S.C. § 4332) (national bear baiting policy is not a major federal action triggering EIS obligations). *See Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269 (8th Cir. 1980) (issuance of a permit by Army Corps of Engineers allowing power line to cross river was not a major federal action triggering NEPA); *Save the Bay, Inc. v. United States Corps of*

*Engineers*, 610 F.2d 322, 326 (5th Cir. 1980) (issuance of permit by Army Corps of Engineers allowing natural gas pipeline to install effluent pipeline 2,200 feet in length in marshlands was not a major federal action triggering NEPA).

The decision of the Supreme Court in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), is also instructive. There, the Court held that once a major federal action requiring an EIS has been completed (in that case approval of a land use plan for federal land), allegations about damage to the land by off-road vehicles were not “significant new circumstances” requiring evaluation under NEPA. 542 U.S. at 73. Similarly, the issuance of the Osage Project license was a major federal action triggering NEPA, but the activity here during the license term was minor and did not rise to that level.

**C. The Commission And Its Licensee Complied With The Relevant Provisions Of The Clean Water Act.**

Before the Commission, the Association argued that Ameren’s approval of Pebble Creek’s effluent discharge pipe was in violation of section 402(a) of the Clean Water Act, 33 U.S.C. § 1342(a), because of the latter’s alleged failure to obtain a national pollutant discharge elimination system permit. *See* Complaint Rehearing Order P 14, JA 266. The Association further contended that Ameren’s approval of Pebble Creek’s placement of fill dirt in a wetland area and proposed placement of a park in a wetland area were violations of section 404 of the Act, 33 U.S.C. § 1344, because Pebble Creek had failed to obtain the necessary dredge and

fill permits. *Id.*

As the Commission observed, the Association conceded that the Act applied to Ameren and the developer with respect to these issues, rather than the Commission itself. *Id.* Nonetheless, the Association maintained that Ameren’s license “‘arguably imposes obligations on FERC to ensure that the licensee and Pebble Creek are in compliance’ with these [Clean Water Act] provisions.” *Id.* & n.15 (quoting Association’s Request for Rehearing at 10), JA 266.

The Commission rejected the Association’s Clean Water Act claims in its Complaint Rehearing Order. First, with respect to section 402(a), it determined that “the developer has obtained both a construction permit and an operating permit for its wastewater treatment facility.” *Id.* P 15, JA 266. Thus, the agency concluded, Ameren was “authorized under its license to grant an easement for the effluent discharge pipe.” *Id.*

The Commission went on to deny the Association’s contention that it should prevent Ameren from allowing the easement for the discharge pipe because the developer was allegedly allowing discharges that violated the permit:

Deciding this matter, either with or without an evidentiary hearing, would require the Commission to resolve issues concerning the developer’s application for a discharge permit, the state’s decisions authorizing construction and operation of the wastewater treatment facility, and the scope of activities authorized under the state-issued permit. These are issues involving the administration and enforcement of the [Clean Water Act] and are therefore outside the Commission’s jurisdiction under the FPA. . . . Any issues concerning

the validity of the permit or the discharges authorized therein can and must be raised either before the state permitting agency in the first instance, or on appeal of the state permit.

*Id.* P 16, JA 267 (footnote omitted).

Similarly, the Commission concluded that the Association’s Clean Water Act section 404 allegations concerning wetland permits were beyond the agency’s jurisdiction. Rather, the Army Corps of Engineers “is responsible for the administration and enforcement of the section 404 permit program, and any allegations of noncompliance with that program should be brought to that agency’s attention.” *Id.* P. 18, JA 268.

The Commission did indicate that “[a]t this juncture,” there was “nothing in the record to indicate that” that Ameren had violated section 404 of the Clean Water Act. *Id.* Nonetheless, the Commission did require Ameren to identify wetlands in the Pebble Creek development, and designate them as such in the shoreline management plan to be filed in the course of the project’s relicensing. *See* Complaint Rehearing Order P 18, JA 268.<sup>12</sup> The Commission subsequently found that Ameren had complied with those requirements. *See* January 2006 Rehearing Order PP 24-26, JA 315, July 2006 Rehearing Order P 17, JA 342.

---

<sup>12</sup> In the Order Issuing New License, the Commission permitted Ameren to develop the Shoreline Management Plan in post-licensing proceedings. 118 FERC ¶ 62,247 P 59-60.

On appeal, the Association simply restates, without more, the allegations concerning the Clean Water Act it made before the Commission. Pet. Br. 29-30.

The Court should sustain the Commission's decision. The Commission's direct Clean Water Act responsibility is limited to ensuring that a license is properly permitted, which was not at issue here.

With respect to the discharge pipe, once Ameren had confirmed that the developer had secured the necessary permits under the Clean Water Act, it had complied with the relevant license terms. As the Commission properly concluded, the Association's allegations about the developer's compliance with the permits were beyond its jurisdiction.

**D. The Commission Fully Complied With The National Historic Preservation Act.**

The Commission complied with the terms of section 106 of the National Historic Preservation Act in its review of Ameren's actions concerning the seawall and the effluent discharge pipe. Under that provision, an agency must "take into account the effect" of any "undertaking" on any district or site eligible for inclusion in the National Register of Historic Places, and give the federal Advisory Council on Historic Preservation "a reasonable opportunity to comment" with respect to such undertaking. 16 U.S.C. § 470f.

As the Commission explained, its staff determined that the seawall and effluent pipe "had no adverse effect on the historic values of Duncan's Point," and

requested comments from both the Advisory Council on Historic Preservation and the Missouri State Historic Preservation Officer. Complaint Rehearing Order P 20, JA 269. Neither the Advisory Council on Historic Preservation, after requesting further information, nor the Missouri State Historic Preservation Officer, filed a response. *Id.* Thus, the Commission determined:

The Advisory Council's regulations implementing section 106 provide that, if the Advisory Council does not respond within fifteen days, the Commission may assume that the Advisory Council concurs with its finding of no adverse effect. As a result, the Commission was not required to engage in consultation concerning the avoidance or mitigation of adverse effects.

*Id.* (footnotes omitted) (citing 36 C.F.R. § 800.5(c)(3)).

The Commission also rejected the Association's contention that it had not complied with section 110 of the National Historic Preservation Act, 16 U.S.C. § 470h-2, under which a federal licensing agency will not grant a license to an applicant which has attempted to avoid the requirements of section 106 of the Act, intentionally allowed a historic property to be subject to a significant adverse effect, or failed to prevent such an effect.

The Commission reasoned that "[s]ection 110 applies, by its express terms, to actions of an applicant prior to the agency's grant of a federal license." Complaint Rehearing Order P 21, JA 270. Thus, the agency concluded, "it cannot be applied retroactively to Ameren[]'s existing license." *Id.*

The Commission further stated that the possible application of section 110 to

Ameren's application for a new license was irrelevant to the complaint and compliance proceedings, which "concern[ed] the licensee's compliance with its existing license." *Id.* In any event, the Commission reiterated, its staff had found that "the licensee's authorization of the seawall and discharge pipe had no adverse effect on the historic values of Duncan's Point." *Id.*

Before the Court, the Association asserts that the Commission has "indirect jurisdiction" under the National Historic Preservation Act "over Pebble Creek's activities" because its licensee Ameren "authorized Pebble Creek's activities." Pet. Br. 29. Thus, the Association reasons, the Commission must consider the effect of Pebble Creek's activities under section 106 of the Act. For this proposition, the Association relies on *Fein v. Peltier*, 949 F. Supp. 374, 379 (D.V.I. 1996) (*Fein*). *Id.*

The Commission's orders acknowledge that Ameren's actions pursuant to its license -- authorizing the seawall and discharge pipe -- are subject to the National Historic Preservation Act. Complaint Rehearing Order P 20, JA 269. This finding is in accord with the Court's precedent under the Act. *See Sheridan Kalorama Historical Association v. Christopher*, 49 F.3d 750, 754 (D.C. Cir. 1995) (federal authority "to license a project can render the project an undertaking" for purposes of the Act). Indeed, this is exactly the type of "indirect jurisdiction" recognized by the district court in *Fein*. *See* 949 F. Supp. at 379 (National Park Service had



jurisdiction for purposes of the National Historic Preservation Act with respect to an undertaking on land it owned but to which it had assigned a property right to an individual).

However, no precedent supports the Association's view that "indirect jurisdiction" under the National Historic Preservation Act can be expanded so that a federal agency is authorized to interfere with a private party over which it has no authority. *See, e.g., Atlantic City Electric Co.*, 295 F.3d at 8. Here, as the Commission made clear, its "jurisdiction is limited to the licensee's authorization of the seawall and discharge pipe." Complaint Rehearing Order P 20 n.23, JA 264. The agency has "no authority, direct or indirect, over the remainder of the Pebble Creek development, which is outside the project boundary and does not require any authorization from either the Commission or the licensee." *Id.* As the Commission correctly recognized, the National Historic Preservation Act does not expand FERC jurisdiction to encompass the developer of Pebble Creek and its activities that are not covered by the terms of the license, merely because it has a relationship with FERC's licensee.

The Association also appears to raise two factual issues with respect to the Commission's findings under the National Historic Preservation Act. First, the Association maintains that the Commission failed to respond as required to an assertion by the Missouri State Historic Preservation Office in March 2003

concerning Duncan's Point. Pet. Br. 13.

The letter, dated March 28, 2003 (R. 299, JA 1), requested notification by FERC concerning whether the seawall was an undertaking pursuant to regulations implementing section 106 of the National Historic Preservation Act. This letter initiated a correspondence between the Commission and the state officer as well as the federal Advisory Council on Historic Preservation.<sup>13</sup> The correspondence culminated in the Commission's January 6, 2005, Letter from Commission Staff to Advisory Council and State Officer (January 2005 Letter), confirming FERC's finding that "the construction of the seawall and the authorization for the discharge pipe are not adverse effects on the [Duncan's Point Historic] District as defined by Section 106 of the [National Historic Preservation Act]." R. 6 at Appendix G, JA 121. Thus, the Association's contention is refuted by the record.<sup>14</sup>

Second, the Association maintains that the January 2005 letter was somehow "handled by FERC" in an "inaccurate and misleading way," which "may have caused the [Advisory Council on Historic Preservation] not to respond." Pet. Br. 18. However, the Association provides no basis for this assertion, and the text of

---

<sup>13</sup> See, e.g., July 1, 2004, Letter from Commission Staff to State Officer (R. 300, JA 2), and November 17, 2004, Letter from Commission Staff to Advisory Council (R. 6 Appendix F, JA 108).

<sup>14</sup> As the Commission explained, while its staff provided further information on January 6, 2005 (R. 6 Appendix G, JA 118), there was no further response from either the federal or state officials. See Complaint Rehearing P 20, JA 269.

the letter itself demonstrates that it was in no way inaccurate or misleading.<sup>15</sup>

**III. THE COMMISSION FULLY AFFORDED THE ASSOCIATION AND ITS MEMBERS THEIR DUE PROCESS RIGHTS IN ADJUDICATING ISSUES ARISING FROM THEIR DISPUTE WITH AMEREN.**

The Commission emphatically rejected the Association's contention that it had been denied due process by the agency or its staff during the course of the proceedings leading to this appeal. For example, in response to the allegation that the Commission staff had been biased against the Association and its members, and failed to give their claims proper attention, the agency explained:

The record shows that Complainants have had numerous opportunities to bring their concerns to the Commission's attention. Staff's letter orders reflect a careful review of the facts and include mitigation measures designed to address the effects of the 300-foot seawall on public access to the lake. The fact that staff was unable to resolve Complainants' concern does not suggest a rush to judgment or denial of due process.

Complaint Rehearing Order P 6, JA 263. *See also* January 2006 Rehearing Order PP 5-9, JA 306-309 (rejecting as unsupported Association contentions that agency personnel had deprived its members of any constitutional or procedural rights).

Before the Court, the Association's contention that it was deprived of due

---

<sup>15</sup> The Association also indicates that "a number of different versions of the same letter" appear in the administrative record. Pet. Br. 18. The only January 6, 2005, letter by Commission staff of which we are aware is designated in the record as R. 6 Appendix G, JA 118.

process in the proceedings before the Commission consists of two arguments.

First, the Association maintains that FERC failed to provide it due process by not providing notice of hearings, or the opportunity for consultation, during the course of the administrative proceedings. Pet. Br. 25-26. Specifically, the Association argues that Ameren permitted the construction of the seawall and the effluent pipe without public notice and comment, *id.* 3, 8, and that the Commission provided insufficient notice concerning the July 2004 visit by agency staff to the Osage Project site. *Id.* 26.<sup>16</sup>

However, as the Commission explained:

[P]articipation in post-licensing compliance proceedings is limited to filings that involve material changes to the project or license, adversely affect property rights in a manner not contemplated by the license, or concern matters in which an entity is specifically given a consultation role in the license.

January 2006 Rehearing Order P 8 n.13, JA 308 (citing Complaint Rehearing Order P 4 & n.5, JA 262). “Thus,” the agency concluded, “Complainants were not entitled to service of post-licensing compliance documents in this case.” *Id.* (citing *National Committee for the New River, Inc., v. FERC*, 433 F.3d 830, 833 (D.C. Cir. 2005) (*National Committee*), and *City of Tacoma, Washington*, 109 FERC ¶ 61,318 at PP 6-7 (2004)). As the agency indicated, its position on this issue was confirmed by the Court in *National Committee*.

---

<sup>16</sup> The Association incorrectly asserts that the site visit “constituted a hearing.” Pet. Br. 26.

In any event, as the administrative record abundantly demonstrates, the Association actively participated in all phases of the proceedings before the agency, and the Commission fully considered the Association's objections to the seawall and effluent pipe, vitiating petitioner's notice claims. *See* Complaint Rehearing Order P 3, JA 261 (Commission efforts included informal, and ultimately unsuccessful, alternative dispute resolution). *See also Moreau v. FERC*, 982 F.2d 556, 569 (D.C. Cir. 1993) (no due process violation because any lack of notice cured by participation in the agency proceeding).

Second, the Association argues that due process required a "full, fair and unbiased evidentiary hearing on the merits" before an Administrative Law Judge for the resolution of its complaint. Pet. Br. 2.

In denying the Association's request for a trial-type, evidentiary hearing, the Commission indicated that it had "considered the licensee's actions and staff's response to Complainants' allegations," and "reviewed staff's findings concerning the licensee's compliance with the terms of its license." Complaint Rehearing P 8, JA 263. Because "[t]hese facts are not in dispute[.]" the agency reasoned, "[n]o purpose would be served by conducting an evidentiary hearing on the possible motivation of the licensee or the developer in this case." *Id.*

The Court reviews the Commission's decision to resolve a matter without an evidentiary hearing on abuse of discretion standard. *E.g., Sacramento Municipal*

*Utility District v. FERC*, 474 F.3d 797, 804 (D.C. Cir. 2007) (citing *Moreau*, 982 F.2d at 568). Furthermore, “[e]ven where there are . . . disputed issues, FERC need not conduct . . . a hearing if they may be adequately resolved on the written record.” *Alabama Power Co. v. FERC*, 993 F.2d 1557, 1565 (D.C. Cir. 1993) (quoting *Moreau*, 982 F.2d at 568).

Here, the Commission reasonably determined that there was no need for an evidentiary hearing because the legal issues in dispute, concerning the enforcement of the license terms, could be decided on the written record. The agency further concluded that the Association’s allegations of bad faith on the part of FERC employees were without substance, while those relating to the developer were irrelevant. *See* Complaint Rehearing Order P 9-10, JA 263-264; January 2006 Rehearing Order P 5-7, JA 306-307. Under these circumstances, the Commission’s decision not to order an evidentiary hearing was a reasonable exercise of its discretion.

## CONCLUSION

For the reasons stated, the Commission's orders should be affirmed in all respects.

Respectfully submitted,

Cynthia A. Marlette  
General Counsel

Robert H. Solomon  
Solicitor

Samuel Soopper  
Attorney

Federal Energy Regulatory  
Commission  
Washington, DC 20426  
TEL: (202) 502-8134  
FAX: (202) 273-0901

July 10, 2007  
Final Brief: November 16, 2007