In the United States Court of Appeals for the First Circuit

No. 10-1470

L.S. STARRETT COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

THOMAS R. SHEETS
GENERAL COUNSEL

ROBERT H. SOLOMON
SOLICITOR

BETH G. PACELLA
SENIOR ATTORNEY

FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

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STATEMENT OF THE ISSUE

The issue presented for review is whether the Federal Energy Regulatory Commission ("FERC" or "Commission") reasonably determined that, if L.S. Starrett Company ("Starrett") proceeded with proposed changes to its hydroelectric power project, the Federal Power Act ("FPA") would require the Project to be licensed by the Commission.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory and regulatory provisions are contained in the Addendum to this Brief.

STATEMENT OF THE CASE

In this proceeding, the Commission investigated whether FPA § 23(b)(1), 16 U.S.C. § 817(1), would require the Crescent Street Dam Project ("Crescent Street Project" or "Project") to be licensed if Starrett proceeded with proposed changes to the Project. The Commission found that Starrett's proposed changes would require the Project's licensing because the Project would then meet FPA § 23(b)(1) criteria for mandatory FERC licensing. Specifically, the proposed changes would involve post-1935 "construction" within the meaning of the FPA as interpreted by the Commission. Moreover, the Project affects the interests of interstate commerce. *L.S. Starrett Co.*, 129 FERC ¶ 62,053 (2009) ("2009 Order"), Appendix[1] 49, *order on reh'g*, 130 FERC ¶ 61,112 (2010) ("Rehearing Order"), A. 163.

STATEMENT OF FACTS

I. STATUTORY BACKGROUND

The Federal Power Act, as originally enacted in 1920 and as substantially amended in 1935, contemplates two schemes for the federal licensing of

[1] References to the Appendix will be designated "A." "P" refers to the internal paragraph number in a FERC order.

hydroelectric projects. Under FPA section 4(e), 16 U.S.C. § 797(e), contemplating voluntary licensing, a license *may* issue for any project that develops power in any body of water over which Congress has Commerce Clause authority. Under FPA section 23(b)(1), 16 U.S.C. § 817(1), contemplating mandatory licensing, a license *must* issue for any project that develops power "in any of the navigable waters of the United States." *See also* FPA section 3(8), 16 U.S.C. § 796(8) (defining "navigable waters").

If a hydroelectric project -- like the Crescent Street Project at issue here -- is not located on navigable waters, it still might be subject to mandatory FERC licensing if certain statutory criteria are met. Under FPA section 23(b)(1), 16 U.S.C. § 817(1), a project must be licensed by the Commission if: (1) the operator intends to "construct a dam or other project works" in non-navigable waters; (2) construction commences after the 1935 amendment to the FPA; and (3) the project is located on Commerce Clause waters. *See also Knott v. FERC*, 386 F.3d 368, 370 (1st Cir. 2004) (distinguishing between voluntary and mandatory FERC licensing and enumerating statutory criteria; affirming the Commission's assertion of mandatory licensing jurisdiction, on navigability grounds, over a previously-unlicensed project).

The statute defines certain of the relevant licensing words, such as the various entities subject to FERC licensing, *see* 16 U.S.C. §§ 796(3)-(7) (defining

"corporation," "person," "licensee," "State," and "municipality"), "project", *id*. § 796 (11) (defined as consisting of a wide array of project structures, including a power house, dams, and all "appurtenant works and structures" that represent a "complete unit of improvement or development"), and "project works," *id*. § 796(12) (meaning the "physical structures of a project"). There is, however, no statutory definition of project "construction" as that word is used in FPA § 23(b).

II. EVENTS LEADING TO THE CHALLENGED ORDERS

A. The 1992 Order

In 1992, the Commission reviewed whether the Crescent Street Project, as then configured, needed to be licensed under FPA § 23(b)(1). *L.S. Starrett Co.*, 61 FERC ¶ 62,200 (1992), A. 119. The Project consisted of, among other things, a reservoir, a dam, and two powerhouses (one containing a 112 kilowatt ("kW") installed capacity generator, the second containing a 250 kW installed capacity generator). *Id.* at 63,380, A. 119.

As pertinent here, the Commission found that, "[a]lthough the project is interconnected to a grid, there [was] no evidence of post-1935 construction." *Id.* Consequently, the Commission determined that FPA § 23(b)(1) did not require the Crescent Street Project to be licensed. *Id.* The 1992 Order was "issued without prejudice to any future determination, upon new or additional evidence, that licensing is required." *Id.* at 63,381, A. 120; *see also Chippewa and Flambeau*

Improvement Co. v. FERC, 325 F.3d 353, 356-57 (D.C. Cir. 2003) (the Commission may reexamine previous non-jurisdictional determination in light of change in relevant facts or law); *Nantahala Power and Light Co. v. FPC*, 384 F.2d 200, 204-208 (4th Cir. 1967) (same).

B. Fish And Wildlife Service's 2009 Request For Investigation

In March 2009, the United States Fish and Wildlife Service requested that, based on new information, FERC investigate the Crescent Street Project's jurisdictional status. R. 1 at A. 5. Fish and Wildlife explained that Starrett had received funding to replace the Project's 112 kW turbine/generator with a 270 kW turbine/generator, which, among other things, would "significantly increase generating capacity at the project." *Id.* at A. 5. Fish and Wildlife was concerned that Starrett's proposed changes would negatively impact aquatic resources by increasing the likelihood of fish entrainment. *Id.* at A. 6.

Starrett's funding application, which Fish and Wildlife attached to its filing, confirmed that Starrett intended "to design and construct a rehabilitated small hydropower generation facility on the left side of the[] dam . . . ." *Id.* Att. B at A. 14. "The existing non-functional turbine on the left side will be replaced with a new Kaplan turbine and the [112 kW] generator will be replaced with a new higher capacity [270 kW] generator." *Id.* at A. 14; *see also id.* at A.17, 27. Additionally, Starrett explained, "[a]n extended and new plunge pool draft tube will be

constructed to permit the full utilization of the head difference between the powerhouse and the tailwater level in the tailrace channel, thereby increasing the gross head of the system."[2] *Id.* at A. 17.

The funding application further noted that the Project will generate approximately 1,812 megawatt hours of power each year, which will partially offset Starrett's existing power demands that otherwise are supplied by Suez Energy Resources NA and delivered by National Grid. *Id.* at A. 11, 12, 14, 27. "The average annual value of electricity costs avoided and potential sale of Renewable Energy Certificates is estimated at greater than $270,000 per year" during the first several years of the proposed project operations. *Id.* at A. 15, 27.

C. FERC's Request For Additional Information

On May 4, 2009, the Commission notified Starrett that increasing the generating capacity at the Project would constitute post-1935 construction and would require licensing under FPA § 23(b). R. 3 at A. 39. The Commission directed Starrett to provide additional information concerning the proposed construction and increased generation capacity. *Id.*

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[2] As Starrett notes in its Brief at 30 n.7, "gross head" is the difference between the water surface elevation immediately upstream of the dam (*i.e.*, the headwater) and the water surface elevation after the water travels downward through large pipes or tunnels (*i.e.*, the tailrace). "Net head" is the amount of gross head that a turbine can use effectively, *i.e.*, gross head less friction and hydraulic losses.

D. Starrett's Response

Starrett explained that it expected the Project's "construction activities" to include: (1) replacing the left powerhouse's pre-1935 112 kW capacity turbine/generator with a 198 kW capacity turbine/generator; (2) lowering the left powerhouse floor by more than five feet; (3) improving the plunge pool for installation of the draft tube and widening the outlet portal from the left powerhouse; and (4) excavation of about 10 cubic yards of bedrock from the river bottom. R. 4 at A. 42. Thus, while Starrett would retain the right-side powerhouse's 250 kW generator, it intended to replace the left-side powerhouse's 112 kW generator with a 198 kW generator. *Id.* at A. 43, 45. Starrett contended that, because the 250 kW right-side generator purportedly "has a maximum power output of 80 kW due to the physical limitations (head and flow) of the site," *id.* at A. 44, its proposal would not increase the Project's total capacity above pre-1935 levels. *Id.* at A. 41, 43, 45.[3]

[3] In the background of its brief, Starrett claims that it relied on information from a member of the Commission's staff in concluding that its Project would remain non-jurisdictional as long as the total amount of power to be produced was not increased above the level referenced in the 1992 Order. Br. at 9-10. As the Rehearing Order explained, however, an "opinion or advice from staff does not bind the Commission." Rehearing Order at A. 166 n.10 (citing 18 C.F.R. § 4.32(h) ("The opinions or advice of the staff will not bind the Commission or any person delegated authority to act on its behalf.")); *see also Malta Irrigation Dist. v. FERC*, 955 F.2d 59, 64 (D.C. Cir. 1992) ("FERC is not bound by the opinions or advice of staff"). In any event, because "[s]taff's advice to Starrett [was] not memorialized

Starrett's response also provided a "[s]ummary of the head and flow available to the Units," which stated that the proposal would increase the net head for the Project's left-side powerhouse from 8.5 feet to 15.1 feet. *Id.* at A. 44-45. Furthermore, the response confirmed that the proposal was "intended to supply power for on-site use to partially offset existing power demands of Starrett." *Id.* at A. 43.

III. THE CHALLENGED ORDERS

The Commission found that Starrett's proposal would require the Project's mandatory licensing under FPA § 23(b)(1). 2009 Order at A. 49 P 1, A. 51-52 PP 8-10; Rehearing Order at A. 163 P 1, A. 165 P 8, A. 166-70 PP 11-18. First, the Project is located on a body of water -- Millers River in Worcester County, Massachusetts -- over which Congress has Commerce Clause authority. 2009 Order at A. 52 P 10; Rehearing Order at A. 165 n.6. This point is not in dispute.

Furthermore, the proposal would involve post-1935 construction, as it would increase the Project's installed generating capacity. Rehearing Order at A. 165 P 8, A. 166-67 PP 11-12, A. 170 P 18; 2009 Order at A. 51-52 PP 8-10.

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in the written record of this proceeding," the Commission could not "evaluate whether Starrett's conclusion, that the actual capacity of one turbine could be combined with the installed capacity of the other turbine, represented a reasonable reliance on staff advice." Rehearing Order at A. 166 n.10.

Alternatively, the Commission found, there would be post-1935 construction because the proposal would provide nearly seven feet of additional head at the Project. Rehearing Order at A. 168 P 13.

Finally, the Commission determined that the Project affects the interests of interstate commerce. Rehearing Order at A. 168-70 PP 14-17; 2009 Order at A. 51-52 PP 9-10. Starrett's use of the power produced by the Project displaces power Starrett otherwise would receive from the interstate grid, and the Project is a member of a national class of small hydroelectric projects whose activities cumulatively have a substantial effect on interstate commerce. Rehearing Order at A. 169 P 17.

SUMMARY OF ARGUMENT

The Commission's determination that Starrett's proposed changes to the Crescent Street Project would require the Project's licensing under FPA § 23(b)(1) was reasonable and consistent with Court and Commission precedent.

It is uncontested that Starrett's proposal would increase the Project's installed capacity from its pre-1935 level. Under long-standing Commission and Court precedent, an increase in installed capacity constitutes FPA § 23(b)(1) post-1935 construction. The Commission reasonably determined, therefore, that Starrett's proposal to increase the Project's installed capacity would constitute post-1935 construction.

The Commission's alternative finding -- that there would be FPA § 23(b)(1) post-1935 construction because the proposal would increase the Project's head -- also was reasonable. Commission and Court precedent establish that increasing a project's head constitutes FPA § 23(b)(1) post-1935 construction, and Starrett's own filing stated that the proposed changes to the Project would increase its head. While Starrett contends there would be no post-1935 construction because only net head would increase, it cites no precedent limiting post-1935 construction to increases of only gross head.

Furthermore, consistent with Commission and Court precedent, the Commission also reasonably determined that the Project affects interstate commerce. As the Commission explained, the power generated at the Project displaces power Starrett otherwise would obtain from the interstate grid. Furthermore, this effect, when considered cumulatively with that of other small hydroelectric projects throughout the nation, is substantial.

ARGUMENT

I. STANDARD OF REVIEW

The Court "review[s] FERC orders under the Administrative Procedure Act, 5 U.S.C. § 551," and only "reverse[s] an agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Knott*, 386 F.3d at 372 (quoting *Wis. Valley Improvement Co. v. FERC*, 236 F.3d

738, 742 (D.C. Cir. 2001)). Moreover, the Court "defer[s] to the agency's expertise . . . so long as its decision is supported by 'substantial evidence' in the record and reached by 'reasoned decisionmaking,' including an examination of the relevant data and a reasoned explanation supported by a stated connection between the facts found and the choice made." *Id.* (quoting *Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937, 944 (1st Cir. 1993) (omission by Court)).

"Questions involving an interpretation of the FPA involve a de novo determination by the court of congressional intent; if that intent is ambiguous, FERC's conclusion will only be rejected if it is unreasonable." *Knott*, 386 F.3d at 372 (quoting *Northeast Utils.*, 993 F.2d at 944; citing *Chevron USA v. Natural Res. Def. Council*, 467 U.S. 837, 842-45 (1984)). While Starrett contends that the Commission's interpretation of FPA § 23(b), 16 U.S.C. § 817(1), is not entitled to *Chevron*-like deference because Congress purportedly "has directly spoken on the issue," Br. 19; *see also* Br. 21 (proposed change to Crescent Street Project "is not 'construction' under any definition of the word"), Congress has not spoken on the precise issue presented. The statute defines other terms, *see supra* pp. 3-4, but it neither defines post-1935 "construction" nor provides any other indication of clarity regarding that term. In this circumstance, the Commission's reasonable interpretation of FPA §23(b) criteria, consistent with longstanding Commission and Court precedent, is entitled to deference.

II. THE COMMISSION REASONABLY DETERMINED THAT STARETT'S PROPOSAL WOULD REQUIRE THE CRESCENT STREET PROJECT TO BE LICENSED UNDER FPA § 23(b)(1)

Having received information from Fish and Wildlife that Starrett intended to increase the installed capacity of, and otherwise modify, the Crescent Street Project, the Commission determined that it needed to investigate whether these changes would require the Project to be licensed under FPA § 23(b)(1). Request for Investigation at A. 5-37; FERC Request for Additional Information at A. 38-40. Starrett confirmed that it intended to conduct "construction activities" at the Project, including, among other things: (1) replacing the left powerhouse's pre-1935 112 kW capacity turbine/generator with a 198 kW capacity turbine/generator (while retaining the right powerhouse's 250 kW generator); and (2) lowering the left powerhouse floor by more than five feet, which would increase net head by nearly seven feet. R. 4 at A. 42-45.

Based on all the information in the record, the Commission reasonably concluded that Starrett's proposal would require the Project to be licensed under FPA § 23(b)(1), as the Project is located on Commerce Clause waters, the proposal would involve post-1935 construction, and the Project affects interstate commerce.[4] 2009 Order at A. 49 P 1, A. 51-52 PP 8-10; Rehearing Order at

[4] Starrett does not challenge the Commission's finding that the Project is located on Commerce Clause waters. *See* Rehearing Order at A. 165 n.6.

A. 163 P 1, A. 165 P 8 and n.6, A. 166-70 PP 11-18.

A. Increasing A Project's Installed Capacity Constitutes Post-1935 Construction

Starrett contends that "installed capacity is not the basis by which post-1935 construction is determined." Br. at 30 (capitalization in heading changed). Starrett is mistaken. 2009 Order at A. 51 P 8; Rehearing Order at A. 165-67 PP 9, 11, 12.

Under longstanding precedent, a "project's installed capacity is the relevant factor in the jurisdictional determination of post-1935 construction" under FPA § 23(b)(1). *Gilman Bros. Co.*, 67 FERC ¶ 61,151 at 61,436 and n.10 (1994), *cited in* Rehearing Order at A. 166 P 11; *see also, e.g.*, *Habersham Mills*, 56 FERC ¶ 61,077 at 61,262 (1991) (same), *aff'd on other grounds*, *Habersham Mills v. FERC*, 976 F.2d 1381 (11th Cir. 1992), *cited in* Rehearing Order at A. 166 P 11; *Thomas Hodgson & Sons, Inc.*, 67 FERC ¶ 61,202 at 61,632 (1994) (same), *rev'd on other grounds, Thomas Hodgson & Sons, Inc. v. FERC*, 49 F.3d 822 (1st Cir. 1995), *cited in* 2009 Order at A. 51 P 8 and n.3 and Rehearing Order at A. 166-67 and n.12; *Gilman*, 67 FERC at 61,436 ("The addition of generating capacity constitutes post-1935 construction for Section 23(b)(1) purposes.").[5]

[5] Although the challenged orders cite to and rely on these Commission orders in support of the Commission's post-1935 construction determination (2009 Order at A. 51 P 8 and n.3; Rehearing Order at A. 165 P 8 and n.9, A. 166 P 11 and n.11), Starrett's brief does not mention them.

Thus, the Commission based its 1992 determination that the Crescent Street Project did not need to be licensed on the installed capacity of the Project at that time. 1992 Order at A. 119; Rehearing Order at A. 167 P 12. Likewise, in *Gilman*, for example, the Commission found that replacing a pre-1935 142.5 kW installed capacity generator/turbine with a 250 kW installed capacity generator/turbine constituted post-1935 construction. *Gilman*, 67 FERC at 61,436 (citing *Puget Sound Power and Light Co. v. FPC*, 557 F.2d 1311, 1316 (9th Cir. 1977) (finding no post-1935 construction where, among other things, "the electrical generating capacity remain[ed] the same today as before 1935")); *see also, e.g., Cox*, 94 FERC ¶ 61,331 at 62,235 (2001) (increase in installed capacity from 350 kW to 360 kW constituted post-1935 construction); *Habersham Mills*, 56 FERC at 61,262 (replacement of a 250 kilovolt-amperes installed capacity generator with a 500 kilovolt-amperes installed capacity generator constituted post-1935 construction).

Starrett's claim that "replacement of the left-side generator/turbine will not increase the actual capacity of the project above the 362 kW total pre-1935 [installed] capacity," Br. at 31-32, is irrelevant to the post-1935 construction analysis. As just discussed, installed, not actual, capacity is the relevant factor in that analysis. Starrett simply disregards all Commission precedent on this point.

In any event, the Commission found that, "[e]ven if [it] were to consider the actual capacity of the generator on the right side of the dam, installing the new 198 kW generator would increase the project's capacity." 2009 Order at A. 51 n.5. "The project's capacity before installing the new generator would be 192 kW (80 kW plus 112 kW), and the capacity after installing the new generator would be 278 kW (80 kW plus 198 kW)." *Id.* As the Commission explained, "[j]urisdictional determinations must be made consistently; [the Commission] could not base [its] 1992 determination on the project's installed capacity and then use the project's actual capacity for assessing jurisdiction now." *Id.*; *see also* Rehearing Order at A. 167 P 12 (basing the post-1935 construction determination here on actual, rather than installed, capacity would conflict with the 1992 Order, which made the determination based on installed capacity); Br. at 31 (acknowledging that "[a]s noted in the 1992 Order, the installed capacity of Starrett's turbine generators was 362 kW.").

Starrett also challenges the Commission's use of a standard definition of installed capacity that does not take into account site-specific limiting factors such as stream flow, available hydrostatic head, or other operational constraints. Br. at 34-35. As the Commission explained, however, its regulations and precedent apply a standard definition of installed capacity because case-specific adjustments based on a project's physical conditions are neither necessary under the FPA nor

administratively feasible. Rehearing Order at A. 167 P 12 (citing 18 C.F.R. § 11.1(i), and, *e.g.*, *Nekoosa Packaging Corp.*, 73 FERC ¶ 61,291 at 61,811 (1995); *Charges and Fees for Hydroelectric Projects*, Order No. 576, FERC Stats. & Regs. ¶ 31,015 at 31,303-04 (1995); *Pub. Util. District No. 2 of Grant County, Wash.*, 62 FERC ¶ 61,229 at 62,557-58 (1993)).[6]

While Starrett claims that it is inconsistent "with the intent of the Federal Power Act" for the Commission not to consider operational constraints in determining installed capacity, Br. at 35, Starrett neither explains why it believes this is so nor cites to any provision of the FPA, its legislative history, or case law to support this claim. The Commission, by contrast, reasonably relied on its regulations and precedent, which permit consideration of physical alterations to a generator or turbine, but not site-specific operational constraints such as stream flow and available hydrostatic head, in determining installed capacity. Rehearing Order at A. 166-67 PP 11-12 (citing, *e.g.*, 18 C.F.R. § 11.1(i); *Nekoosa Packaging*, 73 FERC at 61,810-11; Order No. 576, FERC Stats. & Regs. ¶ 31,015 at 31,303-04; *Grant County*, 62 FERC at 62,557-58).

[6] Again, while the challenged orders cite to and rely on this Commission regulation and precedent (2009 Order at A. 51 P 8 and n.4; Rehearing Order at A. 167 PP 11-12 and nn.12-14), Starrett's brief does not mention them.

Starrett's challenge to the Commission's alternative rationale for not considering site-specific operational constraints in determining installed capacity -- administrative infeasibility -- fails as well. Br. at 34-35. In Starrett's view, considering site-specific adjustments would require nothing more than placing a power meter on the generator/turbine. Br. at 35. The Commission, however, was concerned that it would be administratively infeasible to conduct project-by-project evaluations of the myriad site-specific conditions that might arise. Rehearing Order at A. 167 P 12 (citing Commission cases). As the Commission has explained, "defining a project's installed capacity for FPA purposes becomes at some point an exercise in line-drawing." *Nekoosa Packaging*, 73 FERC at 61,811, cited in Rehearing Order at A. 167 nn.13-14. "FERC 'has wide discretion to determine where to draw administrative lines.'" *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1085 (D.C. Cir. 2002) (quoting *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000)). FERC appropriately exercised that discretion when it determined, long ago, where to draw the line in defining installed capacity.

Starrett also argues that replacing the left-side generator/turbine would simply maintain its preexisting hydropower project. Br. at 22-28. To the contrary, replacing the generator/turbine as proposed would change the Project's specifications by increasing its installed capacity.

Thus, under this and other Courts' precedent, replacing the left-side generator as proposed here would constitute post-1935 construction under FPA § 23(b)(1). *Hodgson*, 49 F.3d at 826-27, 828 (work that only maintains or restores a project to its former specifications generally not considered post-1935 construction), *cited in* 2009 Order at A. 51 P 8 and n.3 and in Rehearing Order at A. 166-67 and n.12; *Aquenergy Systems, Inc. v. FERC*, 857 F.2d 227, 229-30 (4th Cir. 1988) (restoring a project to its pre-1935 specifications, including replacing a turbine with one that has the "same designed capacity as the old one" constitutes "ordinary maintenance, repair and reconstruction activity" rather than "construction" under FPA § 23(b)(1)); *Puget Sound*, 557 F.2d at 1313, 1316 (no FPA § 23(b)(1) "construction" where work "merely restored the Electron project to its original specifications and configuration," and "the electrical generating capacity remain[ed] the same . . . as before 1935."), *cited in Hodgson*, 49 F.3d at 826-27, 828, and *in* Rehearing Order at A. 165 P 8 and n.8, A. 166 P 11 and n.11.

Starrett further argues that replacing the left-side generator/turbine does not constitute construction under FPA § 23(b)(1) because a generator/turbine purportedly is not a "project" or "project works" under the FPA. Br. at 22-24 (citing the definitions of "project" and "project works" in FPA §§ 3(11) and (12), 16 U.S.C. §§ 796(11) and (12)). Starrett did not raise this argument to the Commission on rehearing and, therefore, has forfeited it on appeal. *See*

Londonderry Neighborhood Coalition v. FERC, 273 F.3d 416, 424 n.6 (1st Cir. 2001); *see also* FPA § 313(b), 16 U.S.C. § 825*l*(b) ("[n]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so.").[7]

In any event, Starrett's argument has no merit. FPA § 3(12) broadly defines "project works" as "the physical structures of a project." *See Hodgson*, 49 F.3d at 826 n.7 (noting FPA definition of "project works"). The Commission has long interpreted "project works" to include generators and turbines. *See, e.g.*, *Pub. Util. Dist. No. 1 of Chelan County*, 107 FERC ¶ 61,280 at P 85 (2004) (describing generator/turbine as "project works"); *Pacific Gas and Elec. Co.*, 106 FERC ¶ 61,065 at 61,226 n.192 (2004) (same); *Va. Elec. and Power Co.*, 72 FERC ¶ 61,075 at 61,399 n.41 (1995) (same); *Independence County, Ark.*, 49 FERC ¶ 61,057 at 61,228 n. 4 (1989) (same). Indeed, the Commission's longstanding interpretation is entirely consistent with the statutory definition of "project" in FPA section 3(11), which specifically encompasses (among other physical structures)

[7] *Londonderry* involved an identical provision of the Natural Gas Act, 15 U.S.C. § 717r(b). As this Court has recognized, "[i]t is 'established practice' to cite decisions interpreting cognate provisions of the two statutes interchangeably." *Londonderry*, 273 F.3d at 423 n.4 (citing *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981)).

the "power house" and broadly encompasses the "complete unit of improvement or development." If there is any ambiguity here, the Commission's reasonable interpretation of the statutory term "project works" as including a generator/turbine deserves *Chevron*-like deference and should be upheld. *See Knott*, 386 F.3d at 372; *Northeast Utils.*, 993 F.2d at 944.

Starrett's brief poses several hypotheticals under which it would not only replace the left-side 112 kW generator/turbine unit with a 198 kW unit, but also would change the right-side generator/turbine unit so that the Project's total installed capacity would not increase. Br. at 32-34. These hypotheticals simply show that Starrett could configure its generators/turbines in various ways and not fall within FPA § 23(b)(1) jurisdiction based on increased installed capacity. The Commission understandably made its determination here on the facts before it.

To the extent that Starrett attempts, through its hypotheticals, to challenge the Commission's historical reliance on installed rather than actual generating capacity, it challenges a long-standing policy choice at the core of the Commission's regulatory mission that deserves substantial deference. *See Sacramento Municipal Util. Dist. v. FERC*, No. 07-1208, 2010 U.S. App. LEXIS 15179, at *19, *30, *34, *59 (D.C. Cir. July 23, 2010) (exercise of judgment involving regulatory policy at the core of FERC's mission is entitled to substantial deference); *Alcoa Inc. v. FERC*, 564 F.3d 1342, 1347 (D.C. Cir. 2009) (judicial

deference to agency "policy judgments that lie at the core of the regulatory mission").

B. Increasing A Project's Head Constitutes Post-1935 Construction

As an alternative, independent finding, the Commission also reasonably, and consistent with longstanding precedent, determined that Starrett's proposal would constitute post-1935 construction because, as Starrett's June 5, 2009 filing (A. 42, 44, 45) established, the proposal would increase the project's head.[8] 2009 Order at A. 51 P 8; Rehearing Order at A. 168 P 13, A. 170 P 18; *see also*, *e.g.*, *Aquenergy*, 857 F.2d at 229-30 (restoring a project to its pre-1935 specifications, including head, constitutes "ordinary maintenance, repair and reconstruction activity" rather than "construction" under FPA § 23(b)(1)); *PacifiCorp Electric Operations*, 73 FERC ¶ 61,365 at 62,142 (1995) (increasing a project's head constitutes FPA § 23(b)(1) post-1935 construction), *order on reh'g*, 74 FERC ¶ 61,262 at 61,871-72

[8] The Court need not address this alternative rationale for the post-1935 construction finding because the Commission's primary rationale for that finding -- increased installed capacity -- should be affirmed as reasonable and consistent with Court and Commission precedent. In *Knott*, 386 F.3d at 372, the Court affirmed the Commission's exercise of mandatory licensing authority under FPA § 23(b) based on its finding of navigability; the Court had no reason to "reach the [other] issues" presented. *See also Southern Co. Servs., Inc. v. FERC*, 353 F.3d 29, 35 (D.C. Cir. 2003) (if the Court affirms the Commission's primary rationale for a decision, there is no need to review the Commission's alternative rationale for that decision); *El Paso Natural Gas Co. v. FERC*, 96 F.3d 1460, 1465 (D.C. Cir. 1996) (same).

(1996) (same); *Central Vt. Pub. Serv. Corp.*, 70 FERC ¶ 61,150 at 61,147 and n.13 (1995) (same); *Habersham Mills*, 56 FERC at 61,262 and n.4 (same), *cited in* Rehearing Order at A. 166 P 11; *Central Vt. Pub. Serv. Corp.*, 54 FERC ¶ 61,132 at 61,434 (1991) (same).

Without citing any authority, Starrett contends that the proposal would increase only the Project's net, but not gross, head and, therefore, that there is no post-1935 construction. Br. at 30 n. 7. This contention has no basis. None of the precedent limits post-1935 construction to increases of gross, but not net, head.

In any event, the Commission reasonably found insufficient Starrett's bald assertion on rehearing that gross (or total) head would not change. Rehearing Request at A. 59 n.2. "[W]ithout more specific information," the Commission found that it "ha[d] no basis for accepting Starrett's statement that total head will remain unchanged." Rehearing Order at A. 168 P 13; *see also* Starrett's Funding Application at A. 17 (explaining that the proposal would "increas[e] the gross head of the system.").

On appeal, Starrett attempts, for the first time, to buttress its contention that gross head would not change by arguing that "[t]he only ways to physically change the gross head at the site are to either raise the tip of the spillway (which would raise the normal headwater elevation) or to lower the downstream river bottom," and that "[i]n this case, neither is being done." Br. at 30 n.7. "Since [Starrett]

never made this argument before the Commission, it has forfeited that claim on appeal." *Londonderry*, 273 F.3d at 424 n.6; *see also* FPA § 313(b), 16 U.S.C. § 825*l*(b). The Commission cannot be faulted for not considering or responding to information and argument never presented to it. *See Olsen v. U.S.*, 414 F.3d 144, 155 (1st Cir. 2005) ("The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.") (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)).

C. The Commission Did Not Base Its Jurisdictional Determination On The Other Proposed Renovations To The Project Standing Alone

Starrett asserts that it is unsure whether the Commission found that the other proposed Project renovations (improving the plunge pool for installation of the draft tube and widening the outlet portal from the left powerhouse, excavating bedrock from the river bottom, and lowering the powerhouse's floor), standing alone, would constitute post-1935 construction. Br. at 20-21 and n.6, 28-29.

The challenged orders, however, establish that the Commission did not base its post-1935 construction finding on the other Project renovations standing alone. Rehearing Order at A. 168 n.16 (explaining that the Commission would have to determine whether the other renovations, standing alone, would be considered post-1935 construction only if it had not already otherwise determined there was post-1935 construction); *id.* at A. 170 P 18 (noting that "licensing of the project is

required if Starrett engages in post-1935 construction by replacing the left powerhouse turbine as proposed, or increasing hydrostatic head, *or possibly*, altering the existing powerhouse and outlet portal.") (emphasis added). The Commission definitively found FPA § 23(b)(1) post-1935 construction only on the two alternative bases discussed above -- increased installed capacity or increased head -- not on the other proposed Project renovations standing alone.

D. The Project Affects Interstate Commerce

Both Commission and Court precedent have long held that there is an effect on interstate commerce when a company supplies a portion of its energy needs with power generated from its own hydroelectric project and, thereby, displaces electricity that the company otherwise would obtain from the interstate electric grid. *See, e.g.*, *Habersham Mills*, 976 F.2d at 1384 (citing *Wickard v. Filburn*, 317 U.S. 111, 127-29 (1942) (holding that wheat grown for home consumption affected interstate commerce by reducing overall market demand for wheat), *cited in* Rehearing Order at A. 168-69 PP 14-17; *Habersham Mills*, 57 FERC ¶ 61,351 at 62,149 (1991) ("Project generation affects the size of Habersham Mills' demand for electricity from Georgia Power, and thereby the supply of electricity to the entire grid"), *cited in* Rehearing Order at A. 169 P 15 and n.21; *Fairfax County Water Auth.*, 43 FERC ¶ 61,062 at 61,166-67 (1988) ("To the extent the projects do or do not generate, they affect the functioning of the interstate energy [system]

and thus interstate commerce, because they increase or decrease the amount of power that other resources must produce to keep the system balanced;" "An interconnected project that generates to supply its own power needs, thereby displacing power that would otherwise be purchased from the interstate system, affects the operation of the system as does the project that generates to directly sell energy, because both affect the supply of and the demand for energy.").

Consistent with this precedent, the Commission reasonably found that the Crescent Street Project affects interstate commerce by displacing power Starrett otherwise would receive from the interstate grid. Rehearing Order at A. 169 P 17; 2009 Order at A. 51 P 9; *see also* Starrett's Funding Application at A. 11, 12, 14, 27 (stating that Project generation will partially offset Starrett's existing power demands that otherwise are supplied by the interstate grid); Starrett's Response to the Commission's Request for Information at A. 43 (same).

The Commission also reasonably determined that the Project's effect on interstate commerce is substantial. Rehearing Order at A. 169 P 17. In accordance with Court and Commission precedent, the Commission based this determination on the cumulative effect of small hydroelectric projects throughout the nation. *See*, *e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (finding that there is federal authority over a purely local activity which, when viewed in the aggregate, substantially affects interstate commerce) (citing, *e.g.*, *United States v. Lopez*, 514

U.S. 549, 561 (1995) (same), and *Wickard*, 317 U.S. at 127-28 ("That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.")); *Habersham Mills*, 976 F.2d at 1385 (affirming the Commission's finding that a small hydroelectric project's effect on interstate commerce was substantial when considered cumulatively with the effects of the other small hydroelectric projects on interstate commerce); *Keck*, 51 FERC ¶ 61,018 at 61,033 (1990) ("a small hydroelectric facility, as part of a national class of small projects, affects interstate commerce in a substantial way"); *Fairfax County*, 43 FERC at 61,166-67 (finding that "as a class, small hydroelectric projects connected to an interstate power system have a substantial effect on interstate commerce."); *Clifton Power Corp.*, 39 FERC ¶ 61,117 at 61,454-55 (1987) (same), *aff'd on other grounds sub nom. Cooley v. FERC*, 843 F.2d 1464 (D.C. Cir. 1988).

Starrett claims that, "[u]nlike the record in *Habersham Mills*, here the Commission lacks substantial record evidence to show that there is any cumulative, substantial effect of projects like Starrett's on interstate commerce." Br. at 40. In fact, however, in both *Habersham Mills* and the instant case the Commission incorporated, and based its substantial effects determinations on, data on hydroelectric facilities throughout the United States.

The Commission's substantial effect finding in *Habersham Mills* cited to and relied on *Clifton Power*, which, based on data contained in 1981 and 1984 Commission reports on hydroelectric facilities throughout the United States, found that small hydroelectric facilities, as a class, substantially affect interstate commerce. *Habersham Mills*, 55 FERC ¶ 61,158 at 61,514-15 (1991); *Clifton Power*, 39 FERC at 61,454-55. Then, in affirming the Commission's orders in *Habersham Mills*, the court noted that a 1988 Commission report again confirmed that "small projects collectively account for a substantial portion of the nation's hydroelectric generating capacity." *Habersham Mills*, 976 F.2d at 1385.

The Commission's substantial effect on interstate commerce finding in the instant case cited to and relied on both *Habersham Mills*, 55 FERC ¶ 61,158, and the court's affirmance of that order in *Habersham Mills*, 976 F.2d at 1385. Rehearing Order at A. 169 PP 15 and 16. Thus, the Commission based its finding not only on the data and findings in *Clifton Power*, 39 FERC at 61,454-55, and incorporated into *Habersham Mills*, 55 FERC ¶ 61,158, but also on the additional data addressed by the court in *Habersham Mills*, 976 F.2d at 1385. *See also Stowell v. Sec'y of Health and Human Servs.*, 3 F.3d 539, 544 (1st Cir. 1993) (noting that an agency appropriately may rely on its specialized experience and expertise garnered in administering its programs); *Aluminum Co. of America v. BPA*, 175 F.3d 1156, 1161 (9th Cir. 1999) (agency need not reinvent the wheel and

conduct a new independent analysis "when nothing more is offered than evidence and arguments already considered" by the agency).

Starrett next attempts to liken the instant case to *City of Centralia, Wash. v. FERC*, 661 F.2d 787, 792-93 (9th Cir. 1981). Br. at 40. As the *Centralia* court explained, however, the Commission based its substantial effect finding in that case solely on the impact of the individual small hydroelectric project at issue. *Centralia*, 661 F.2d at 792-93. Here, by contrast, the Commission based its finding on the Project's membership in a national class of small hydroelectric projects that collectively have a substantial effect on interstate commerce. Rehearing Order at A. 169 P 17.

Finally, Starrett complains that "[a]ny reliance by the Commission on a 'cumulative effect' theory leaves the Commission's commerce clause jurisdiction without boundary" because, purportedly, "[e]very hydropower project is connected to the interstate power grid." Br. at 40. All hydroelectric projects, however, are not connected to the interstate power grid. *See, e.g.*, *Independence Power, LLC*, 125 FERC ¶ 62,124 at PP 2, 4 and n.1 (2008) (noting that the project "will not be connected to an interstate grid" and, in fact, that "there is no interstate or foreign transmission of electricity in Alaska."); *Golden Lotus, Inc.*, 114 FERC ¶ 62,083 at P 4 (finding licensing under FPA § 23(b)(1) not required because the project,

located in Ostego County, Michigan, is not connected to an interstate grid), *reh'g denied*, 115 FERC ¶ 61,360 (2006).

Moreover, Starrett's complaint is "grounded more on policy than on law." *Habersham Mills*, 976 F.2d at 1385. To the extent Starrett is arguing that Congress was too expansive in developing a role for federal hydroelectric licensing, or that the Commission is too expansive in defining its own role in the process, this argument is based on a "theoretical extreme" that is beyond "the facts before [the court] and the statute. . . ." *Id.*; *see also supra* at pp. 20-21 (not the court's role to second-guess the agency's policy judgments). Starrett's complaint also ignores that, even if a project substantially affects interstate commerce, it will fall under FERC jurisdiction only if it also meets both of the other FPA § 23(b)(1) criteria, *i.e.*, it is located on a Commerce Clause body of water and has had post-1935 construction.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

Thomas R. Sheets
General Counsel

Robert H. Solomon
Solicitor

/s/ Beth G. Pacella
Beth G. Pacella
Senior Attorney

Federal Energy Regulatory
Commission
888 First Street, N.E.
Washington, D.C. 20426
Phone: 202-502-6048
Fax: 202-273-0901
E-mail: beth.pacella@ferc.gov

September 8, 2010

L.S. Starrett Company v. FERC **Docket No. UL09-1**
1st Cir. No. 10-1470

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,639 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii);

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14 point Times New Roman.

/s/ Beth G. Pacella
Beth G. Pacella
Senior Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
TEL: (202) 502-6048
FAX: (202) 273-0901

September 8, 2010

ADDENDUM

STATUTES
AND
REGULATIONS

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Federal Power Act, Section 3(1)-(12), 16 U.S.C. § 796(1)-(12), provides as follows:

(1) "public lands" means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include "reservations", as hereinafter defined;

(2) "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;

(3) "corporation" means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined;

(4) "person" means an individual or a corporation;

(5) "licensee" means any person, State, or municipality licensed under the provisions of section 797 of this title, and any assignee or successor in interest thereof;

(6) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States;

(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

(8) "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids,

together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority;

(9) “municipal purposes” means and includes all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality;

(10) “Government dam” means a dam or other work constructed or owned by the United States for Government purposes with or without contribution from others;

(11) “project” means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

(12) “project works” means the physical structures of a project;

Federal Power Act, Section 4(e), 16 U.S.C. § 797(e), provides as follows:

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: Provided, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: [1] The license applicant and any party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such conditions. All disputed issues of material fact raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection and within the time frame established by the Commission for each license proceeding. Within 90 days of August 8, 2005, the Secretaries of the Interior, Commerce, and Agriculture shall establish jointly, by rule, the procedures for such expedited trial-type hearing, including the opportunity to undertake discovery and cross-examine witnesses, in consultation with the Federal Energy Regulatory Commission.[2] Provided further, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: Provided further, That in case the Commission shall find that any Government dam may be advantageously used by the United

States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: And provided further, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

Federal Power Act, Section 23(b)(1), 16 U.S.C. § 817(1), provides as follows:

(1) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works, across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

Federal Power Act, Section 313(b), 16 U.S.C. § 825*l*(b), provides as follows:

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

18 C.F.R. § 4.32(h), provides as follows:

(h) A prospective applicant, prior to submitting its application for filing, may seek advice from the Commission staff regarding the sufficiency of the application. For this purpose, five copies of the draft application should be submitted to the Director of the Division of Hydropower Licensing. An applicant or prospective applicant may confer with the Commission staff at any time regarding deficiencies or other matters related to its application. All conferences are subject to the requirements of Sec. 385.2201 of this chapter governing ex parte communications. The opinions or advice of the staff will not bind the Commission or any person delegated authority to act on its behalf.

18 C.F.R. § 11.1(i), provides as follows:

(i) Definition. As used in paragraphs (c) and (d) of this section, authorized installed capacity means the lesser of the ratings of the generator or turbine units. The rating of a generator is the product of the continuous-load capacity rating of the generator in kilovolt-amperes (kVA) and the system power factor in kW/kVA. If the licensee or exemptee does not know its power factor, a factor of 1.0 kW/kVA will be used. The rating of a turbine is the product of the turbine's capacity in horsepower (hp) at best gate (maximum efficiency point) opening under the manufacturer's rated head times a conversion factor of 0.75 kW/hp. If the generator or turbine installed has a rating different from that authorized in the license or exemption, or the installed generator is rewound or otherwise modified to change its rating, or the turbine is modified to change its rating, the licensee or exemptee must apply to the Commission to amend its authorized installed capacity to reflect the change.

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CERTIFICATE OF SERVICE

I, Beth G. Pacella, hereby certify that on September 8, 2010, I served copies of the foregoing brief on the following parties electronically by the Notice of Docket Activity.

David K. McCay
dmccay@mirickoconnell.com
Joseph M. Hamilton
jhamilton@mirickoconnell.com
Mirick O'Connell DeMallie & Lougee LLP
100 Front Street
Worchester, MA 01608-1477

/s/ Beth G. Pacella
Beth G. Pacella
Senior Attorney

Federal Energy Regulatory Commission
Washington, DC 20426
Tel: (202) 502-6048
Fax: (202) 273-0901
Email: beth.pacella@ferc.gov