IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 00-1909, 01-2025, and 03-2055

JAMES M. KNOTT, SR., AND
RIVERDALE POWER & ELECTRIC CO., INC.
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7), I hereby certify that this brief contains 8,182 words, not including the tables of contents and authorities, this certificate of counsel, and the addendum.

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IN THE UNITED STATES COURT OF APPEALS
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JAMES M. KNOTT, SR., AND
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ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

1. Whether Respondent Federal Energy Regulatory Commission ("Commission" or "FERC") reasonably concluded that a hydroelectric project located on the Blackstone River in Massachusetts is subject to its mandatory licensing authority under section 23(b)(1) of the Federal Power Act ("FPA"), 16 U.S.C. § 817(1), based on two alternative findings: (1) that the Blackstone River at the project site is navigable; and (2) that the project was reconstructed after a

period of abandonment.

2. Whether the Commission reasonably concluded that Petitioner James M. Knott, Sr. ("Knott") failed to comply with: (1) the terms and conditions of his license by failing to install gages necessary to measure stream flow at the project; and (2) FERC filing requirements that revisions to project design must be recorded on standardized, inexpensive microfiche cards.

3. Whether the Commission, by requiring Knott to continue to comply with license requirements and obligations under federal law, properly rejected Knott's due process and "takings" objections.

STATUTES AND REGULATIONS

Pertinent sections of the Federal Power Act ("FPA"), 16 U.S.C. § 796, *et seq.*, are set out in the Addendum to this brief.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION

Petitioner Knott operates the Riverdale Mills Project ("Project") on the Blackstone River in Worcester County, Massachusetts. [1] In 1985, Knott voluntarily requested, and in 1987 received, a 30-year license, *see* FPA § 4(e), 16

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[1] This brief refers to both Petitioners collectively as "Knott." Although James Knott, Sr. is the holder of the license for the Riverdale Mills Project, filings with the Commission, as here, also have been made in the name of Riverdale Power & Electric Co., Inc. However, the Commission never has authorized any transfer of the project license from Knott to Riverdale.

U.S.C. § 797(e), that contains various standard and project-specific terms and conditions. Knott now appeals four Commission orders that sought to enforce compliance with his license. Two of the orders, responding to complaints about extreme fluctuations in water flow on the Blackstone River, found that Knott violated the terms of his license by failing to install and to maintain gages necessary to measure stream flow at the Project. *James M. Knott*, 89 FERC ¶ 62,189 (1999), App. 21 ("Compliance Order I"), *reh'g denied*, 91 FERC ¶ 61,175 (2000), App. 24 ("Compliance Order II"). [2] Two later orders found that Knott violated Commission filing requirements by failing to file a drawing of certain project revisions in a standard format. *James M. Knott*, 94 FERC ¶ 62,258 (2001), App. 14 ("Compliance Order III"), *reh'g denied*, 95 FERC ¶ 61,235 (2001), App. 17 ("Compliance Order IV").

During the course of the compliance proceedings, Knott raised as a defense his belief that the Project does not fall within the Commission's mandatory licensing authority under section 23(b)(1) of the FPA, 16 U.S.C. § 817(1). In response, the Commission initiated a jurisdictional investigation of the Project and Knott's licensing obligations. In two additional orders, the Commission determined that the Project is subject to the Commission's mandatory licensing

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[2] References to portions of the Appendix to Knott's opening brief, filed on June 15, 2004, are marked "App." References to portions of the Supplemental Appendix, filed contemporaneously with the filing of the Commission's answering brief, are marked "Supp. App."

authority, under either of two alternative grounds (navigability of the Blackstone River; reconstruction of the Project after period of abandonment) for licensing jurisdiction under FPA § 23(b)(1). *James M. Knott*, 102 FERC ¶ 61,241 (2003), Supp. App. 1 ("Jurisdictional Order I"), *reh'g denied*, 103 FERC ¶ 61,315 (2003), App. 1 ("Jurisdictional Order II"). [3]

II. STATEMENT OF FACTS

A. The Commission's Licensing Authority

The FPA grants the Commission two types of licensing authority over hydroelectric projects. Permissive, or voluntary, licensing is governed by section 4(e) of the FPA, 16 U.S.C. § 797(e). Under this section, in relevant part, the Commission is authorized to issue a license for any hydroelectric project that develops 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. . . ."

Mandatory licensing is governed by section 23(b)(1) of the FPA, 16 U.S.C.

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[3] In his brief, Knott challenges only the second of the Commission's 2003 orders on jurisdiction (the rehearing order, App. 1), *see* Br. 4, 15, ignoring altogether the Commission's initial order on jurisdiction (Supp. App. 1) and, indeed, omitting it from his Appendix. The judicial review section of the FPA, 16 U.S.C. § 825*l*(b), precludes such selective review of certain orders. A challenge to a Commission order denying rehearing necessarily presents for review the earlier "aggrieving" order. *See Londonderry Neighborhood Coalition v. FERC*, 273 F.3d 416, 423 (1st Cir. 2001); *City of Oconto Falls v. FERC*, 204 F.3d 1154, 1159 (D.C. Cir. 2000).

§ 817(1), which prohibits the unlicensed construction and operation of certain types of hydroelectric projects. In relevant respect, a project must be licensed if **either**: (1) it is located on "any of the navigable waters of the United States;" **or** (2) it is located on a body of water over which Congress has Commerce Clause jurisdiction, project construction occurred on or after August 26, 1935, **and** the project affects the interests of interstate or foreign commerce. *See, e.g., FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1154-55 (D.C. Cir. 2002); *Thomas Hodgson & Sons, Inc. v. FERC*, 49 F.3d 822, 826-27 (1st Cir. 1995). Section 3(8) of the FPA, 16 U.S.C. § 796(8), in turn, defines "navigable waters" in relevant part as:

> 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. . . .

See, e.g., Rochester Gas & Electric Corp. v. FPC, 344 F.2d 594, 596 (2d Cir. 1965) (FPA § 3(8) contemplates that navigability may be established through past, present, or future uses of the waterway).

Thus, it is possible for an applicant to obtain a voluntary license under FPA § 4(e) for a hydroelectric project that would not require a mandatory license under

FPA § 23(b)(1). *See, e.g., Cooley v. FERC*, 843 F.2d 1464, 1471 (D.C. Cir. 1988). Regardless of whether a FERC-issued license is voluntary or mandatory, however, a licensee must abide by all terms and conditions of the license, until its expiration, surrender or transfer. *See, e.g., Pennsylvania Electric Co*., 56 FERC ¶ 61,435 (1991) (declaratory order that, absent mandatory licensing authority, Commission cannot compel new license upon expiration of voluntary license). *See generally* 18 C.F.R. §§ 4.30-4.108 (various application procedures and exemptions for various types and sizes of projects); *id*. §§ 6.1-6.5 (procedures for surrender or transfer of license); *id*. §§ 9.1-9.3 (procedures for license transfer).

B. The Blackstone River and the Riverdale Mills Project

From its source in Worcester, Massachusetts, the Blackstone River flows in a southeast direction for 27 miles before entering Rhode Island, where its name changes to the Pawtucket (or Seekonk) River. It then continues to flow for another 17 miles to Providence and into the Narragansett Bay. *See* App. 60-61 (portions of 1988 navigability study describing and picturing river).

The Riverdale Mills Project ("Project") is located on the Blackstone River in Worcester County, Massachusetts. The Project includes a 150-kilowatt generator located within a mill building. Among other things, the original 18th century timber and granite dam was washed out in 1955 and replaced in 1957 with a 142-

foot long, 10-foot high, concrete and steel dam which impounds 11.8 acres. [4]

After lying abandoned for several years, without maintenance or repair, the Project was acquired by Mr. Knott in 1979. *See United States v. Knott*, 256 F.3d 20, 22-23 (1st Cir. 2001) (explaining Knott's manufacturing operations). In 1985, Mr. Knott applied to the Commission for, and received in 1987, a 30-year voluntary license (expiring in 2017) to operate and maintain the Project. *James M. Knott*, 39 FERC ¶ 62,308 (1987), App. 93 ("License Order"). In issuing the license, the Commission described the project works and design, App. 94, 102-03, and evaluated the environmental concerns of federal and state agencies, App. 94, 97-102. The Commission also attached to the license a number of terms and conditions, some of which are specific to the Project and the concerns raised by the parties, App. 95-97, and some of which are standard license terms and conditions attached to all "minor projects" of similar size and generation capacity, App. 94, 104-111. Because Knott voluntarily applied for the license, *see* App. 102-03 (indicating that Knott might sell some of the Project's output to the interstate grid), the Commission had no occasion at that time to consider whether it has mandatory licensing jurisdiction over the Project.

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[4] Although Knott claims to operate ancient "sixteenth century" facilities, *see* Br. 2-3, the facts show otherwise. Similar factual statements below concerning the operation of the Project – such as the height of the dam and the configuration of the mill building – contrast with those originally presented in support of Knott's 1985 license application. *See* Jurisdictional Order I at P7 n.7, P39, Supp. App. 3, 20; Jurisdictional Order II at P16 n.24, App. 10.

C. The Commission's Compliance Orders

In early 1999, the Commission received letters from conservation groups and state agencies alleging extreme stream flow fluctuations in the Blackstone River below the Project and suggesting that the cause might be Knott's failure to operate the Project in accordance with various license terms and conditions requiring "run-of-river" operating mode. In a series of letters, the Commission repeatedly requested stream flow gaging records, and Knott repeatedly responded that he had no obligation to install gages at the Project site.

Ultimately, the Commission issued compliance orders requiring Knott to file a plan for installing stream flow gages at the Project. *James M. Knott*, "Compliance Order," 89 FERC ¶ 62,189 (Dec. 10, 1999), App. 21 ("Compliance Order I"), *reh'g denied*, *James M. Knott*, "Order Denying Rehearing and Dismissing Stay Request," 91 FERC ¶ 61,175 (May 22, 2000), App. 24 ("Compliance Order II"). The Commission explained that Knott's obligation to install gages to measure stream flow is mandated by two license conditions. *See* standard Article 6 (requiring the installation and maintenance of gages to determine the stage and flow of the stream on which the project is located), App. 94, 106; project-specific Article 401 (requiring Knott to minimize and measure stream fluctuations to protect fish and wildlife resources in the Blackstone River), App. 95. The Commission also found that: (1) gages upstream and downstream of

the Project, operated by the U.S. Geological Survey, were too remote to measure stream flow at the Project; (2) all other licensees on the Blackstone River have installed stream flow gages; and (3) the Commission cannot verify Knott's compliance with its environmental obligations without such gages. App. 28.

Another compliance dispute arose in late 2000, after Knott filed for Commission approval to install a new "flood flow modular gate." The Commission approved the project redesign, but required the filing of a better quality drawing of the gate in a specific, standardized format. *James M. Knott*, "Order Approving As-Built Exhibit F Drawing," 94 FERC ¶ 62,258 (March 27, 2001), App. 14 ("Compliance Order III"). Specifically, the Commission required the filing of aperture cards (3 ¼ in. x 7 in.) of the approved drawing on silver or gelatin 35 mm microfilm. *See* App. 15 (reproducing standard format cards).

In denying Knott's request for rehearing, *James M. Knott*, "Order Denying Rehearing, Stay, and Oral Argument," 95 FERC ¶ 61,235 (May 17, 2001), App. 17 ("Compliance Order IV"), the Commission explained that its regulations require the accurate depiction of all project works in one standardized format. App. 18-19 (citing 18 C.F.R. § 4.39). The Commission explained further that the cards it requires of all hydroelectric project features provide a durable medium of storing information and are relatively inexpensive to produce. App. 19.

D. The Commission's Jurisdictional Orders

In the compliance proceedings, Knott contended that compliance with license terms and filing requirements was unnecessary because the Commission has no jurisdiction over the Project. Knott asserted that he obtained a project license voluntarily, in anticipation of selling excess power to the local utility, but that, in fact, no such sales have been made; rather, all power generated at the Project is consumed on-site and thus does not affect interstate commerce. Knott also contended that the Blackstone River is not a "navigable" river within the meaning of the FPA, *see supra* page 5. In response to Knott's allegations, the Commission instituted a proceeding to reexamine the basis for its jurisdiction over the Project. *See* Compliance Order II, App. 29-30.

In November 2000, the Commission's staff prepared a supplemental study of the navigability of the Blackstone River.[5] App. 34. The study described in detail a four-day expedition in September 2000, organized by local businesses, environmental groups, and governmental bodies, by approximately 30 canoeists who traversed the Blackstone River, from Worcester, Massachusetts, past the Project, across the Rhode Island state line, and on to the Narragansett Bay. Based on this expedition, which was accomplished with only a minimum amount of

[5] Earlier, in 1988 (in response to a 1986 request by Knott), the Commission found that the Riverdale Mills Project was required to be licensed. *See James M. Knott*, 43 FERC ¶ 62,308 (1988). This finding was based on a 1988 report, *see* App. 58, reviewing the history of the Blackstone River and finding it "navigable," within the meaning of the FPA, by virtue of the interstate transport of persons and property along the Blackstone Canal between the years 1828 and 1848.

difficulty, App. 38, Commission staff concluded that the Blackstone River is suitable for interstate use by recreational boaters and thus is a navigable water within the meaning of FPA § 3(8).

The Commission served Knott with the staff navigation study and requested comments from interested persons. *See* Supp. App. 26, 29. In response, Knott disputed the factual and legal basis for the navigability finding of the report. Four governmental entities, on the other hand, supported the finding of navigability and the exercise of FERC licensing authority. *See* Supp. App. 31 (Massachusetts Department of Environmental Protection); Supp. App. 38 (Massachusetts Division of Fisheries and Wildlife); Supp. App. 40 (Rhode Island Department of Environmental Management); and Supp. App. 35 (U.S. National Park Service).

In two orders issued in 2003, the Commission concluded that the Project is subject to its FPA mandatory licensing authority, and that, accordingly, Knott must continue to abide by all license terms and conditions. *See James M. Knott, Sr.*, "Order Finding Hydroelectric Project Required to be Licensed," 102 FERC ¶ 61,241 (Feb. 28, 2003), Supp. App. 1 ("Jurisdictional Order I"), *reh'g denied*, *James M. Knott, Sr.*, "Order Denying Rehearing," 103 FERC ¶ 61,315 (June 9, 2003), App. 1 ("Jurisdictional Order II"). The Commission rested its conclusion that the Project must operate under a FERC-issued license on two alternative, independent findings.

First, the Commission upheld the findings of the staff navigability report, that recreational boating from Massachusetts to Rhode Island along the Blackstone River demonstrates its navigability, within the meaning of the FPA. Disagreeing with the more stringent jurisdictional standard advocated by Knott, the Commission relied on the language of FPA § 3(8) and decades of case law interpreting that section to confirm that navigability can be established by interstate canoeing that requires occasional portages around stream interruptions (*e.g.*, projects, falls, areas of low water).

Second, as an entirely separate basis for jurisdiction over the Project under FPA § 23(b)(1), the Commission made several findings: (1) the Blackstone River has an effect on interstate commerce; (2) the Project has an effect on interstate commerce; (3) the Project had been shut down and abandoned for three years prior to Knott's purchase in 1979; and (4) Knott substantially rebuilt and returned to operation Project facilities

Finally, the Commission rejected arguments that its proceedings failed to afford Knott adequate due process or were tainted by bias. The Commission also rejected the argument that it was unconstitutionally "taking" Knott's property rights, explaining that its grant of a license conferred benefits (rather than extinguished rights) that are reasonably conditioned on Knott's compliance with reasonable license conditions.

SUMMARY OF ARGUMENT

The Commission reasonably found that it has mandatory licensing authority over the Project pursuant to FPA section 23(b)(1), 16 U.S.C. § 817(1). This finding rests on two independent bases. First, the Commission reasonably found that the Project site on the Blackstone River is "navigable," as that term is defined in FPA section 3(8), 16 U.S.C. § 796(8), and as that term previously has been interpreted by the Commission and the courts. The Commission's interpretation of its statutory authority and its reading of applicable case law – that navigability can be demonstrated by canoe trips, requiring occasional portages around interruptions, in interstate commerce -- is entitled to deference. Moreover, there is substantial evidence, in the form of a Commission staff study of canoeing on the Blackstone River in September 2000, in support of the Commission's navigability finding.

As a second basis for finding mandatory licensing authority, the Commission found that Knott reconstructed the Project after a period of abandonment. These factual findings, too, are supported by substantial historical evidence and must be upheld.

In addition, the Commission reasonably found that Knott failed to comply with license conditions requiring the installation of stream flow gages. Compliance with those license conditions is necessary to assure that Knott operates its facility in the manner represented to the Commission when it issued the project

license and in compliance with all environmental requirements. Similarly, the Commission reasonably found that Knott failed to comply with filing requirements obligating him, at little expense or burden, to submit all drawings of project works in a standard durable format.

In making its determinations on the basis of the parties' "paper" submissions, the Commission afforded Knott numerous opportunities to present his position and to produce evidence prior to Commission action. The Commission did not deprive him of any due process right by declining to initiate additional procedures before an administrative law judge. Nor has the Commission unconstitutionally "taken" Knott's property rights. The compliance and jurisdictional orders merely enforce reasonable license terms and conditions that previously were applicable, and which will remain applicable, to Knott's operation of the Project.

<u>ARGUMENT</u>

I. STANDARD OF REVIEW

Judicial review of Commission orders proceeds under the arbitrary and capricious standard. *See* 5 U.S.C. § 706(2)(A). That standard requires the reviewing court to satisfy itself that the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs.*

Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). A reviewing court determines whether an agency "has met the minimum standards set forth in the statute," and does not "substitute its own judgment for that of the [agency]." *United States Postal Service v. Gregory*, 534 U.S. 1, 11 (2001). In other words, if there are "reasonable policy arguments on both sides . . . the agency's choice easily controls so long as it adequately explains its position." *Sithe New England Holdings, LLC v. FERC*, 308 F.3d 71, 78 (1st Cir. 2002); *see also Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 943-44 (1st Cir. 1993) (Commission's decisions are entitled to "great deference").

Findings of fact by the Commission, if supported by substantial evidence, are conclusive. FPA ▪ 313(b), 16 U.S.C. ▪ 825*l*(b); *see, e.g., Boston Edison Co. v. FERC*, 885 F.2d 962, 964 (1st Cir. 1989) (Breyer, J.). Because substantial evidence is more than a scintilla, but something less than a preponderance, of the evidence, the possibility of drawing two different conclusions from the same evidence does not prevent one of those conclusions from being deemed reasonable. *E.g., FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002).

Moreover, when the Commission interprets a provision of the FPA, and the legislative intent of that provision is ambiguous, "FERC's conclusion will only be

rejected if it is unreasonable." *Northeast Utilities Service Co. v. FERC*, 993 F.2d at 944 (citing *Chevron U.S.A v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984)); *but see Thomas Hodgson & Sons, Inc. v. FERC*, 49 F.3d 822, 826 (1st Cir. 1995) (*Chevron* deference not appropriate where agency rests entirely on a reading of judicial precedent).

As explained below, the Commission's findings as to its licensing authority over the Project are reasonable, well-explained, and supported by substantial evidence, and therefore must be upheld.

II. THE COMMISSION REASONABLY CONCLUDED THAT IT HAS MANDATORY LICENSING JUSRISDICTION OVER THE PROJECT BY VIRTUE OF THE NAVIGABILITY OF THE BLACKSTONE RIVER

A. The Commission Employed a Standard of Navigability That is Consistent With the FPA and Relevant Case Law

Throughout this proceeding, Knott has disputed the Commission's choice of a standard to assess the navigability of the Blackstone River. In the challenged orders, the Commission found, as one independent basis for claiming mandatory licensing jurisdiction, that evidence of canoeing along the Blackstone River, from Massachusetts to Rhode Island, *see* App. 33-39, satisfies the definition of navigability found in FPA § 3(8). *See* Jurisdictional Order I at PP 13-21, Supp. App. 6-10; Jurisdictional Order II at PP 6-12, App. 3-8. Because the Blackstone River is navigable within the meaning of the FPA, Knott must continue to comply

with the terms and conditions of his license.

Knott seeks to limit the reach of the FPA by alleging that navigability requires "actual commercial use," and not just simply occasional recreational boating. *E.g.*, Br. 17. In Knott's opinion, the "statutory definition of 'navigability' expects a true relationship to commerce, not recreational activity in the absence of any marketplace for goods or services." Br. 20 n.8. In his opinion, the Commission has "sever[ed] the commercial element of 'navigability' required by the statute," Br. 30, and has exceeded "limits to federal regulatory jurisdiction" recognized by the courts. Br. 27.

Contrary to Knott's position, however, the provisions of the FPA, by their very terms and as interpreted by the courts, are not so limited. FPA section 3(8) explicitly contemplates that navigability may be established by demonstrating that waters "are used or suitable for use for the transportation of persons or property in interstate or foreign commerce. . . ." 16 U.S.C. § 796(8). The absence of "actual" commercial traffic does not bar a conclusion of navigability where "personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation." *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 416 (1940). Other courts, citing the *Appalachian* decision, similarly have concluded that the Commission reasonably could support a finding of navigability under FPA § 3(8) on the basis of irregular canoe trips. *See FPL*

Energy Maine Hydro LLC v. FERC, 287 F.3d 1151 (D.C. Cir. 2002) (three test canoe trips); *Consolidated Hydro, Inc. v. FERC*, 968 F.2d 1258 (D.C. Cir. 1992) (single canoe race); *New York State Dept. of Environmental Conservation v. FERC*, 954 F.2d 56 (2d Cir. 1992) (recreational boating).

Similarly, FPA § 3(8) explicitly contemplates that streams or waters may be navigable "notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage. . . ." 16 U.S.C. § 796(8). Thus, the mere fact that the Blackstone River, at certain places and at certain times, might require overland transport (portages) around dams or shallow waters, *see* Br. 15, 20-21, 27, does not by itself defeat a finding of navigability. *See, e.g.*, *Consolidated Hydro*, 968 F.2d at 1262 (citing cases).

Thus, the Commission acted in a manner consistent with the "plain language of FPA Section 3(8) and judicial case law," Jurisdictional Order II at P9, App. 5, in basing its finding of navigability of the Blackstone River on the canoe trips identified by Commission staff in its 2000 study. The Commission's finding is thus entitled to deference. *See FPL Energy Maine*, 287 F.3d at 1156-59 (affording *Chevron* deference to the Commission's interpretation of the FPA definition of navigability). [6] In contrast, Knott's efforts to restrict the FPA definition of

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[6] This Court's decision in *Hodgson*, *see* 49 F.3d at 826, not to afford the Commission *Chevron* deference, did not address the same interpretative issue of navigability and, in any event, rested entirely on a reading of case law.

navigability, which he construes as requiring regular commercial activity, relies primarily on cases, *see, e.g.*, Br. 17, 28, that arise under general admiralty law, not on the precise language of the FPA at issue or on case law interpreting that language. Jurisdictional Order II at P10 & n.16, App. 5 (drawing distinction between "navigability" under admiralty law and "navigability" under the FPA). [7]

Moreover, Knott overstates the sweep of the Commission's assertion of licensing authority by arguing that it relied "on the presence of a handful of canoe and kayak rentals or an evening dinner cruise" on the Blackstone River. Br. 29 (similarly arguing that it is "unlikely that any body of water" could escape jurisdictional capture). Contrary to those claims, however, the Commission's standard for assessing navigability is not so boundless. The Commission did not rest simply on evidence of occasional boating in the vicinity of the Project, but rather on evidence of canoeing in interstate commerce – from Massachusetts to Rhode Island – thereby demonstrating the availability of the river for the "simpler types of commercial navigation." *Appalachian Electric*, 311 U.S. at 416. *See*

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[7] For example, Knott relies on the decision in *LeBlanc v. Cleveland*, 198 F.3d 353 (2d Cir. 1999), for the proposition that "artificial obstructions" defeat the navigability of a waterway. *See* Br. 24. As the Commission explained, however, that decision arises under general admiralty law, not the specific provisions of the FPA. The fact that a waterway is not navigable in admiralty law, which requires an assessment of the present capability of the waters to sustain commercial shipping, cannot control the meaning of navigability under the FPA, which explicitly permits "interruptions" in navigable waters. Jurisdictional Order II at P10 & n.16, App. 5

Jurisdictional Order II at P10 n.18, App. 7 (disclaiming reliance on recreational boating that does not cross state lines); *see also* Jurisdictional Order I at P20 n.28, Supp. App. 10 (noting that the Commission has disclaimed jurisdiction where recreational boating requires expert skills).

B. The Commission's Finding of Navigability Is Reasonable and Supported by Substantial Evidence

Knott does not dispute the facts central to the finding that the Blackstone River is navigable – that, in a September 2000 expedition, about 30 persons in canoes and kayaks, with occasional portages, navigated along the river from Worcester, Massachusetts, past the Project, across the state line into Rhode Island, and on to Narragansett Bay. Jurisdictional Order II at P12, App. 8; *see also* App. 33-39 (staff navigability study). Rather, his objections concern how those undisputed facts are to be interpreted. *See* Jurisdictional Order I at P4 n.5, Supp. App. 2 (no dispute over the facts; issue presented is "what these facts mean in the context of the case law"); Jurisdictional Order II at P9, App. 4-5 (Knott's objections focus on his interpretation of the facts).

First, Knott questions the motivation behind the September 2000 expedition, suggesting that it was a government-organized trip to build a case for Commission jurisdiction that otherwise could not be made. *See* Br. 5-6, 18, 21. As the Commission explained, however, the participants represented a wide range of interests and perspectives, including members of environmental groups, tourism

boosters, local, federal and state officials, and local media, all promoting the redevelopment and recovery of the Blackstone River. Jurisdictional Order I at P16, Supp. App. 7; *see also id.* at P19 n.25, Supp. App. 9 (no indication that September 2000 expedition was motivated by a desire to secure mandatory Commission jurisdiction over the Project).

In any event, even if the sole purpose of the September 2000 expedition had been to establish Commission jurisdiction, such motivation would not be relevant. In *FPL Energy*, 287 F.3d at 1156-58, the court upheld a finding of navigability based on three non-recreational "test canoe trips" made solely for the purpose of FERC jurisdictional litigation. *See also United States v. Utah*, 283 U.S. 64, 83 (1931) (noting that the "capacity [of a waterway to meet the needs of commerce] may be shown by physical characteristics and **experimentation** as well as by the uses to which the streams have been put") (emphasis added).

Second, Knott claims that the September 2000 expedition was an "arduous" trip requiring many portages and occasional trespasses on private property. Br. 15, 18. As explained above, however, *see supra* page 5, the statutory definition of navigability explicitly allows for "land carriage" around "interruptions," and courts have upheld findings of navigability based on canoe trips similarly requiring portages. *See supra* page 18. Moreover, the fact that navigation might, at present, be difficult and might inhibit regular activity does not defeat a finding of

navigability under FPA § 3(8), which refers either to current use or "suitab[ility]" for use. The Supreme Court long ago held that "[t]he capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use." *The Montello*, 87 U.S. (11 Wall.) 430, 441 (1870).

In any event, the Commission staff study indicated that the September 2000 expedition was not arduous, despite occasional portages. *See, e.g.*, App. 36 (noting that canoeists had "few problems" and that portages were "relatively easy").

Third, Knott challenges the consistency of the Commission's navigability finding. He claims that the Commission, in issuing the voluntary license to Knott in 1987, did not rely on any nexus to interstate commerce, and thus granted "automatic Congressional permission for the project's existence." Br. 11, 30. As the Commission explained, however, the Commission's 1987 License Order simply did not address the navigability of the Blackstone River, as it had no reason to do so, given Knott's voluntary application.[8] Jurisdictional Order II at P9 n.10, App. 4; *see also* Jurisdictional Order I at P11 & n.13, Supp. App. 5 (noting that

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[8] Knott is incorrect in suggesting, Br. 22, that the 1987 License Order, which did not address the issue of navigability, reflects a 1981 finding by the Army Corps of Engineers that the Blackstone River is not navigable. In any event, the Army Corps determined that the river is not navigable within the meaning of section 9 of the River and Harbor Act of 1899, *see* App. 280, and made no assessment of navigability under the FPA. Further, the Army Corps did not have all the facts in 1981 (particularly the facts of the September 2000 canoe expedition) later available to the Commission when it issued the challenged orders.

while the License Order made no explicit finding as to the basis for Commission jurisdiction to issue the license, the license itself (App. 94, 104) did include standard terms and conditions applicable to projects "affecting the interests of interstate or foreign commerce"). Thus, there is no inconsistency between the challenged orders and the License Order. [9]

Similarly, there is no inconsistency between the challenged orders and other orders actually concerning navigability on the Blackstone River. Knott asserts that the Commission "has reversed its own position at least three times in the past decades." Br. 22; *see also id*. 30 (Commission "has repeatedly overturned itself"). However, there have been no reversals as to the Commission's jurisdictional assessment of the Riverdale Mills Project. To the contrary, on two earlier occasions, prior to the challenged orders, the Commission found the Blackstone River at the site of Knott's facility to be navigable and a FERC license to be

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[9] Even if the License Order definitively had ruled that the Blackstone River were not navigable, which it did not, the Commission would not have been estopped from subsequently revisiting the issue and, if appropriate, reversing its decision. Jurisdictional Order I at P11 n.13, Supp. App. 5; Jurisdictional Order II at P10 n.17, App. 7. *See also Chippewa and Flambeau Improvement Co. v. FERC*, 325 F.3d 353, 356-57 (D.C. Cir. 2003) (Commission is not bound by previous determination that project facility is exempt from federal licensing authority); *City of Centralia, Washington v. FERC*, 661 F.2d 787, 789 (9th Cir. 1981) (same); *Connecticut Light and Power Co. v. FPC*, 557 F.2d 349, 353-54 (2d Cir. 1977) (same). As the court explained in *Nantahala Power & Light Co. v. FPC*, 384 F.2d 200, 209 (4th Cir. 1967), Congress, in enacting the FPA, did not intend "to create an indefeasible private right springing from an initial exercise of the Commission's regulatory authority, that would survive and remain immune from future regulation under any circumstances."

mandatory. Specifically, in a June 17, 1988 order, issued in response to a request by Knott, the Commission found that the Blackstone River is navigable by virtue of its historic use, referencing the transportation of persons and property for two decades in the 19th century over the Blackstone Canal. *See* Jurisdictional Order II at P9 n.10, App. 4 (citing *James M. Knott*, 43 FERC ¶ 62,038 (1988)). In addition, in a February 1, 2002 order, the Commission found that the Blackstone River is navigable based on the same evidence (the September 2000 canoeing expedition) used here. *See* Jurisdictional Order I at P3, Supp. App. 2 (noting that the 2002 jurisdictional order subsequently was rescinded in order to give Knott an opportunity to comment on the staff navigability report). In other words, the Commission never has found that it lacks licensing authority over Knott's facility.

To be sure, the Commission has changed its jurisdictional assessment of another facility on the Blackstone River, the Farnumsville Project, that is upstream of Knott's facility. [10] However, the Commission ultimately found that the Blackstone River at the upstream Farnumsville project site is navigable based on the same set of facts (those presented in the staff study of the September 2000

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[10] In 1996, the Commission found the river at the site of the Farnumsville Project to be navigable (because of 19th century use of the Blackstone Canal); in 1999, it found the project site to be non-navigable (because of the absence of a nexus to interstate commerce); and, in 2000, it found the project site again to be navigable (because of evidence of recreational canoeing between two states). *See* Jurisdictional Order II at P9 n.10, App. 4 (citing *Blackstone Mill Depot Street Trust*, 93 FERC ¶ 61,247 (2000), App. 73).

canoe expedition) later used in the challenged orders to establish the navigability of the Blackstone River at Knott's downstream Project. Thus, there is no inconsistency.

III. THE COMMISSION REASONABLY CONCLUDED THAT IT HAS MANDATORY LICENSING JURISDICTION OVER THE PROJECT BY VIRTUE OF RECONSTRUCTION WORK AFTER A PERIOD OF ABANDONMENT

As an entirely separate basis for claiming mandatory licensing authority over the Project, the Commission made three findings under FPA § 23(b)(1): (1) that the Blackstone River has an effect on interstate commerce; (2) that the Project has an effect on interstate commerce; and (3) that Knott repaired and reconstructed the Project after a period of abandonment. *See* Jurisdictional Order I at PP22-43, Supp. App. 11-22; Jurisdictional Order II at PP13-18, App. 8-12. Knott does not challenge the general standards applied by the Commission, and does not challenge the Commission's finding that the first of the standards (the river's effect on interstate commerce) was easily satisfied. It does, however, challenge the Commission's findings that the remaining two standards were satisfied.

First, Knot argues that the Project, standing alone, has no impact on interstate commerce. Br. 39-40. The Commission responded that Knott's focus is much too narrow, noting that the Project is connected to the interstate electrical

grid. While the interstate impact of the Project itself might be small, [11] it is one member of a large class of small hydroelectric projects that collectively has a significant impact on interstate commerce. *See* Jurisdictional Order I at P24, Supp. App. 11-12; Jurisdictional Order II at P13, App. 8-9. The courts have found that the Commission reasonably can look to such a collective impact in establishing an effect on interstate commerce. *See Habersham Mills v. FERC*, 976 F.2d 1381, 1384 (11th Cir. 1992) (rejecting argument that effect of single small hydroelectric project that no longer sells power is too trivial to constitute an effect on interstate commerce, and "see[ing] nothing in [FPA § 23(b)(1)] that restricts the way in which the Commission may determine or assess a particular project's effect on interstate commerce") (citing Commerce Clause cases). Knott fails to offer any authority to the contrary.

Second, Knott argues that the Project never was "abandoned," and that it did not engage in post-abandonment "construction," as those terms have been used in court cases addressing the scope of the Commission's licensing authority under FPA § 23(b)(1). *See Thomas Hodgson & Sons v. FERC*, 49 F.3d 822 (1st Cir.

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[11] As explained *supra* at page 7, the License Order, *see* App. 102-03, indicates that Knott sought a voluntary license to sell excess power to the interstate grid or to reduce power purchases from the grid. While Knott asserts that he has not, in fact, sold any power to the grid, his use of power generated on-site has an effect on interstate commerce through the displacement of electricity that otherwise would be generated by other facilities connected to the grid. Jurisdictional Order II at P13 n.20, App. 9.

1995); *Aquenergy Systems, Inc. v. FERC*, 857 F.2d 227 (4th Cir. 1988); *Puget Sound Power & Light Co. v. FPC*, 557 F.2d 1311 (9th Cir. 1977). Under this line of cases, as the Commission explained, mandatory licensing authority can be established where there is repair and reconstruction to a project that was constructed prior to 1935 and that subsequently was shut down and abandoned. *See* Jurisdictional Order I at PP25-33, Supp. App. 12-17 (explaining standard for assessing jurisdiction based on post-abandonment construction); Jurisdictional Order II at PP14-15, App. 9 (same).

The Commission explained that the relevant cases, taken together, require a complete cessation of both project generation and project maintenance to constitute project "abandonment." *See* Jurisdictional Order I at PP32-33, Supp. App. 16-17. The Commission found that the Project fits within this standard of abandonment, as the record (including newspaper articles) demonstrates that the mill and project works were entirely shut down and left without maintenance between 1976 and 1979. *Id*. at PP34-39, Supp. App. 17-20.

Knott responds that a three-year period of abandonment is too short to establish jurisdiction. Br. 35-36. While the Commission acknowledged that the abandonment in the *Aquenergy* case, for example, was for a much longer period, it nevertheless disagreed that "three years is too short a time to demonstrate the cessation of project generation and maintenance where, as here, the owner

abandoned the project and made no effort to maintain it." Jurisdictional Order II at P17, App. 10-11.

Knott also argues that the Commission inappropriately rested its jurisdictional findings on Knott's post-abandonment reconstruction of its mill buildings. Br. 37. To be sure, the Commission found it difficult to determine where Knott's mill structures end and its hydroelectric project works start, as generating equipment is found in the Riverdale Mills factory floor and entirely within the mill buildings. Jurisdictional Order I at PP35-37, Supp. App. 18-19 (examining specifications in License Order and licensing documents). [12] For this reason, the Commission was careful not to impute reconstruction of the mill structures using the generated power to reconstruction of the hydroelectric generating facilities. Nevertheless, it was still able to find post-abandonment construction in the undisputed fact of Knott's "removal, rebuilding, and reinstallation of the project turbine, the installation of stoplogs in the project dam, and the refilling of the millpond behind the dam." Jurisdictional Order II at P18, App. 11-12.

The Commission's decision to view these historical events as evidence of project abandonment and reconstruction, that are sufficient to establish an

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[12] The difficulty here of determining the precise boundaries and specifications of Knott's structures demonstrates the reasonableness of the Commission's efforts here, *see infra* pages 30-32, to enforce compliance with standardized requirements for the filing of all project drawings.

alternative basis for asserting mandatory licensing authority, is one that is entitled to judicial respect. *See Florida Municipal Power Agency v. FERC*, 315 F.3d 362, 368 (D.C. Cir. 2003) (under substantial evidence standard, relevant question is not whether record evidence supports petitioner's version of events, but whether it supports the Commission's); *see also Sithe New England Holdings, LLC v. FERC*, 308 F.3d 71, 79 (1st Cir. 2002) (Commission decisions among competing policy choices are "grist for the agency mill" and "there is no basis for a court to substitute its own view").

IV. THE COMMISSION REASONABLY CONCLUDED THAT KNOTT FAILED TO COMPLY WITH BOTH THE TERMS OF ITS LICENSE AND FERC FILING REQUIREMENTS

The four Compliance Orders directed Knott to comply with the terms of his 1987-issued license and the Commission's filing requirements. Specifically, in Compliance Order I, App. 21, and Compliance Order II, App. 24, the Commission found that Knott violated two terms of his license – Articles 6 and 401 – by failing to install gages to measure stream flow at the Project and to ensure operation in run-of-river mode. *See* Article 6, App. 106 (standard license condition requiring licensee to "install and thereafter maintain gages and stream-gaging stations for the purpose of determining the stage and flow of the stream or streams on which the project is located" in a manner that "shall at all times be satisfactory to the

Commission"); [13] Article 401, App. 95 (project-specific license condition requiring Knott to "act at all times to minimize [stream] fluctuations" in order to protect "fish and wildlife resources in the Blackstone River"). [14] In Compliance Order III, App. 14, and Compliance Order IV, App. 17, the Commission found that Knott violated the Commission's filing requirements by refusing to depict all project features in a standardized format. *See also* License Order, App. 94, 103 (approving Knott's project works as depicted in his Exhibit F drawings).

Knott complains that the Commission's compliance directives are unnecessary or burdensome. *See* Br. 3, 5, 11, 52-54. The Commission provided a reasonable explanation for its directives. The installation of stream flow gages at Knott's facility will enable the Commission to determine whether that facility is responsible for stream flow fluctuations on the Blackstone River. Knott claims that there is no evidence directly linking the Project to Blackstone flow fluctuations. But that claim is no excuse for non-compliance:

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[13] Knott argues (Br. 54-55) that the gaging requirement cannot be considered part of the license for his "constructed" minor project because it was included in standard terms and conditions applicable to "unconstructed" minor projects. The Commission explained, however, that the label does not matter because the gaging requirement is a standard requirement applicable to all projects, constructed or unconstructed. *See* Compliance Order II, App. 28.

[14] State agencies commented that it was necessary for the Commission to issue a license to Knott with license conditions designed to avoid Project-caused fluctuations in the Blackstone River and to protect fish and wildlife resources in, and the environmental quality of, the river. *See* Supp. App. 33 (Massachusetts Department of Environmental Protection); Supp. App. 38 (Massachusetts Division of Fisheries and Wildlife).

> The Commission staff was unaware, until the recent claims of fluctuations in river flow, that the Riverdale Mills Project has no gages. The lack of evidence that this project violated its run-of-river license condition cannot be relied upon as grounds for declining to submit a gaging plan, because one of the functions of a gaging system is to verify compliance with that condition.

Compliance Order II, App. 5. The Commission also explained that all other Blackstone licensees have installed gages in compliance with their license conditions, that the USGS gage upstream of Knott's facility is too distant to measure changes in the elevation of the Project's impoundment, and that the downstream USGS gage is too distant to measure outflow from the Project (because of several intervening projects). Compliance Order II, App. 4-5.

The filing of project drawings in a single, standardized format, *see* Compliance Order III (depicting specific format), App. 15, better enables the Commission to determine that all design changes have been approved and to determine whether design changes are substantial. *See* Compliance Order IV, App. 19 (finding that Knott failed to file drawings accurately showing the replacement gate). Microfiche cards of the type and specifications required by the Commission, while perhaps not employing the latest in technology, nevertheless "provide a durable medium for storing information about hydropower project features" at a modest price to Knott -- $25-50 for a one-time set-up fee and one dollar for each

original card. *Id.* [15]

In these circumstances, Knott's claim that there is no "rational basis" for the Commission's compliance directives, Br. 55, is unfounded. As to the installation of gages, they are the means to assure operation of the Project in run-of-river mode and compliance with the environmental conditions of Knott's license. *See Clifton Power Corp. v. FERC*, 88 F.3d 1258, 1262 (D.C. Cir. 1996) (holding, in relevant part, that "[i]t is not unreasonable for the Commission to require [petitioner] to install [stream gaging] devices to determine whether the [project] is operating in the mode described in its license application"). As to the standardized filing of drawings, uniformity and durability of design depiction over the life of a license is desirable. *See Coalition for the Fair and Equitable Regulation of Docks on the Lake of the Ozarks v. FERC*, 297 F.3d 771, 779 (8th Cir. 2002) (finding a "rational basis" for the assessment of modest fees for use of the project reservoir under license terms and conditions); *Central Maine Power Co. v. FERC*, 252 F.3d 34, 46 (1st Cir. 2001) (noting that the Commission "enjoys a favorable standard of review" in determining non-compliance). [16]

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[15] The Commission has additional enforcement and civil penalty authority under section 31(c) of the FPA, 16 U.S.C. § 823b(c) (up to $10,000 per day per violation), in the event of non-compliance with a FERC-issued license, *see* Compliance Order I, App. 21-22 (alerting Knott as to this authority), but has not invoked that authority.

[16] Knott's suggestion that it is unreasonable for a governmental agency not to employ "modern technology," Br. 53, even assuming the Commission's filing

V. THE COMMISSION AFFORDED KNOTT A FULL AND FAIR OPPORTUNITY TO PRESENT ITS OBJECTIONS TO THE COMMISSION'S DETERMINATIONS

Knott was afforded numerous opportunities to present his position and to produce evidence prior to Commission action concerning the Project. For example, prior to the issuance of the compliance order directing the installation of stream flow gages, Knott exchanged a series of letters with the Commission. Several parties, including Knott, commented on the 2000 staff navigability study prior to the issuance of the Commission's 2003 order asserting mandatory licensing authority over the Project. [17] Knott also sought rehearing of the Commission's compliance and jurisdictional orders.

Thus, Knott has had a full and fair opportunity to be heard on all relevant issues. As the Commission explained, "Knott asked for an 'evidentiary hearing' on the facts underlying" the Commission's proposed actions on compliance and jurisdiction, and "[t]his is what he has been given, in that he has been able to

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requirements fail this standard, disregards the Commission's discretion to determine what filings best suit its needs. For example, that other government entities (including the Commission, *see* http://www.ferc.gov/docs-filing/efiling.asp) now allow for electronic filing in lieu of paper filing does not mean, as the logic of Knott's argument would require, that this Court's filing requirements, because they require the time and expense of preparing, binding and mailing paper copies, are unreasonable.

[17] To provide Knott (and potential intervenors) additional process, the Commission rescinded its February 1, 2002 order on jurisdiction, treated Knott's objections as a petition for a declaratory order on the jurisdictional issue, and sought comment on the findings in the 2000 staff navigability study. *See* Supp. App. 25-29.

present his claims and arguments." Jurisdictional Order I at P4, n.5, Supp. App. 2.

Nonetheless, Knott complains that he has been denied an opportunity to be heard and an opportunity to present evidence and to develop a record. *E.g.*, Br. 12, 48. But Knott received all the process that was due, as he was given full opportunity to present arguments and evidence, both initially and on rehearing, and to challenge arguments and evidence advanced by others. While he believes that only an oral hearing satisfies due process, that simply is not the case in Commission proceedings – thousands of which are instituted every year. As this Court recently explained:

> The term "hearing" is notoriously malleable, but what petitioners got here was not only a hearing but a species of evidentiary hearing which is now quite common in utility and carrier regulation. Very extensive evidentiary submissions were made by both sides in the form of affidavits from experts and others, together with extensive written argument. . . .

Central Maine Power Co. v. FERC, 252 F.3d 34, 46 (1st Cir. 2001) (citations omitted) (rejecting claim that due process required referral of objections to an administrative law judge); *see also Boston Edison Co. v. FERC*, 885 F.2d 962, 966-67 (1st Cir. 1989) (Breyer, J.) (due process satisfied by affording opportunity to make arguments on rehearing) (citing cases).

Knott claims an entitlement not simply to a hearing, but to what he terms a "true" hearing, with cross-examination and discovery to allow pursuit of possible witness bias and credibility claims. *See* Br. 2, 12, 45-51. It is well-established,

however, as the Commission correctly recognized, that such a "true" hearing before an administrative law judge is only necessary when material facts in dispute cannot be resolved on the basis of the written record. *See* Jurisdictional Order I at P4, n.5, Supp. App. 2; Jurisdictional Order II at P21 & n.37, App. 12-13; Compliance Order IV, App. 20. *See also, e.g.*, *Central Maine Power Co. v. FERC*, 252 F.3d at 46-47 (citing cases approving of hearings conducted by "affidavit and nothing more"); *California v. FERC*, 329 F.3d 700, 713 (9th Cir. 2003) (concluding that the Commission's "consideration of the petitioners' evidence and arguments in their motions to intervene and petitions for rehearing gave the petitioners all the procedural safeguards they were due under the Due Process Clause or the FPA"); *Sierra Ass'n for Environment v. FERC*, 744 F.2d 661, 663 (9th Cir. 1984) (finding that a "paper" hearing was sufficient when the proceeding was open to participation by all interested parties, and when the Commission considered and evaluated the written submissions).

Moreover, there was substantial evidence justifying the Commission's conclusion that Knott's allegations of witness bias were not "material" to the issues presented. The Commission's decision to ask Knott for stream flow records, and to initiate a compliance proceeding after none were provided, was prompted by letters from state agencies and conservation groups alleging extreme flow fluctuations below the Project – not from communications with "the agencies (the

USGS and the U.S. Environmental Protection Agency) or agency staff members that Knott accuses of harassing him." Compliance Order II, App. 4. *Cf. United States v. Knott*, 256 F.3d 20, 36 (1st Cir. 2001) (finding sufficient evidentiary basis to conclude that federal officials did not proceed out of malice or with any intent to harass or annoy Knott). Similarly, the Commission's decision to require a mandatory license from Knott was supported on the record by comments filed by federal and state officials, *see supra* page 11 (listing supporting intervenors), against whom Knott offers no allegation of bias.

In any event, as the Commission explained, its determinations "rest on the facts, to which any attendant motivations are irrelevant." Jurisdictional Order II at P21 n.37, App. 13 (citing decision in *FPL Energy Maine Hydro* affirming a finding of navigability on the basis of test canoe trips). *See also supra* page 21. Thus, the Commission reasonably concluded that the issues in the underlying proceedings turned not on what the facts are, but rather on what the facts mean under the circumstances, which can be fully litigated in a "paper" hearing. Jurisdictional Order I at P4 n.5, Supp. App. 2. *See, e.g., Pacific Gas and Electric Co. v. FERC*, 306 F.3d 1112, 1119 (D.C. Cir. 2002) (adjudication of legal and policy issues does not require an evidentiary hearing); *Louisiana Ass'n of Independent Producers v. FERC*, 958 F.2d 1101, 1115 n.5 (D.C. Cir. 1992) (no right to cross examination to "inquire into the agency's mental processes").

VI. THE COMMISSION DID NOT "TAKE" KNOTT'S PROPERTY RIGHTS BY ENFORCING COMPLIANCE WITH EXISTING LICENSE OBLIGATIONS

Knott argues that the Commission, by enforcing the terms of Knott's existing voluntary license and by finding that the Project is subject to the Commission's mandatory licensing authority, has unconstitutionally "taken" his deeded property rights. *See* Br. 2, 12, 40-44. [18] As the Commission explained, however, "Knott is misinformed." Jurisdictional Order I at P44, Supp. App. 23. The Compliance and Jurisdictional Orders did not impose new restrictions on Knott. Rather, they required compliance with the terms and conditions attached to a valid, existing license. Those terms and conditions, whether attached to a voluntary license or a mandatory license, have not changed.

All Knott may have lost is the ability, if any, to surrender the license before its expiration to avoid compliance. [19] Thus, the Commission has not "destroyed" Knott's property rights, Br. 41, deprived him "of any economically viable use" of his property, Br. 43, or forced him to "suffer a complete economic loss of his water diversion rights," Br. 44. Nor is this a case where "regulation goes too far." Br.

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[18] The state-deeded rights, by Knott's own admission, Br. 40, apply only "on non-navigable waterways," and thus are not applicable to the "navigable" Blackstone River.

[19] In light of its findings, the Commission had no reason to decide this issue. As the gage installation and flow measurement requirements of the 1987 License Order indicate, license conditions often are included to assure a licensee's compliance with other federal and state laws that may be implicated by a project's operation.

43. Rather, the Commission was "regulating" Knott prior to the challenged orders and continues to regulate Knott in the same manner after the challenged orders. [20]

The Supreme Court has explained that "[t]he Federal Government has domination over the water power inherent in the flowing [navigable] stream. . . . The flow of a navigable stream is in no sense private property." *Appalachian Electric Power Co.*, 311 U.S. at 424. In exchange for the right to operate a project under a Commission-issued license, the Commission may adopt and enforce license conditions that "may involve interference with the licensee's retention and exercise of water rights. . . ." *Portland General Electric Co. v. FPC*, 328 F.2d 165, 173 (9th Cir. 1964). *See* Jurisdictional Order II at P20, App. 12 (finding that license conditions are rationally related to the benefits conferred by issuance of the license).

Knott's response, that "[t]he Federal Power Act is not intended to interfere

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[20] This case is thus far removed from cases cited by Knott, *see* Br. 41-44, in which, for example, the government sought to physically remove and possess property subject to a lien (*Armstrong*) or compel the disclosure of commercially valuable trade secrets (*Phillip Morris*). Nor does Knott present, as he submits (at x) in support of oral argument, a takings argument that is a matter of first impression in this Court. *See, e.g., South County Sand & Gravel Co. v. Town of South Kingstown*, 160 F.3d 834, 839 (1st Cir. 1998) (holding that regulatory action will survive a "takings challenge as long as the means that it embodies are substantially related to a legitimate governmental purpose"); *United States of America v. Rivera Torres*, 826 F.2d 151, 157 (1st Cir. 1987) (recognizing that "a requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense") (quoting and citing cases).

with the laws of the respective states relating" to water rights, Br. 40-41, has no legal support. The comprehensive delegation of licensing authority to the Commission under the FPA, as well as under other federal statutory schemes (*e.g.*, environmental protection laws), necessarily includes the authority to condition the license in ways that may upset the conveyance of water rights under state law. As explained in *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152, 180 (1946), Congress intended to enact in the FPA "a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of . . . federal laws previously enacted." *See also, e.g.*, *Wisconsin Power & Light Co. v. FERC*, 363 F.3d 453 (D.C. Cir. 2004) (examining Commission's obligation under the FPA to include in the license conditions for fish passage directed by the Secretary of the Interior); *Coalition for the Fair and Equitable Regulation of Docks v. FERC*, 297 F.3d 771, 778 (8th Cir. 2002) (noting that limitations on the Commission's ability to enforce compliance with license terms, as they affect licensees and non-licensees, "would deprive FERC of the power to effectuate the goals it was directed to accomplish and would negate the broad grants of power and discretion in the [FPA]").

CONCLUSION

For the reasons stated, the Commission submits that the challenged orders are reasonable, well-explained, and supported by substantial evidence, and, accordingly, should be upheld in all respects.

Respectfully submitted,

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