ORAL ARGUMENT IS SCHEDULED FOR JANUARY 14, 2010

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

No. 08-1373

JAMES LICHOULAS, JR.,
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

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OCTOBER 8, 2009
FINAL BRIEF: NOVEMBER 12, 2009

CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

To counsel's knowledge, the parties and intervenors before this Court and before the Federal Energy Regulatory Commission in the underlying docket are as stated in the Brief of Petitioner. In addition, the following individuals filed comments in the Commission proceeding: John Werner, Michael Rodman, David Wright, Christiaan Beeuwkes, James T. Lichoulas III, Kenneth Smith, and Luke McInnis.

B. Rulings Under Review

1. Order Terminating License By Implied Surrender, *James Lichoulas Jr.*, FERC Docket No. P-9300, 124 FERC ¶ 61,255 (Sept. 18, 2008) ("Termination Order"), R. 118, JA 642; and

2. Order Denying Rehearing, *James Lichoulas, Jr.*, FERC Docket No. P-9300, 125 FERC ¶ 61,195 (Nov. 20, 2008) ("Rehearing Order"), R. 123, JA 695.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel is not aware of any other related cases pending before this or any other court. As discussed herein, however, the Petitioner's separate litigation against the City of Lowell, challenging the City's exercise of eminent domain to acquire

property that includes the hydroelectric project that is the subject of this case, was dismissed by both federal and state courts; the state court action is currently on appeal. *Lichoulas v. City of Lowell*, No. 07-10725-RWZ (D. Mass. Mar. 31, 2008), *aff'd*, 555 F.3d 10 (1st Cir. 2009); *Lichoulas v. City of Lowell*, No. 09 MISC 396099, 2009 Mass. LCR Lexis 73 (Mass. Land Ct. June 11, 2009), *appeal docketed*, No. 2009-P-1448 (Mass. App. Ct. July 23, 2009).

s/ Carol J. Banta
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GLOSSARY

Commission or FERC	Federal Energy Regulatory Commission
FERC Orders	Collectively, the Termination Order and Rehearing Order
FPA	Federal Power Act
L.Br.	Initial Brief of Petitioner James Lichoulas, Jr.
Project	Appleton Trust Project (FERC License No. P-9300)
Rehearing Order	Order Denying Rehearing, *James Lichoulas, Jr.*, 125 FERC ¶ 61,195 (Nov. 20, 2008), R. 123, JA 695
Termination Order	Order Terminating License By Implied Surrender, *James Lichoulas Jr.*, 124 FERC ¶ 61,255 (Sept. 18, 2008), R. 118, JA 642

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

1. Whether, assuming jurisdiction, the Federal Energy Regulatory Commission ("Commission" or "FERC") reasonably terminated by implied surrender a license for a hydroelectric project, where the project had not operated regularly in nearly 14 years and the licensee had repeatedly disregarded Commission inquiries and failed to make repairs necessary to resume operation.

2. Whether, assuming jurisdiction, the Commission properly disclosed procedural inquiries by a Member of Congress.

COUNTERSTATEMENT OF JURISDICTION

The Court lacks jurisdiction to review the challenged FERC orders. In addition to satisfying the requirements of Section 313(b) of the Federal Power Act ("FPA"), 16 U.S.C. § 825*l*(b), for judicial review of FERC rulings, Petitioner James Lichoulas, Jr. must satisfy the requirements of Article III of the United States Constitution. As set forth more fully in Part I of the Argument, *infra*, Mr. Lichoulas has not established a basis for standing because his claimed injury would not likely be redressed by a favorable decision, as relief depends on actions of a third party. Even if Mr. Lichoulas were to regain the license, he could not resume operation because the City of Lowell, Massachusetts has taken the project property by eminent domain. In addition, Mr. Lichoulas has failed to meet the statutory prerequisites under FPA § 313(b) because, as set forth more fully in Part III.B of the Argument, *infra*, he did not seek rehearing of the Commission's decision regarding the treatment of certain communications.

STATUTORY AND REGULATORY PROVISIONS

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

INTRODUCTION

The pertinent record in this case covers nearly 14 years beginning in late 1994, when the licensed hydroelectric project ceased regular operation, never to resume. This appeal concerns the Commission's decision to terminate the license

for that long-defunct hydroelectric project by deeming the licensee to have abandoned good faith operation of the project. For over a decade, Mr. Lichoulas disregarded the Commission's repeated demands for a plan to repair and restore the Project to operation and its warnings that failure to resume operation violated the license; when he did respond, he proposed numerous repair schedules that were never carried out. After a decade of fruitless efforts to require Mr. Lichoulas's compliance, and after the Project property had been taken by eminent domain for a municipal redevelopment plan, the Commission finally terminated the license based on implied surrender. *James Lichoulas Jr.*, 124 FERC ¶ 61,255 ("Termination Order"), R. 118, JA 642, *reh'g denied*, 125 FERC ¶ 61,195 (2008) ("Rehearing Order"), R. 123, JA 695.[1]

STATEMENT OF FACTS

I. Statutory And Regulatory Background

Under the Federal Power Act, the Commission is authorized to issue licenses for the construction, operation, and maintenance of hydroelectric projects on jurisdictional waters. FPA § 4(e), 16 U.S.C. § 797(e). A license "shall be conditioned upon acceptance by the licensee of all the terms and conditions of this chapter and such further conditions, if any, as the Commission shall

[1] "R." refers to a record item. "JA" refers to the Joint Appendix page number. "P" refers to the internal paragraph number within a FERC order.

prescribe . . . ." FPA § 6, 16 U.S.C. § 799. Among those conditions are the licensee's obligations to "maintain the project works in a condition of repair adequate for . . . efficient operation" and to "make all necessary renewals and replacements" for that purpose. FPA § 10(c), 16 U.S.C. § 803(c).

A license "may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter and may be altered or surrendered only upon mutual agreement between the licensee and the Commission . . . ." FPA § 6, 16 U.S.C. § 799. The Commission also has enforcement authority in connection with licenses; under FPA § 31(a), the Commission can monitor, investigate, and require compliance with license conditions. 16 U.S.C. § 823b(a).

The Commission's regulations specify the process for terminating a license, requiring 90 days notice to the licensee. 18 C.F.R. § 6.3. The regulations further provide for the Commission to terminate a license involuntarily, based on implied surrender:

> If any licensee holding a license subject to the provisions of section 10(i) of the Act[2] shall cause or suffer essential project property to be removed or destroyed, or become unfit for use, without replacement, or shall abandon, or shall discontinue good faith operation of the project for a period of three years, the Commission will deem it to be

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[2] FPA § 10(i), 16 U.S.C. § 803(i), governs licenses for minor projects (under 2000 horsepower installed capacity), such as the one at issue here. *See James Lichoulas*, 36 FERC ¶ 62,047, at 63,134 (1986) (noting that authorized installed capacity was 460 horsepower).

> the intent of the licensee to surrender the license; and not less than 90 days after public notice may in its discretion terminate the license.

18 C.F.R. § 6.4.

II. The Commission Proceedings And Orders

A. Background: Appleton Trust Project

The Appleton Trust Project (the "Project") was a small, 346-kilowatt hydroelectric project located in the basement of a former mill building in Lowell, Massachusetts, using an intake from one canal to generate power from the flow to a lower canal. Termination Order at PP 1-4, JA 642-43. The Commission issued the license for the Project in 1986. *James Lichoulas*, 36 FERC ¶ 62,047 (1986). The Project was not operated regularly after November 1994. Termination Order at P 6, JA 643.

1. 1996-2004: The Commission's Efforts to Require the Licensee to Resume Project Operations

Because the Commission based its finding of implied surrender on the protracted efforts of Commission Staff to require Mr. Lichoulas to complete necessary repairs and resume Project operation, as required by the terms and conditions of the license (*see* Termination Order at PP 6-12, 20-21, JA 643-44, 647-48; Rehearing Order at PP 4-5 & n.5, 8, 11, 14-15 & n.19, JA 696-97, 698, 699-700), we provide a brief chronology of those efforts as documented in the record.

a. 1996

As previously noted, the Project ceased regular operation in November 1994. On May 9, 1996, Commission Staff[3] conducted an operation inspection of the Project and confirmed that no generation had occurred at the site since January 6, 1996. *See* March 1997 FERC Letter, R. 44, JA 41. Mr. Lichoulas told Commission Staff that no commercial power from the Project had been sold since November 15, 1994, and that repairs to damaged equipment would begin in September 1996. *See id.* (referencing June 1996 letter from Mr. Lichoulas to FERC).

b. 1997

In February 1997, Mr. Lichoulas confirmed to Commission Staff that the Project remained inactive. *See id.* (referencing February 27, 1997 telephone conversation). In its March 1997 letter to Mr. Lichoulas, Commission Staff noted that Article 4 of the license required notice to the Commission of any change in project operations, construction, and maintenance; accordingly, Commission Staff

[3] Where this Brief distinguishes between actions of FERC Staff and actions of the Commission, it does so only for clarity. FERC Staff acts on behalf of the Commission pursuant to delegated authority, and the legitimacy of that authority is not challenged in this appeal. *See generally* 18 C.F.R. §§ 375.301, 375.308 (Delegation to the Director of the Office of Energy Projects); *Rockies Express Pipeline, LLC*, 128 FERC ¶ 61,045 at P 21 (2009).

requested that Mr. Lichoulas advise it of his "plans regarding the future operation" of the Project, and do so by May 15, 1997. *Id.*

In June 1997, a fire damaged buildings adjacent to the Project, leading to selective demolition of other portions of Mr. Lichoulas's property. *See* L.Br. 5, 10; Rehearing Order at PP 8, 13-15, JA 697, 699-700; Termination Order at P 19 & n.14, JA 647.

Several months after the fire, and over six months after Commission Staff requested notice of his plans, Mr. Lichoulas notified Commission Staff of an "approximate repair schedule" for the Project, which would require 20 weekends and be completed by the end of March 1998. September 1997 Lichoulas Letter, R. 45, JA 42. He noted that he had not yet secured a power sale contract, but would "be in a much better situation to do so" once the Project was back in operation; until then, he would use the power himself "and/or also sell to Massachusetts Electric . . . ." *Id.* He promised to notify Commission Staff "as soon as I am up and running." *Id.*

c. 1998

In March 1998, however, Mr. Lichoulas advised Commission Staff that he had "made some progress with the repairs" but had decided to "replace a section of the shaft[,] which is my next project for the summer of 1998." March 1998 Lichoulas Letter, R. 47, JA 44. He reported that he "plan[ned] to go on-line in the

summer of 1998, and will sell to the local utility . . . ." *Id.*; *see also* Termination Order at P 6, JA 643.

d. 1999

Nearly a year later, having received no update from Mr. Lichoulas, Commission Staff again requested that he notify the Commission of his plans for future operation of the Project: "If you intend to continue project operation, your response should include a list of repair work remaining along with an estimated time frame for completion." March 1999 FERC Letter, R. 46, JA 43. Commission Staff requested a response "no later than April 16, 1999." *Id.*; *see also* Termination Order at P 7, JA 643.

Mr. Lichoulas did not answer. Therefore, Commission Staff sent another letter on July 8, 1999. Because the Project had not operated since November 1994 and Mr. Lichoulas had not submitted the plan requested in Commission Staff's March 1999 letter, Commission Staff found "uncertainty as to whether you will resume operation of the project in the near future, if at all." July 1999 FERC Letter, R. 48, JA 45; Termination Order at P 7, JA 643. Staff further explained that failure to operate the Project was a violation of the terms and conditions of Mr. Lichoulas's license. July 1999 FERC Letter, R. 48, JA 45. Staff thus directed Mr. Lichoulas to submit, within 45 days (by late August 1999), either a plan and

schedule for resuming operation or a petition for voluntary surrender of the license. *Id.*

Mr. Lichoulas responded late, in September 1999, apologizing for the tardy filing and listing the necessary repairs and timeframe for each item. September 1999 Lichoulas Letter, R. 50, JA 47-48. He reported that the total time needed for repairs "is in the order of 120 days or four months," expected to begin in mid-October. "Assuming there are no unforeseen problems, we are looking at a startup in late February to early March [2000]." *Id.* at 2, JA 48; Termination Order at P 7, JA 643. Commission Staff approved the plan and schedule, and directed Mr. Lichoulas to contact it "to coordinate the resumption of project operations." October 1999 FERC Letter, R. 51, JA 49.

Project operations did not resume. Termination Order at P 7, JA 643.

e. 2002

Commission Staff inspected the Project on July 24, 2002. *Id.* at P 8, JA 643. A section of the powerhouse roof had caved in and debris had accumulated within the powerhouse area, reportedly as a result of a recent storm. *Id.* The Project was not generating power at the time of the inspection; Mr. Lichoulas's representative told Commission Staff that the project had recently generated power briefly, but that operation had been halted due to vibration within the generator unit. *Id.*

One week after the inspection, Commission Staff followed up with a letter directing Mr. Lichoulas to submit, within 10 days, a plan and schedule for roof repairs and resolution of the vibration problem. July 2002 FERC Letter, R. 53, JA 50; Termination Order at P 9, JA 643. Mr. Lichoulas eventually responded, over a month later, with a progress report that indicated that the site of the Project would be cleared and made safe by November 2002, with operations expected to resume by March 2003. *See id.* & n.4 (citing March 2003 FERC Letter, R. 55, JA 52, which referenced September 2002 progress report), JA 643.

f. 2003

In March 2003, however, Mr. Lichoulas advised Commission Staff by telephone that the generation unit had been repaired but would not be operated until demolition and repairs to the powerhouse were completed in May 2003. *See* March 2003 FERC Letter (describing conversation), JA 52. Commission Staff again followed up with a letter warning that "failure to operate the project is a violation of the terms and conditions of your license." *Id.* Staff directed Mr. Lichoulas to resume operation by May 30, 2003 and to provide a status report by June 15, 2003. *Id.*

Yet again, Mr. Lichoulas failed to file the required report and did not resume Project operations. Termination Order at P 9, JA 644. Accordingly, Commission

Staff formally notified Mr. Lichoulas that he was in violation of the Federal Power Act and subject to civil penalties or revocation of the license:

> . . . Our records indicate that you have not complied with the March 17, 2003 letter.
>
> Section 10 of the Federal Power Act (Act) lists conditions for all licensees issued under Part I of the Act. Section 10(c) is pertinent here as it requires that the licensee maintain the project works in a condition of repair adequate for the efficient operation of project works and make all necessary renewals and replacements.
>
> Because the project is in disrepair and has not generated power regularly since November 1994, *you are in violation of section 10(c) and subject to the civil penalty provisions of section 31(a) of the Act*.
>
> *Your efforts to bring yourself back into compliance in a timely manner may be a factor in determining future Commission action.* Therefore, you are directed to file a plan and schedule for the resumption of project operations *within 21 days* from the date of this letter. . . .
>
> This letter constitutes notice under Section 31(a) of the Federal Power Act. Under Section 31, the Commission is authorized to assess you civil penalties up to a maximum of $11,000 per day, per violation, for failure to comply with the terms and conditions of your license. In the alternative, *the Commission may revoke your license or take other enforcement actions*. Therefore, we strongly urge you to comply with your license and this letter immediately. . . .

Letter Order (Sept. 5, 2003) (emphases added), R. 57, JA 53-54; *see supra* p. 4 (discussing FPA §§ 10(c) and 31(a)).

Mr. Lichoulas still did not respond. Termination Order at P 10, JA 644.

g. 2004

Months later, in March 2004, in a telephone conversation with Commission Staff, Mr. Lichoulas once again stated that he would submit a plan to resume operations — this time, by March 26, 2004 — but, again, Commission Staff received no such filing, and telephone messages left with Mr. Lichoulas's office were not returned. *See* September 2004 FERC Letter at 1, R. 58, JA 56.

In September 2004, a year after the Letter Order giving formal notice of the FPA violation and six months after Mr. Lichoulas's latest failure to provide a restoration plan as promised, Commission Staff notified Mr. Lichoulas that it considered the Project to be abandoned:

> Since you have not made the necessary repairs to your project to resume operations and the project has not operated regularly since November 1994, pursuant to standard article 16 of your license and section 6.4 of the Commission's regulations [18 C.F.R. § 6.4], *we consider the project to be abandoned and that it is your intent to surrender your license. Thus, the Commission may terminate your license under an implied surrender proceeding.* However, you have an opportunity to voluntarily surrender your license.
>
> If you do not intend to return your project to operating condition, you should submit an application for the surrender of your license. . . .

September 2004 FERC Letter at 1 (emphasis added), JA 56; *see also* Termination Order at P 11, JA 644. Commission Staff suggested that Mr. Lichoulas submit an application for surrender within 90 days. September 2004 FERC Letter at 2, JA 57.

Mr. Lichoulas finally responded in December 2004, apologizing for "my lack of proper response regarding the status of my project . . . ." December 2004 Lichoulas Letter, R. 59, JA 58. Rather than submit a surrender application, Mr. Lichoulas stated that "the necessary planning is underway" for the necessary repairs, and again promised to provide a plan and schedule:

> It is my plan to understand and develop a full scope of work by early March 2005. I will forward an outline of the scope with a full timeline projection to the Federal Energy Regulatory Commission.
>
> I am ready to go forward with the project and do not foresee any additional delay.

Id.

Notwithstanding his claimed commitment to proceed, "Mr. Lichoulas never submitted this information." Termination Order at P 12, JA 644-45. The record reflects no further communications from Mr. Lichoulas until April 2007, after the Commission initiated the termination proceeding.

2. 2006: City's Acquisition of the Project by Eminent Domain

On July 26, 2006, the City of Lowell ("City") notified the Commission that, through eminent domain, it had acquired the land on which the Project is located on April 25, 2006. Termination Order at P 13 (citing letter filed by City, R. 61, JA 60), JA 645. The City explained that the property was part of a 15-acre site being marketed to developers for a major mixed-use project. *Id.* Mr. Lichoulas did not file a response to the City's filing. *Id.*

Mr. Lichoulas eventually challenged the City's acquisition of the Project and surrounding property in federal and state court actions separate from the FERC proceeding or this appeal. A federal district court dismissed his complaint and was affirmed by the U.S. Court of Appeals for the First Circuit in a published opinion. *Lichoulas v. City of Lowell*, No. 07-10725-RWZ (D. Mass. Mar. 31, 2008), *aff'd*, 555 F.3d 10, 13 (1st Cir. 2009) ("This is not a case where the taking had any effect on the ongoing production of power or where FERC has evidenced any concern. Lichoulas is simply seeking to have the federal court derail a state takings proceeding . . . ."). A subsequent challenge in state court also was dismissed; Mr. Lichoulas's appeal is pending. *Lichoulas v. City of Lowell*, No. 09 MISC 396099, 2009 Mass. LCR Lexis 73 (Mass. Land Ct. June 11, 2009), *appeal docketed*, No. 2009-P-1448 (Mass. App. Ct. July 23, 2009). *Cf.* L.Br. 6-7 & n.15, 12-13 & nn.30-31.

B. 2007-2009: License Termination Proceeding

1. Termination Notice And Proceeding

On March 21, 1997, the Commission issued a Notice of Termination of License by Implied Surrender ("Termination Notice"), which initiated a proceeding to terminate the Project license pursuant to 18 C.F.R. § 6.4. R. 63, JA 61; *see* Termination Order at P 14, JA 645. The Termination Notice briefly recounted Commission Staff's March 2003 directive to Mr. Lichoulas to resume

operation; the September 2004 letter deeming the Project abandoned and warning Mr. Lichoulas that the Commission could terminate the license; and Mr. Lichoulas's failure to file the repair plan that he had promised in his December 2004 letter. Termination Notice at 2, JA 62. Mr. Lichoulas filed a protest to the Termination Notice in April 2007 and a supplement in October 2007 opposing termination of the license. *See id.*; R. 64 (Protest), JA 64; R. 71 (Supplement), JA 242.

Commission Staff issued an Environmental Assessment in February 2008 that evaluated the environmental impacts of the proposed surrender. R. 77. Mr. Lichoulas and others filed comments and related filings in March through May 2008. R. 79-83, 85-109. Mr. Lichoulas objected to Staff's recommendation that the Commission accept the surrender. R. 79, JA 548; R. 86, JA 605.

During the course of the FERC proceeding, the Commission received several procedural inquiries from Congresswoman Niki Tsongas, who represents the district in which the Project was located. *See* R. 78 (procedural inquiry from Rep. Tsongas, received Mar. 17, 2008), JA 547; R. 84 (FERC response on Mar. 27, 2008), JA 604; R. 114 (procedural inquiry from Rep. Tsongas, received Aug. 4, 2008), JA 624; R. 115 (FERC response on Aug. 18, 2008), JA 625. On August 6, 2008, the Commission's Acting Director of External Affairs received a telephone call from Congresswoman Tsongas. Rehearing Order at P 21, JA 703. The

Congresswoman requested an update on the status of the FERC proceeding, which the Acting Director provided, and stated that her office would send additional information. *Id.* That information was an e-mail to the Acting Director with an attached memorandum, which was placed in the Commission's non-decisional public record. *Id.*; R. 116, JA 626.[4] A staff member in the FERC Office of External Affairs received a further e-mail from the Congresswoman's staff on August 18, 2008, asking for information about the status of the proceeding, which the Office of External Affairs provided. Rehearing Order at P 21, JA 703.

2. Termination Order

On September 18, 2008, the Commission issued its Order Terminating License By Implied Surrender, *James Lichoulas Jr.*, 124 FERC ¶ 61,255 (2008), R. 118, JA 642. The Commission invoked its authority under the terms of the license, which provided:

> If the Licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without adequate replacement, or shall abandon or discontinue good faith operation of the project or refuse or neglect to comply with the terms o[f] the license and the lawful orders of the Commission . . . , the Commission will deem it to be the intent of the Licensee to surrender the

[4] Though the memorandum, which was addressed to Congresswoman Tsongas from a member of her staff, suggested that the Congresswoman place a telephone call to the FERC Office of External Affairs "to put pressure on the Commission" to issue a termination order, or to update the timetable for issuing such an order, the Office received no other phone call. Rehearing Order at P 21 n.26, JA 703.

> license. . . . [T]he Commission in its discretion, after notice and opportunity for hearing, may also agree to the surrender of the license when the Commission, for the reasons recited herein, deems it to be the intent of the Licensee to surrender the license.

Standard Article 16, *quoted in* Termination Order at P 18, JA 646. The Commission's regulations provide for involuntary termination of a license based on implied surrender if a licensee abandons its project for a three-year period. Termination Order at P 18 (citing 18 C.F.R. § 6.4), JA 646; *see supra* pp. 4-5.

The Commission considered Mr. Lichoulas's claims that he had diligently pursued the rehabilitation of the Project, but concluded that his "renewed interest in the project is too little, too late." Termination Order at P 20, JA 647. The project had not operated for almost 14 years and "needs major repairs and a power sales contract to resume operation." *Id.* Commission Staff had tried to work with Mr. Lichoulas for over 10 years: "Again and again, the licensee either failed to respond or responded by providing schedules for fixing the project that were never met." *Id.*; *see also id.* at PP 6-12 (recounting Staff's communications with Mr. Lichoulas), JA 643-45. He also neglected to keep the Commission informed of the Project's status, "only responding when required to do so." *Id.* at P 20, JA 647.

Moreover, the Commission found "no evidence that the project is any closer to being able to resume operation than it was 14 years ago." *Id.* at P 21, JA 647. Indeed, the City's acquisition of the property by eminent domain "makes any possibility of repairing the project and resuming operations even less likely." *Id.*

(The Commission noted that it was not clear why Mr. Lichoulas did not challenge the City's action in court for almost a year, until after the Commission issued the Termination Notice. *Id.* n.17, JA ___.) Of course, the taking itself, in 2006, occurred "long after Commission staff notified the licensee that it considered the licensee to have abandoned good faith operation of the project[5] and long after the licensee stopped communicating with Commission staff.[6]" *Id.* at P 21, JA 647-48.

Finally, the Commission rejected Mr. Lichoulas's request for a trial-type, evidentiary hearing, finding that Article 16 of the license can be satisfied by a paper hearing and that Mr. Lichoulas had "not identified any issues of material fact that cannot be adequately resolved based upon the [paper] record . . . ." *Id.* at P 24, JA 649.

3. Rehearing Order

Mr. Lichoulas filed a timely request for rehearing. R. 119, JA 651. In addition, on November 19, 2008, he filed a motion to reopen the record and to hold

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5 *See* September 2004 FERC Letter at 1, JA 56, *quoted at supra* p. 12; *see also supra* pp. 8, 10, 11 (describing July 1999, March 2003, and September 2003 letters from Commission Staff warning Mr. Lichoulas about failure to operate the Project).

6 *See supra* p. 13 (noting absence of communication after December 2004).

the proceeding in abeyance, based on an agreement reached with the City. R. 121, JA 684.

On November 20, 2008, the Commission issued its Order Denying Rehearing, *James Lichoulas, Jr.*, 125 FERC ¶ 61,195 (2008), R. 123, JA 695. The Commission denied the motion to reopen the record, concluding that the potential settlement of the takings litigation "does not overcome Mr. Lichoulas'[s] longstanding inaction and lack of compliance with Commission orders: it does not go to the heart of this case . . . ." *Id.* at P 11, JA 698-99. The Commission then reaffirmed its determination that Mr. Lichoulas's years of inaction, together with his disregard of Commission directives and failure to meet any of his own repair proposals, had shown intent to abandon the project, consistent with the applicable standard and precedents. *Id.* at PP 14-15 & n.19, JA 699-700. The Commission found that neither Mr. Lichoulas's account of past impediments to restoring operation nor his renewed interest in doing so outweighed that 14-year record. *Id.* at PP 14-15, JA 699-700. The Commission also reaffirmed that no genuine factual dispute existed to warrant an evidentiary hearing; rather, Mr. Lichoulas disputed the interpretation of the record evidence. *Id.* at P 16-17, JA 701.

Finally, the Commission addressed, in the first instance, Mr. Lichoulas's arguments regarding the communications between Congresswoman Tsongas and the Commission's Office of External Affairs. The Commission explained that all

such contacts had been procedural, regarding the status of the proceeding, and denied that the communications, which were filed in the non-decisional public record, had influenced the Commission's decisionmaking. *Id.* at P 21, JA 703.

This petition followed.

SUMMARY OF ARGUMENT

The Commission reasonably determined that Mr. Lichoulas's failure to operate the Project for over a decade constituted implied surrender of the license.

First, as to jurisdiction, Mr. Lichoulas lacks Article III standing because his claimed injury would not likely be redressed by a favorable decision. Even if Mr. Lichoulas regained the license, his ability to resume operation would depend on the actions of a third party not before the Court: the City, which acquired the property that includes the Project by eminent domain, and which Mr. Lichoulas has offered no reason to believe would return the property or otherwise allow him access to the Project.

On the merits, the Commission's findings are well-supported by the record. The Project had not operated regularly since November 1994, and would have required extensive repairs to resume operation. Moreover, for more than a decade before the termination, Mr. Lichoulas frustrated the Commission's efforts to monitor and enforce compliance, either ignoring its inquiries completely or proposing repair plans that he never carried out.

The Commission's decision to terminate the license was consistent with its regulations and precedents and the terms of the license and was a reasonable exercise of its discretion on these particular facts. Based on the Project's extended dormancy and Mr. Lichoulas's history of flouting the Commission's enforcement authority, the Commission reasonably concluded that Mr. Lichoulas had abandoned good faith operation of the Project and that it was in the public interest to terminate the license by implied surrender.

The Commission's long-forewarned decision to terminate the license was not influenced by a few procedural inquiries from a Member of Congress, which the Commission properly disclosed in accordance with its regulations concerning *ex parte* contacts.

ARGUMENT

I. PETITIONER HAS NOT ESTABLISHED ARTICLE III STANDING

To obtain judicial review of a FERC order, a party must meet the requirements of Article III standing. *See, e.g., Pub. Util. Dist. No. 1 of Snohomish County v. FERC*, 272 F.3d 607, 613 (D.C. Cir. 2001) (party is not "aggrieved" within the meaning of FPA § 313(b), 16 U.S.C. § 825*l*(b), unless it can establish constitutional and prudential standing). The "irreducible constitutional minimum" for standing requires the petitioner to have suffered (1) an "injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical," (2) that has a "causal connection" with the challenged agency action, and (3) that "likely . . . will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations and quotation marks omitted); *see also, e.g., Bennett v. Spear*, 520 U.S. 154, 162 (1997).

Mr. Lichoulas's appeal fails the redressability requirement. In a case "in which relief for the petitioner depends on actions by a third party not before the court, the petitioner must demonstrate that a favorable decision would create 'a significant increase in the likelihood that the [petitioner] would obtain relief that directly redresses the injury suffered.'" *Klamath Water Users Ass'n v. FERC*, 534 F.3d 735, 739 (D.C. Cir. 2008) (citations omitted); *see also id.* at 740 ("[T]he

burden of establishing redressability falls upon the petitioner."). Mr. Lichoulas cannot make that showing because, even by his own account (*see* L.Br. 6, 12-13), he has already, separately, lost ownership of and access to the Project itself.

Even before the Commission issued the Termination Notice in March 2007, the City had already acquired the property that includes the Project. While Mr. Lichoulas has challenged the City's exercise of eminent domain in both federal and state courts — so far without success, though a state court appeal remains pending — the City retains the property (or, indeed, may already have transferred the property to a third party in connection with the planned development[7]). Both federal and state courts denied Mr. Lichoulas's motions for *lis pendens* (notice securing a plaintiff's claim to title to property pending the outcome of litigation, *see* Mass. Gen. Laws ch. 184, § 15), which might have prevented the City from disposing of the property pending resolution of the eminent domain litigation. *See Lichoulas*, No. 07-10725-RWZ (D. Mass. July 8, 2008), *aff'd*, 555 F.3d 10, 14 (1st Cir. 2009); *Lichoulas*, 2009 Mass. LCR Lexis 73 at **9. The state court noted that

[7] Mr. Lichoulas asserted, in a recently-filed brief before the Massachusetts Appeals Court, that the City transferred title to a portion of the property to a developer for the downtown revitalization project after the Massachusetts Land Court denied the motion for *lis pendens* in June 2009, and that the developer was expected to begin demolition and other construction work shortly. Brief of the Appellant at 19-20, 36, *Lichoulas v. City of Lowell*, No. 2009-P-1448 (Mass. App. Ct. filed Sept. 1, 2009).

any remedy under state law would be in the form of money damages, rather than invalidation of the taking. *See id.* at **8. Accordingly, even if the Commission were to hold an evidentiary hearing and Mr. Lichoulas were successfully to refute the implied surrender, Mr. Lichoulas still could not make the necessary repairs and resume operation of the Project.

This Court's holding in *Klamath* is instructive. In that case, petitioners challenged the Commission's decision not to include the terms of an expiring power contract in an annual hydroelectric license. The petitioners' claimed injury was the loss of favorable retail rates contained in the contract; state regulators, however, had already decided to set new retail rates. 534 F.3d at 738. Indeed, the state regulators had recognized, at the time of their rate decisions, that the Commission might extend the contract. *Id.* at 740. Accordingly, this Court found that the petitioners had offered no reason to believe that reversal of the Commission's decision would cause the state regulators to readopt the expired contract rates. *Id.* Likewise, Mr. Lichoulas has offered no reason to believe that reversal of the license termination would cause the City to return the Project property to him or otherwise to allow him access to repair and operate the Project.

It appears that Mr. Lichoulas, in the eminent domain litigation, unsuccessfully relied on the existence of the now-terminated FERC license to argue that the City's taking was precluded by FPA § 14(a), 16 U.S.C. § 807(a)

(concerning government takeovers of projects by condemnation). *See Lichoulas*, 555 F.3d at 12. If Mr. Lichoulas's object in the current appeal from the FERC Orders is to reinstate the license for the purpose of reviving that argument in his suit against the City — even assuming such an indirect litigation interest to be sufficient[8] — he bore the obligation to justify his claim of standing to this Court. *See Sierra Club v. EPA*, 292 F.3d 895, 900-01 (D.C. Cir. 2002); D.C. Cir. Rule 28(a)(7). His opening brief, however, failed to explain his continued interest in a license for a damaged and long-defunct hydropower project.

II. THE COMMISSION REASONABLY FOUND IMPLIED SURRENDER OF THE LICENSE

A. Standard Of Review

The Court reviews hydroelectric licensing decisions to determine whether they are "arbitrary and capricious" and whether the underlying factual findings are supported by substantial evidence. *Rhinelander Paper Co. v. FERC*, 405 F.3d 1, 4 (D.C. Cir. 2005); *N. Carolina v. FERC*, 112 F.3d 1175, 1189 (D.C. Cir. 1997). "In both cases, the review is quite deferential." *Id.*; *Brady v. FERC*, 416 F.3d 1, 5 (D.C. Cir. 2005) ("In both regards, the scope of our review is quite limited"). A petitioner "bears a heavy burden" as "[t]he court may not substitute its judgment

[8] *But see, e.g.*, *Fulani v. Brady*, 935 F.2d 1324, 1330-31 (D.C. Cir. 1991) (denying standing where purpose of appeal of agency action was to gain leverage as to third party).

for that of the [agency], and must consider only 'whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . .'" *Wis. Power & Light Co. v. FERC*, 363 F.3d 453, 461 (D.C. Cir. 2004) (citation omitted); *see also Keating v. FERC*, 569 F.3d 427 (D.C. Cir. 2009) ("FERC has wide discretion to determine where to draw administrative lines," which the Court is "generally unwilling to review . . . unless a petitioner can demonstrate that lines drawn . . . are patently unreasonable") (internal quotation marks and citation omitted).

This Court also gives substantial deference to the Commission's interpretation of its own regulations and precedents. *See NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007); *Amerada Hess Pipeline Corp. v. FERC*, 117 F.3d 596, 600 (D.C. Cir. 1997).

The Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825*l*(b). The substantial evidence standard "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002). The Court reviews the Commission's denial of an evidentiary hearing for abuse of discretion. *Cajun Elec. Power Coop., Inc. v. FERC*, 28 F.3d 173, 177 (D.C. Cir. 1994).

B. The Commission Reasonably Terminated The License By Implied Surrender

1. Ample Record Evidence Supported The Commission's Finding Of Implied Surrender

The Commission's finding of deemed abandonment, and thus implied surrender, was well-founded, as the chronological account of Commission Staff's dealings with Mr. Lichoulas demonstrates. *See supra* pp. 5-13. The record shows that, from 1996 through 2004, the Commission's repeated inquiries and warnings were met with silence, with assurances that plans for repairs would be forthcoming, or with repair schedules that were never completed. Mr. Lichoulas protests that he ignored only one-third of the Commission's inquiries (L.Br. 37), but even that count overstates his compliance.[9] Furthermore, as the Commission noted, Mr. Lichoulas responded, if at all, "only . . . when required to do so." Termination Order at P 20, JA 647; *see also* Rehearing Order at P 11 (citing Mr.

[9] Mr. Lichoulas accurately counts three inquiries to which he entirely failed to respond, in March 1999, March 2003, and September 2003, notwithstanding the Commission's express directives to respond by specified dates. As set forth in detail at *supra* pp. 7-10, Mr. Lichoulas also answered three inquiries after the Commission's deadlines, in September 1997, September 1999, and September 2002. The record shows only one timely response (in a sense), when the Commission in September 2004 requested that he submit an application to surrender the license within 90 days, and he instead submitted a letter explaining that he intended to make repairs and "would forward an outline of the scope with a full timeline projection" — then never did so. December 2004 Lichoulas Letter, JA 58.

Lichoulas's "longstanding inaction and lack of compliance with Commission orders"), JA 698.

Nearly ten years after the Project ceased regular operation, and following eight years of urging compliance to no avail, the Commission notified Mr. Lichoulas that it considered the project to be abandoned and asked him to surrender the license voluntarily. September 2004 FERC Letter at 1, JA 56. Over two years later, after Mr. Lichoulas had yet again failed to offer any plan to resume operation and almost one year after the City had acquired the property by eminent domain, the Commission issued the Termination Notice.

Mr. Lichoulas now insists that he "very much wishes to retain the Project, and is fully capable of returning it to operation . . . ." L.Br. 36; *see also* L.Br. 40, 42. The Commission, having received similar assurances in the past — including repair schedules proposed in June 1996, September 1997, March 1998, September 1999, September 2002, and (by telephone) March 2003, and promises in March and December 2004 to submit additional plans — reasonably found his "renewed interest in the project" (*circa* 2007) to be "too little, too late." Termination Order at P 20, JA 647; *see also id.* ("Again and again, the licensee either failed to respond or responded by providing schedules for fixing the project that were never met."); Rehearing Order at P 14 n.19 (noting "the numerous exchanges of letters between Commission staff requiring scheduling of project restoration and Mr. Lichoulas'[s]

responding with numerous restoration schedules, none of which [was] ever attempted, much less met"), JA 700.

Finally, the Commission found "there is no evidence that the project is any closer to being able to resume operation than it was [in 1994]." Termination Order at P 21, JA 647. In fact, the City's acquisition of the property "makes any possibility of repairing the project and resuming operations even less likely." *Id.* The Commission noted, however, that the City did not acquire the property until 2006, "long after Commission staff notified the licensee that it considered the licensee to have abandoned good faith operation of the project and long after the licensee stopped communicating with Commission staff." *Id.*, JA 648; *see also* Rehearing Order at P 11 ("the basis for our finding of implied surrender was Mr. Lichoulas'[s] failure to rehabilitate the project for some 12 years prior to the City's condemnation of the project"), JA 698; *cf. Lichoulas*, 555 F.3d at 13 ("This is not a case where the taking had any effect on the ongoing production of power . . . ."). Though Mr. Lichoulas states that the City began discussing the prospective acquisition in late 2004, L.Br. 11, he does not claim to have lost access to the Project before the taking in April 2006. Nor did he communicate with the Commission at any time during his "[l]engthy discussions" with the City — or, indeed, for nearly one year after the City completed the acquisition. *See supra*

p. 13; Rehearing Order at P 11 (citing Mr. Lichoulas's "continued inaction" after the condemnation process began), JA 698.

Taken together, this 14-year record more than adequately supports the Commission's finding of abandonment. "[A]t some point an agency must be able to say, 'Enough is enough.'" *Cooley v. FERC*, 843 F.2d 1464, 1473 (D.C. Cir. 1988) (finding Commission did not abuse its discretion in refusing to reopen record in hydroelectric licensing proceeding to take additional evidence).

2. Termination In This Case Was Consistent With Commission Regulations And Precedent

Furthermore, the license termination met the standards under 18 C.F.R. § 6.4 and Article 16 of the license and was consistent with Commission precedent. The Commission's finding of abandonment followed from the language of the regulation, which provides (with respect to minor projects) for a finding of deemed intent to surrender where the licensee "[s]hall cause or suffer essential project property to be removed or destroyed, or become unfit for use, without replacement, or shall abandon, or shall discontinue good faith operation of the project for a period of three years . . . ." 18 C.F.R. § 6.4. In such a case, the Commission "may in its discretion terminate the license" after at least 90 days' notice. *Id.* Consistent with the regulation, Standard Article 16 of the license likewise provides for deemed intent to surrender where the licensee has "abandon[ed] or discontinue[d] good faith operation of the project" or has "refuse[d] or neglect[ed] to comply with

the terms or the license and the lawful orders of the Commission . . . ." *See* Termination Order at P 18, JA 646.

The Commission has articulated the purpose of implied surrender in past cases. *See, e.g., Clark Fork and Blackfoot, LLC*, 111 FERC ¶ 61,160 at P 24 (2005) ("The essence of implied surrender is that actions have occurred . . . that make it clear that the project will not be restored to operation . . . ."); *Montana Power Co.*, 62 FERC ¶ 61,166, at 62,143 (1993) (Commission invokes implied surrender "only when the licensee, by its actions or inactions, has clearly indicated its intent to abandon the project, but has not filed a surrender application with the Commission"); *id.* n.41 (citing cases "where licensees had abandoned project operation a number of years earlier," had sold the project without Commission approval, or had been dissolved or otherwise could not be located).[10]

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[10] Implied surrender cases are indeed rare, as Mr. Lichoulas observes (L.Br. 35-36). *See Montana Power*, 62 FERC at 62,143 ("The Commission has only rarely had to resort to the implied-surrender procedure to address a licensee's failure to live up to the obligations of its license."). This is in part because,"[i]n almost all cases," the Commission can obtain compliance by contacting licensees and monitoring their remedial efforts (*id.*) — as the Commission tried to do in this case for ten years. Short of terminating a license, the Commission may attempt to enforce compliance using its broad authority under FPA § 31, 16 U.S.C. § 823b, to impose civil penalties. 62 FERC at 62,143. *Cf.* September 2003 Letter Order, JA 53 (giving Mr. Lichoulas notice of potential penalties), *quoted supra* at p. 11.

Moreover, implied surrender, by its very nature — that is, being premised on abandonment — is not often litigated, and what disputes do crop up tend to arise from unusual circumstances. *Cf., e.g., Clark Fork*, 111 FERC ¶ 61,160 at PP 1-2, (continued...)

Mr. Lichoulas argues (L.Br. 35-36, 39) that the Commission's finding of implied surrender was not consistent with the standard described in *Clark Fork* and *Montana Power*. The Commission, however, reasonably concluded that the Project's long-term dormancy and Mr. Lichoulas's failure to restore operation, as well as his repeated failure to comply with the Commission's directives, constituted sufficient evidence of abandonment to meet that standard. Rehearing Order at PP 14-15, JA 699-700; *see also* Termination Order at PP 20-21, JA 647. The Commission further found that Mr. Lichoulas's longstanding "failure in any way to meet the restoration schedules required by his exchanges of correspondence with Commission staff" demonstrated such "'neglect to comply with the terms of the license and the lawful orders of the Commission,'" and thus "is relevant and material evidence of his clear intent to abandon the project." Rehearing Order at P 14 n.19 (quoting Standard Article 16), JA 700.

Mr. Lichoulas's current expressions of interest in operating the Project, no matter how vehemently stated, do not contravene the Commission's well-

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21-28 (case concerned dispute over effective date of license termination, where dam was to be decommissioned and removed under direction and exclusive jurisdiction of EPA; FERC used implied surrender to end its licensing oversight without creating regulatory gap); *Montana Power*, 62 FERC at 62,143 (Commission described implied surrender provision in response to new licensee's request for clarification); *Fourth Branch Assocs. (Mechanicville) v. FERC*, 253 F.3d 741, 745-46 (D.C. Cir. 2001) (finding challenge to implied surrender proceeding unripe because termination notice was not final agency action).

supported finding of implied surrender. *See* Rehearing Order at P 14 ("notwithstanding any interest he later expressed in resuming operations, Mr. Lichoulas's actions over more than 14 years, when taken as a whole, supported the finding" of abandonment; "Nor does Mr. Lichoulas's stated intention to resume project operation warrant a different conclusion."), JA 699-700; *id.* n.18 (citing cases), JA 700; *cf. id.* at P 16 n.21 (Mr. Lichoulas's recent arrangements for assistance and financing and litigation over the City's taking "cannot overcome the clear evidence of some 14 years of inactivity"), JA 701. "[T]he key element [for implied surrender] is the licensee's failure to live up to the obligations of its license, and we have implied surrender even where the licensee has expressed an interest in continuing to operate the project." *John C. Jones*, 122 FERC ¶ 61,053 at P 13 (2008), *cited in* Rehearing Order at P 14 n.18, JA 700; *see also Fourth Branch Assocs. (Mechanicville) v. Niagara Mohawk Power Corp.*, 89 FERC ¶ 61,194, at 61,597-98 (1999) (citing similar cases), *reh'g denied*, 90 FERC ¶ 61,250 (2000), *aff'd*, 253 F.3d 741 (finding challenge to implied surrender unripe for review; affirming orders on other grounds). Moreover, Mr. Lichoulas's portrayal of his current readiness to proceed with restoration echoes his previous (unfulfilled) assurances. *Cf. supra* pp. 6-10, 13.[11]

[11] Indeed, Mr. Lichoulas's emphasis on engineering and financing arrangements to demonstrate his intent to restore the Project (*see* L.Br. 14, 42, 45) (continued...)

Based on Mr. Lichoulas's 14-year record, the Commission determined that termination of the license was in the public interest. Termination Order at P 25, JA 649. As this Court has recognized, "[a] license under the Federal Power Act confers both benefits and obligations." *Energie Group, LLC v. FERC*, 511 F.3d 161, 163 (D.C. Cir. 2007) (affirming Commission's denial of hydroelectric permits and licenses to applicants with records of noncompliance). Thus, in considering licensing matters, the Commission "assesses the public interest, broadly defined, keeping in mind that the license will allow the holder to appropriate water resources from the public domain." *Id.* (internal quotation marks and citation omitted); *cf. Keating*, 569 F.3d at 433 (affirming Commission's decision to lift 11-year stay of license's deadline to commence construction because undeveloped project did not serve public interest). Thus, in this case, the Commission justifiably concluded that "where, as here, a project has fallen into disrepair and has not operated for many years, and we see no evidence that it will be restored to

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mirrors similar claims in the past: September 1999 Lichoulas Letter at 1 ("We are finalizing an arrangement with D. Hobbs Contracting to dismantle and repair the machine."), JA 47; December 2004 Lichoulas Letter ("Khalsa Design Inc., Mr. Alfred M. Marzullo P.E. of Somerville, Massachusetts, will be involved [in reconstruction] and I am in discussions with Mr. Lucas Wright of Ware River Power in Barre, Massachusetts regarding the mechanical repairs . . . . Funding is ready and in the bank at Banknorth, Framingham, Massachusetts."), JA 58.

operation in the near future, we believe that the public interest requires us to terminate the license . . . ." Rehearing Order at P 19, JA 702.[12]

3. The Commission Properly Determined That "Mitigating Factors" Did Not Overcome The Implied Surrender

Mr. Lichoulas also contends that the Commission failed to consider "mitigating factors" — the fire, nearby demolition, asbestos abatement, and acquisition by eminent domain — that would excuse his failure to repair and restore the Project to operation. L.Br. 38. The Commission, however, did consider his arguments and found them "unpersuasive." Rehearing Order at P 14, JA 699.

Both FERC Orders took into account the fire, the asbestos clean-up, and the City's taking, but concluded that Mr. Lichoulas's actions (and inaction) over the entire 14 years, "taken as a whole," demonstrated abandonment of good faith operation of the Project. *Id.*; *see also id.* at P 8, JA 697; Termination Order at PP 19-20, JA 647.[13] And, after 14 years of inoperability, "there is no evidence that

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[12] Though the Commission indicated that termination would "open the site to the possibility of future hydropower development by another entity" (Rehearing Order at P 19, JA 702), the Commission did not suggest that the City or any other party had indicated an intent to operate a hydropower project (*cf.* L.Br. 40) — only that continuing the status quo, with the Project having been defunct for 14 years under Mr. Lichoulas's control, would not serve the public interest.

[13] Mr. Lichoulas erroneously contends that the Termination Order did not address those obstacles, L.Br. 37-38, and oddly dismisses the Commission's more detailed consideration in the Rehearing Order as "*post facto* rationalization," L.Br. 38.

the project is any closer to being able to resume operation than it was 14 years ago." Termination Order at P 21, JA 647, *quoted in* Rehearing Order at P 14, JA 700.[14] "In short, the alleged impediments to project restoration . . . fail to negate the conclusion that Mr. Lichoulas's inaction demonstrated a clear intent to abandon the project." Rehearing Order at P 15, JA 700.

The Commission further found that throughout the period when the Project was not operating — including the time of the fire (June 1997), the selective demolition (2000-2001), the asbestos abatement (2001-2006), and the City's initial moves to acquire the property (2004-2006) — Mr. Lichoulas consistently "neglected to keep the Commission abreast of the status of the project," except when the Commission expressly required him to do so (if even then). Termination Order at P 20, JA 647. Nor does the record support Mr. Lichoulas's attribution of the failure to meet his proposed repair schedules to those complications (L.Br. 37). Mr. Lichoulas had already failed to complete repairs as scheduled and ignored a Commission inquiry even before the fire. *See supra* pp. 6-7 (describing Mr. Lichoulas's stated plan to begin repairs in September 1996 and failure to respond by May 1997 as directed). Mr. Lichoulas then submitted, and failed to

[14] The Commission also noted that the selective demolition, in which Mr. Lichoulas spent $1.2 million (*see* L.Br. 10), did not include efforts to restore project operations, as the continued degraded condition of the project's property demonstrated. Rehearing Order at P 15, JA 700.

complete — or to keep the Commission apprised of his progress or difficulties — five more repair plans between September 1997 and March 2003, during the period that followed the fire and continued through the demolition and abatement work. *See supra* pp. 7-10; *cf.* L.Br. 5, 10 (indicating that demolition and abatement continued through 2004).

Mr. Lichoulas also argues that he has been unable to make repairs and restore Project operation since April 2006 because the City barred him from the property. L.Br. 41. The Commission, however, found his lack of access irrelevant, as the Commission had already deemed the Project to be abandoned more than 18 months before the City took the property. *See* September 2004 FERC Letter at 1, JA 56, *quoted supra* at p. 12. Even before then, the Commission had repeatedly warned Mr. Lichoulas that his failure to operate the Project violated both the license and the Federal Power Act, and that his inaction could result in termination of the license. *See supra* pp. 8-11. The Commission based its Termination Notice in 2007 and its Termination Order in 2008 on Mr. Lichoulas's record of inaction since 1994, not merely his inability to access the project starting in 2006. Termination Order at PP 19-20, JA 647; Rehearing Order at PP 14, 16 n.21, JA 699-700, 701.

C. The Commission Appropriately Decided This Case On The Paper Record

The Commission properly concluded that it was not required to hold a trial-type, evidentiary hearing. Termination Order at P 24, JA 649; Rehearing Order at P 17 ("the Commission exercises broad discretion in deciding whether to conduct a trial-type hearing") (citing *Friends of Cowlitz v. FERC*, 282 F.3d 609 (9th Cir. 2000)), JA 701. Article 16 of the license authorizes, but does not require, the Commission to hold such a hearing. Termination Order at P 24, JA 649; Standard Article 16 (Commission can accept implied surrender "after notice and opportunity for hearing"), *quoted supra* at p. 17. Accordingly, the Commission reasonably interpreted its own license condition to be satisfied by a paper hearing. Termination Order at P 24, JA 649; *id.* n.24 (citing *Cascade Power Co.*, 74 FERC ¶ 61,240, at 61,822 & n.16 (1996); *Sierra Ass'n for Env't v. FERC*, 744 F.2d 661, 662 (9th Cir. 1984)), JA 649.

This Court has long held that the Commission "need not conduct an evidentiary hearing" when there is no disputed issue of material fact that cannot be "adequately resolved on the written record." *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993); *accord Cajun Elec. Power Coop.*, 28 F.3d at 177. There is no such disputed issue here. The Commission found that Mr. Lichoulas had "not identified any issues of material fact that cannot be adequately resolved based upon the [paper] record . . . ." Termination Order at P 24, JA 649. Mr. Lichoulas

disagrees, contending that genuine factual disputes exist concerning (1) his intent to abandon the Project and (2) the ability of the Project to be restored to operation. L.Br. 21, 44-45. But the Commission correctly concluded that Mr. Lichoulas's "dispute is not with the factual record, but rather with our interpretation of that record, an interpretation that we believe is supported by the facts of this case." Rehearing Order at P 17, JA 701.

In continuing to press his interpretation of the record on appeal, Mr. Lichoulas points to evidence that the Commission expressly took into account. As he did before the agency, Mr. Lichoulas cites his recent arrangements for engineering assistance and financing, and his litigation seeking to overturn the City's taking, as evidence that he has both the intent and the ability to repair the Project and restore operation. L.Br. 44-45. The Commission, however, specifically considered that evidence and concluded that Mr. Lichoulas's recent actions "cannot overcome the clear evidence of some 14 years of inactivity." Rehearing Order at P 16 n.21, JA 701. Taking all of the record evidence together, the Commission reasonably determined that Mr. Lichoulas had effectively abandoned operation of the Project for more than three years before the termination and that the Project was not likely to resume operation, and that there was no need for an evidentiary hearing on those matters.

III. THE COMMISSION'S DECISION TO TERMINATE THE LICENSE WAS NOT INFLUENCED BY PROCEDURAL INQUIRIES

A. Standard Of Review

As noted above, the Court affords substantial deference to the Commission's interpretation of its regulations, *Amerada Hess*, 117 F.3d at 600, and reviews a decision not to hold an evidentiary hearing for abuse of discretion, *Cajun Elec.*, 28 F.3d at 177.

B. The Commission Properly Disclosed Congressional Contacts, Which Did Not Influence Its Decision

Mr. Lichoulas's allegations about *ex parte* communications are central to his appeal. *See* L.Br. 15-19, 20, 24-33, 45. But his arguments are jurisdictionally barred because he did not challenge the Commission's ruling on rehearing before the agency. FPA § 313(b), 16 U.S.C. § 825*l*(b). Though Mr. Lichoulas raised questions about Congresswoman Tsongas's contacts with the Commission's Office of External Affairs in his rehearing request, the Commission addressed those communications for the first time in the Rehearing Order at PP 20-21, JA 702-03, and Mr. Lichoulas did not seek rehearing of the Commission's only ruling on the subject.[15] *See, e.g., Cal. Dep't of Water Res. v. FERC*, 306 F.3d 1121, 1125 (D.C.

[15] Mr. Lichoulas could, of course, petition for review on the issue of termination for implied surrender, which he had properly raised on rehearing. The appeal, however, must be limited to issues on which he sought rehearing of an agency ruling. *See, e.g., Tenn. Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1110 (continued...)

Cir. 2002) (strictly construing jurisdictional requirement); *Town of Norwood v. FERC*, 906 F.2d 772, 774 (D.C. Cir. 1990) (same).

In addition to being an express statutory prerequisite for jurisdiction, rehearing serves the important purpose of "enabl[ing] the Commission to correct its own errors, which might obviate judicial review, or to explain why in its expert judgment the party's objection is not well taken, which facilitates judicial review." *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005); *see also, e.g.*, *Ameren Servs. Co. v. FERC*, 330 F.3d 494, 499 n.8 (D.C. Cir. 2003) ("The very purpose of rehearing is to give the Commission the opportunity to review its decision before facing judicial scrutiny."). *Cf. Freeman Eng'g Assocs., Inc. v. FCC*, 103 F.3d 169, 185 (D.C. Cir. 1997) (declining to consider allegations of *ex parte* communications where party failed to seek reconsideration before agency).

1. The Commission Properly Disclosed All Contacts

In any event, the Commission fully complied with (and even exceeded) its regulation concerning *ex parte* communications, 18 C.F.R. § 2201. That regulation establishes a general rule prohibiting off-the-record communications. 18 C.F.R. § 2201(b). By definition, an "off-the-record communication" must be "relevant to the merits" of a contested proceeding. 18 C.F.R. § 2201(c)(4). "[R]elevant to the

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(D.C. Cir. 1989) (court had jurisdiction, but petitioner was "constrained to stick with the objections previously raised to the Commission").

merits," however, does not include "[p]rocedural inquiries, such as a request for information relating solely to the status of a proceeding . . . ." 18 C.F.R. § 2201(c)(5)(i). Such an inquiry will not fall under the "procedural" exclusion if it "states or implies a preference for a particular party or position, or is otherwise intended, directly or indirectly, to address the merits or influence the outcome of a proceeding . . . ." *Id.* In addition, an inquiry that otherwise falls within the definition of "off-the-record communication" may be exempt from the general prohibition if it is a written communication from an elected official who is not a party to the proceeding, subject to disclosure in the record. 18 C.F.R. § 2201(e)(iv), (g). The regulation requires that prohibited communications — *i.e.*, communications that are neither excluded under § 2201(c) nor exempted under § 2201(e) — will not be considered part of the decisional record and must be disclosed in the public non-decisional record. 18 C.F.R. § 2201(f).

The August 6 telephone call and August 18 e-mail from Congresswoman Tsongas, *see supra* pp. 15-16, were procedural inquiries regarding case status, as explained in the Rehearing Order (at P 21, JA 703), and thus were excluded from the definition of *ex parte* communications under § 2201(c). As such, they were not required to be memorialized in the record; nevertheless, their content was described in the Rehearing Order at P 21. In addition, the Commission placed the one document that arguably might be covered as an "off-the-record

communication" — the August 6, 2008 e-mail with attached memorandum (R. 116, JA 626) — into the non-decisional record, consistent with the treatment of prohibited communications under § 2201(f). Rehearing Order at P 21, JA 703. Thus, the Commission appropriately handled the communications from the Congresswoman and her staff.

2. The Inquiries Did Not Influence The Commission's Decision To Terminate The License

More important, the inquiries by Congresswoman Tsongas did not influence the outcome of the license termination proceeding. Among the key factors in determining whether *ex parte* contacts "irrevocably tainted" an agency's decision-making process so as to make outcome unfair, this Court considers whether such contacts could have influenced the ultimate decision. *Freeman*, 103 F.3d at 184 (finding *ex parte* contact "quite serious," where applicant for radio license filed document attacking competitor's application and FCC cited document without giving opportunity to respond — but finding contact harmless because it did not sway agency's decision); *see generally Elec. Power Supply Ass'n v. FERC*, 391 F.3d 1255, 1259 (D.C. Cir. 2004) (key to exclusion of status reports from *ex parte* prohibition is whether communications could affect agency's decision); *Professional Air Traffic Controllers Org. v. Fed. Labor Relations Auth.*, 685 F.2d 547, 565 (D.C. Cir. 1982) (same).

First, the Commission stated unequivocally that no member of the Commission reviewed the August 6, 2008 e-mail and memorandum (which were filed in the non-decisional public record) before approving the Termination Order, so the Commission could not have been influenced by that material. Rehearing Order at P 21 n.26, JA 703. The Commission also stated that the telephone call to the Office of External Affairs that the memorandum recommends, with the suggested purpose "to pressure the Commission," did not take place. *Id.* Mr. Lichoulas simply disbelieves those statements (*see* L.Br. 20, 29-31), but that is not enough:

> It would take considerably more than the unsupported allegation in a brief to show that the Commission or any one of its members failed to act impartially. Under the well-settled presumption of administrative regularity, courts assume administrative officials "to be men [and women] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances."

La. Ass'n of Indep. Producers & Royalty Owners v. FERC, 958 F.2d 1101, 1119 (D.C. Cir. 1992) (citation omitted; alteration in original).

Furthermore, the history (and administrative record) of the Project since 1994 and the course of the termination proceeding itself refute any suggestion that a few Congressional contacts in 2008 affected the Commission's decision to terminate the license. As early as September 2003, after seven years of exhorting Mr. Lichoulas to resume operation, the Commission gave formal notice that he was "in violation of [FPA] section 10(c) and subject to the civil penalty provisions of

[FPA] section 31(a) . . . ." September 2003 Letter Order, JA 53, *quoted supra* at p. 11. A year later, the Commission notified Mr. Lichoulas that it "consider[ed] the project to be abandoned . . . . Thus, the Commission may terminate your license under an implied surrender proceeding." September 2004 FERC Letter, JA 56, *quoted supra* at p. 12. Over two years later, in March 2007, the Commission issued the Termination Notice, JA 61. Commission Staff issued the Environmental Assessment, which analyzed the effects of license termination, in February 2008 and the Commission received comments on the Assessment through May 2008. Termination Order at PP 15-16, JA 645-46. The Termination Order issued four months later. The timing followed from the necessary steps in the termination process (*i.e.*, consideration of the Environmental Assessment), and the likely outcome had been signaled for years. Thus, the record refutes Mr. Lichoulas's claim that the Commission's decision was influenced by a few status inquiries late in the process.

CONCLUSION

For the reasons stated, the petition should be dismissed for lack of jurisdiction. Alternatively, the petition should be denied on the merits and the challenged FERC Orders should be affirmed in all respects.

Respectfully submitted,

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October 8, 2009
Final Brief: November 12, 2009

James Lichoulas, Jr. v. FERC
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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent contains 10,732 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

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November 12, 2009

ADDENDUM
Statutes & Regulations

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STATUTES **PAGE**

REGULATIONS:

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

The Commission is authorized and empowered—
(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc. 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.

Section 6 of the Federal Power Act, 16 U.S.C. § 799, provides as follows:

Licenses under this subchapter shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice.

Section 10(c), (i) of the Federal Power Act, 16 U.S.C. § 803(c), (i), provides as follows:

(c) Maintenance and repair of project works; liability of licensee for damages

That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain, and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license and in no event shall the United States be liable therefor.

…

(i) Waiver of conditions

In issuing licenses for a minor part only of a complete project, or for a complete project of not more than two thousand horsepower installed capacity, the Commission may in its discretion waive such conditions, provisions, and requirements of this subchapter, except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances: Provided, That the provisions hereof shall not apply to annual charges for use of lands within Indian reservations.

Section 14(a) of the Federal Power Act, 16 U.S.C. § 807(a), provides as follows:

(a) Compensation; condemnation by Federal or State Government
Upon not less than two years' notice in writing from the commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 796 of this title, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this chapter, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: Provided, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this chapter at any time by condemnation proceedings upon payment of just compensation is expressly reserved.

Section 31(a) of the Federal Power Act, 16 U.S.C. § 823b(a), provides as follows:

(a) Monitoring and investigation
The Commission shall monitor and investigate compliance with each license and permit issued under this subchapter and with each exemption granted from any requirement of this subchapter. The Commission shall conduct such investigations as may be necessary and proper in accordance with this chapter. After notice and opportunity for public hearing, the Commission may issue such orders as necessary to require compliance with the terms and conditions of licenses and permits issued under this subchapter and with the terms and conditions of exemptions granted from any requirement of this subchapter.

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

(b) Judicial review
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.

restoration has been satisfactorily completed.

[Order 175, 19 FR 5217, Aug. 18, 1954]

§ 6.3 Termination of license.

Licenses may be terminated by written order of the Commission not less than 90 days after notice thereof shall have been mailed to the licensee by certified mail to the last address whereof the Commission has been notified by the licensee, if there is failure to commence actual construction of the project works within the time prescribed in the license, or as extended by the Commission. Upon like notice, the authority granted under a license with respect to any separable part of the project works may be terminated if there is failure to begin construction of such separable part within the time prescribed or as extended by the Commission.

(Administrative Procedure Act, 5 U.S.C. 551–557 (1976); Federal Power Act, as amended, 16 U.S.C. 291–628 (1976 & Supp. V 1981), Dept. of Energy Organization Act 42 U.S.C. 7101–7352 (Supp. V 1981); E.O. 12009, 3 CFR 142 (1978))

[Order 141, 12 FR 8491, Dec. 19, 1947, as amended by Order 344, 48 FR 49010, Oct. 24, 1983]

§ 6.4 Termination by implied surrender.

If any licensee holding a license subject to the provisions of section 10(i) of the Act shall cause or suffer essential project property to be removed or destroyed, or become unfit for use, without replacement, or shall abandon, or shall discontinue good faith operation of the project for a period of three years, the Commission will deem it to be the intent of the licensee to surrender the license; and not less than 90 days after public notice may in its discretion terminate the license.

[Order 141, 12 FR 8491, Dec. 19, 1947]

§ 6.5 Annual charges.

Annual charges arising under a license surrendered or terminated shall continue until the effective date set forth in the Commission's order with respect to such surrender or termination.

[Order 175, 19 FR 5217, Aug. 18, 1954]

CROSS REFERENCE: For annual charges, see part 11 of this chapter.

PART 8—RECREATIONAL OPPORTUNITIES AND DEVELOPMENT AT LICENSED PROJECTS

Sec.

AUTHORITY: 5 U.S.C. 551–557; 16 U.S.C. 791a–825r; 42 U.S.C. 7101–7352.

§ 8.1 Publication of license conditions relating to recreation.

Following the issuance or amendment of a license, the licensee shall make reasonable efforts to keep the public informed of the availability of project lands and waters for recreational purposes, and of the license conditions of interest to persons who may be interested in the recreational aspects of the project or who may wish to acquire lands in its vicinity. Such efforts shall include but not be limited to: the publication of notice in a local newspaper once each week for 4 weeks of the project's license conditions which relate to public access to and the use of the project waters and lands for recreational purposes, recreational plans, installation of recreation and fish and wildlife facilities, reservoir water surface elevations, minimum water releases or rates of change of water releases and such other conditions of general public interest as the Commission may designate in the order issuing or amending the license.

[Order 299, 30 FR 7313, June 3, 1965]

§ 8.2 Posting of project lands as to recreational use and availability of information.

(a) Following the issuance or amendment of a license, the licensee shall post and shall maintain at all points of public access which are required by the license (or at such access points as are specifically designated for this purpose by the licensee) and at such other

writing, published in the FEDERAL REGISTER, that the national interest would be served by such action or representation.

Subpart V—Off-the-Record Communications; Separation of Functions

§ 385.2201 Rules governing off-the-record communications (Rule 2201).

(a) *Purpose and scope.* This section governs off-the-record communications with the Commission in a manner that permits fully informed decision making by the Commission while ensuring the integrity and fairness of the Commission's decisional process. This rule will apply to all contested on-the-record proceedings, except that the Commission may, by rule or order, modify any provision of this subpart, as it applies to all or part of a proceeding, to the extent permitted by law.

(b) *General rule prohibiting off-the-record communications.* Except as permitted in paragraph (e) of this section, in any contested on-the-record proceeding, no person outside the Commission shall make or knowingly cause to be made to any decisional employee, and no decisional employee shall make or knowingly cause to be made to any person outside the Commission, any off-the-record communication.

(c) *Definitions.* For purposes of this section:

(1) Contested on-the-record proceeding means

(i) Except as provided in paragraph (c)(1)(ii) of this section, any proceeding before the Commission to which there is a right to intervene and in which an intervenor disputes any material issue, any proceeding initiated pursuant to rule 206 by the filing of a complaint with the Commission, any proceeding initiated by the Commission on its own motion or in response to a filing, or any proceeding arising from an investigation under part 1b of this chapter beginning from the time the Commission initiates a proceeding governed by part 385 of this chapter.

(ii) The term does not include notice-and-comment rulemakings under 5 U.S.C. 553, investigations under part 1b of this chapter, proceedings not having a party or parties, or any proceeding in which no party disputes any material issue.

(2) *Contractor* means a direct Commission contractor and its subcontractors, or a third-party contractor and its subcontractors, working subject to Commission supervision and control.

(3) *Decisional employee* means a Commissioner or member of his or her personal staff, an administrative law judge, or any other employee of the Commission, or contractor, who is or may reasonably be expected to be involved in the decisional process of a proceeding, but does not include an employee designated as part of the Commission's trial staff in a proceeding, a settlement judge appointed under Rule 603, a neutral (other than an arbitrator) under Rule 604 in an alternative dispute resolution proceeding, or an employee designated as being non-decisional in a proceeding.

(4) *Off-the-record communication* means any communication relevant to the merits of a contested on-the-record proceeding that, if written, is not filed with the Secretary and not served on the parties to the proceeding in accordance with Rule 2010, or if oral, is made without reasonable prior notice to the parties to the proceeding and without the opportunity for such parties to be present when the communication is made.

(5) *Relevant to the merits* means capable of affecting the outcome of a proceeding, or of influencing a decision, or providing an opportunity to influence a decision, on any issue in the proceeding, but does not include:

(i) Procedural inquiries, such as a request for information relating solely to the status of a proceeding, unless the inquiry states or implies a preference for a particular party or position, or is otherwise intended, directly or indirectly, to address the merits or influence the outcome of a proceeding;

(ii) A general background or broad policy discussion involving an industry or a substantial segment of an industry, where the discussion occurs outside the context of any particular proceeding involving a party or parties and does not address the specific merits of the proceeding; or,

(iii) Communications relating to compliance matters not the subject of an ongoing proceeding.

(d) *Applicability of prohibitions.* (1) The prohibitions in paragraph (b) of this section apply to:

(i) Proceedings initiated by the Commission from the time an order initiating the proceeding is issued;

(ii) Proceedings returned to the Commission on judicial remand from the date the court issues its mandate;

(iii) Complaints initiated pursuant to rule 206 from the date of the filing of the complaint with the Commission, or from the date the Commission initiates an investigation (other than an investigation under part 1b of this chapter) on its own motion; and

(iv) All other proceedings from the time of the filing of an intervention disputing any material issue that is the subject of a proceeding.

(2) The prohibitions remain in force until:

(i) A final Commission decision or other final order disposing of the merits of the proceeding is issued; or, when applicable, after the time for seeking rehearing of a final Commission decision, or other final order disposing of the merits, expires;

(ii) The Commission otherwise terminates the proceeding; or

(iii) The proceeding is no longer contested.

(e) *Exempt off-the-record communications.* (1) Except as provided by paragraph (e)(2), the general prohibitions in paragraph (b) of this section do not apply to:

(i) An off-the-record communication permitted by law and authorized by the Commission;

(ii) An off-the-record communication related to any emergency concerning a facility regulated by the Commission or a facility that provides Commission-regulated services, involving injury or threat of injury to persons, property, or the environment, subject to disclosure under paragraph (g) of this section;

(iii) An off-the-record communication provided for in a written agreement among all parties to a proceeding that has been approved by the Commission;

(iv) An off-the-record written communication from a non-party elected official, subject to disclosure under paragraph (g) of this section;

(v) An off-the-record communication to or from a Federal, state, local or Tribal agency that is not a party in the Commission proceeding, subject to disclosure under paragraph (g) of this section, if the communication involves:

(A) an oral or written response to a request for information made by the Commission or Commission staff; or

(B) a matter before the Commission in which a Federal, state, local, or Tribal agency has regulatory responsibilities, including authority to impose or recommend conditions in connection with a Commission license, certificate, or exemption;

(vi) An off-the-record communication, subject to disclosure under paragraph (g) of this section, that relates to:

(A) The preparation of an environmental impact statement if communications occur prior to the issuance of the final environmental impact statement; or

(B) The preparation of an environmental assessment where the Commission has determined to solicit public comment on the environmental assessment, if such communications occur prior to the issuance of the final environmental document.

(vii) An off-the-record communication involving individual landowners who are not parties to the proceeding and whose property would be used or abuts property that would be used by the project that is the subject of the proceeding, subject to disclosure under paragraph (g) of this section.

(viii) An off-the-record communication from any person related to any national security-related issue concerning a facility regulated by the Commission or a facility that provides Commission-regulated services.

(2) Except as may be provided by Commission order in a proceeding to which this subpart applies, the exceptions listed under paragraph (e)(1) will not apply to any off-the-record communications made to or by a presiding officer in any proceeding set for hearing under subpart E of this part.

(f) *Treatment of prohibited off-the-record communications*—(1) *Commission consideration.* Prohibited off-the-record communications will not be considered part of the record for decision in the applicable Commission proceeding, except to the extent that the Commission by order determines otherwise.

(2) *Disclosure requirement.* Any decisional employee who makes or receives a prohibited off-the-record communication will promptly submit to the Secretary that communication, if written, or a summary of the substance of that communication, if oral. The Secretary will place the communication or the summary in the public file associated with, but not part of, the decisional record of the proceeding.

(3) *Responses to prohibited off-the-record communications.* Any party may file a response to a prohibited off-the-record communication placed in the public file under paragraph (f)(2) of this section. A party may also file a written request to have the prohibited off-the-record communication and the response included in the decisional record of the proceeding. The communication and the response will be made a part of the decisional record if the request is granted by the Commission.

(4) *Service of prohibited off-the-record communications.* The Secretary will instruct any person making a prohibited written off-the-record communication to serve the document, pursuant to Rule 2010, on all parties listed on the Commission's official service list for the applicable proceeding.

(g) *Disclosure of exempt off-the-record communications.* (1) Any document, or a summary of the substance of any oral communication, obtained through an exempt off-the-record communication under paragraphs (e)(1)(ii), (iv), (v), (vi) or (vii) of this section, promptly will be submitted to the Secretary and placed in the decisional record of the relevant Commission proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under paragraph (e)(1)(v) of this section.

(2) Any person may respond to an exempted off-the-record communication.

(3) Any document, or a summary of the substance of any oral communications, obtained through an exempt off-the-record communication under paragraphs (e)(1)(viii) of this section, will be submitted promptly to the Secretary and placed in a non-public decisional file of the relevant Commission proceeding and made available to parties to the proceeding, subject to their signing a non-disclosure agreement. Responses will also be placed in the non-public decisional file and held confidential. If the Commission determines that the communication does not contain sensitive national security-related information, it will be placed in the decisional file.

(h) *Public notice requirement of prohibited and exempt off-the-record communications.* (1) The Secretary will, not less than every 14 days, issue a public notice listing any prohibited off-the-record communications or summaries of the communication received by his or her office. For each prohibited off-the-record communication the Secretary places in the non-decisional public file under paragraph (f)(2) of this section, the notice will identify the maker of the off-the-record communication, the date the off-the-record communication was received, and the docket number to which it relates.

(2) The Secretary will not less than every 14 days, issue a public notice listing any exempt off-the-record communications or summaries of the communication received by the Secretary for inclusion in the decisional record and required to be disclosed under paragraph (g)(1) of this section.

(3) The public notice required under this paragraph (h) will be posted in accordance with § 388.106 of this chapter, as well as published in the FEDERAL REGISTER, and disseminated through any other means as the Commission deems appropriate.

(i) *Sanctions.* (1) If a party or its agent or representative knowingly makes or causes to be made a prohibited off-the-record communication, the Commission may require the party, agent, or representative to show cause why the party's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected because of the prohibited off-the-record communication.

(2) If a person knowingly makes or causes to be made a prohibited off-the-

record communication, the Commission may disqualify and deny the person, temporarily or permanently, the privilege of practicing or appearing before it, in accordance with Rule 2102 (Suspension).

(3) Commission employees who are found to have knowingly violated this rule may be subject to the disciplinary actions prescribed by the agency's administrative directives.

(j) *Section not exclusive.* (1) The Commission may, by rule or order, modify any provision of this section as it applies to all or part of a proceeding, to the extent permitted by law.

(2) The provisions of this section are not intended to limit the authority of a decisional employee to decline to engage in permitted off-the-record communications, or where not required by any law, statute or regulation, to make a public disclosure of any exempted off-the-record communication.

[Order 607–A, 65 FR 71254, Nov. 30, 2000, as amended by Order 623, 66 FR 67482, Dec. 31, 2001; Order 699, 72 FR 45328, Aug. 14, 2007; Order 718, 73 FR 62886, Oct. 22, 2008]

§ 385.2202 Separation of functions (Rule 2202).

In any proceeding in which a Commission adjudication is made after hearing, or in any proceeding arising from an investigation under part 1b of this chapter beginning from the time the Commission initiates a proceeding governed by part 385 of this chapter, no officer, employee, or agent assigned to work upon the proceeding or to assist in the trial thereof, in that or any factually related proceeding, shall participate or advise as to the findings, conclusion or decision, except as a witness or counsel in public proceedings.

[Order 718, 73 FR 62886, Oct. 22, 2008]

PART 388—INFORMATION AND REQUESTS

Sec.

AUTHORITY: 5 U.S.C. 301–305, 551, 552 (as amended), 553–557; 42 U.S.C. 7101–7352.

SOURCE: Order 488, 53 FR 1473, Jan. 20, 1988, unless otherwise noted.

§ 388.101 Scope.

This part prescribes the rules governing public notice of proceedings, publication of decisions, requests for informal advice from Commission staff, procedures for press, television, radio and photographic coverage, requests for Commission records, requests for confidential treatment of documents submitted to the Commission, procedures for responding to subpoenas seeking documents or testimony from Commission employees or former employees, fees for various requests for documents, and requests for reduction or waiver of these fees.

§ 388.102 Notice of proceedings.

(a) Public sessions of the Commission for taking evidence or hearing argument; public conferences and hearings before a presiding officer; and public conferences or hearings in substantive rulemaking proceedings, will not be held except upon notice.

(b) Notice of applications, complaints, and petitions, is governed by Rule 2009 (notice) in part 385 of this chapter. Notice of applications for certificates of public convenience and necessity under section 7 of the Natural Gas Act is governed by §157.9 of this

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d) and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 12th day of November 2009, served the following upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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