ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

Nos. 13-1250 and 13-1253

TURLOCK IRRIGATION DISTRICT *ET AL*.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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July 17, 2014

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in Petitioners' briefs.

B. Rulings Under Review

1. *Turlock Irrigation District and Modesto Irrigation District*, 141 FERC ¶ 62,211 (2012) ("Licensing Order"), JA 1; and

2. *Turlock Irrigation District and Modesto Irrigation District*, 144 FERC ¶ 61,051 (2013) ("Rehearing Order"), JA 22.

C. Related Cases

This case has not previously been before this Court or any other court, and counsel is not aware of any other related cases pending before this or any other court.

/s/ Robert M. Kennedy Jr.
Robert M. Kennedy
Attorney

July 17, 2014

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ADMINISTRATIVE CASES AND ORDERS:

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GLOSSARY

Bechtel Report	La Grange Power Plant Rehabilitation Proposal Evaluation, dated March 1987, prepared by Bechtel (Attachment E to R. 4, JA 100)
Commission or FERC	Federal Energy Regulatory Commission
Conservation Groups	Petitioner Tuolumne River Trust and Intervenors American Rivers, American Whitewater, California Sportfishing Protection Alliance, California Trout, Friends of the River, and Golden West Women Flyfishers
CG Br.	Initial Brief of Petitioner Tuolumne River Trust and Intervenors (Conservation Groups)
Districts	Petitioners Turlock Irrigation District and Modesto Irrigation District
JA	Joint Appendix
ID Br.	Initial Brief of Petitioners Turlock Irrigation District and Modesto Irrigation District
kw	kilowatts
La Grange Report	Report of Turlock Irrigation District to the Federal Energy Regulatory Commission on the La Grange Project, field October 11, 2011 (R. 4), JA 71
Licensing Order	*Turlock Irrigation District and Modesto Irrigation District*, 141 FERC ¶ 62,211 (2012), JA 1
Navigation Report	FERC Staff's Navigation Status Report, filed May 29, 2013 (R.21), JA 260
Project	La Grange Hydroelectric Project
R.	Entry in the certified index to the record
Rehearing Order	*Turlock Irrigation District and Modesto Irrigation District*, 144 FERC ¶ 61,051 (2013), JA 22

Nos. 13-1250 AND 13-1253

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

In the orders under review, the Federal Energy Regulatory Commission ("FERC" or "Commission") determined that the La Grange Hydroelectric Project ("Project") must be licensed under section 23(b)(1) of the Federal Power Act for three independent reasons. The Irrigation District petitioners contend that the Project is not subject to federal jurisdiction at all, while the Tuolumne River Trust and its supporting intervenors assert that it should also be licensed as a component of the Don Pedro Hydroelectric Project. The questions presented for review are:

1. Whether the Commission reasonably determined that the La Grange Project must be licensed under the Federal Power Act for any one of three independent reasons because it (a) is located on a navigable river, or (b) occupies federal lands, or (c) is located on a non-navigable stream subject to Congress' Commerce Clause jurisdiction and was constructed or enlarged after 1935.

2. Assuming jurisdiction, whether the Commission reasonably determined that it need not resolve the question of whether the La Grange Project may also require licensing as a component of the Don Pedro Project because the La Grange Project was required to be licensed on separate grounds.

STATUTORY AND REGULATORY PROVISIONS

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

COUNTERSTATEMENT OF JURISDICTION

As explained in Part III.A of the Argument, the Court lacks jurisdiction over the claims of Petitioner Tuolumne River Trust and its supporting intervenors (collectively, "Conservation Groups"). In the proceedings below, the Conservation Groups asked the Commission to find that the La Grange Project is subject to federal licensing jurisdiction. The Commission determined that the Project must be licensed, but declined to reach one of the jurisdictional theories raised by Conservation Groups (namely, that the La Grange Project is a component of the

Don Pedro Project). Because the challenged orders resulted in a substantive disposition in the Conservation Groups' favor, they were not "aggrieved" by those orders and may not seek judicial review. *See* 16 U.S.C. § 825*l*(b) (only parties "aggrieved by an order issued by the Commission ... may obtain a review").

Moreover, none of the purported injuries raised by the Conservation Groups is sufficient to support standing. *See* Argument, Parts III.B, C. And many of the substantive arguments raised by the Conservation Groups were not presented to the Commission on rehearing. *See* Argument, Part IV.B.1. The Court thus lacks jurisdiction to consider them. *See* 16 U.S.C. § 825*l*(a).

INTRODUCTION

In this proceeding, the Commission responded to a request from the National Marine Fisheries Service to investigate whether the La Grange Project, which is located on Tuolumne River in California, requires licensing under section 23(b)(1) of the Federal Power Act, 16 U.S.C. § 817(1). To inform its jurisdictional determination, FERC Staff prepared a navigation review of the Tuolumne River and reviewed data, analyses, and testimony submitted by Turlock Irrigation District (a joint owner of the Project) National Marine Fisheries Service, California Department of Fish and Game, and the Conservation Groups.

Based on this record, the Commission found that the Project requires licensing under section 23(b)(1) for three independent reasons: (1) it is located on

a navigable river, (2) occupies federal lands, and (3) even if the Tuolumne River was non-navigable, the 1989 enlargement of the Project's generating capacity constituted post-1935 "construction" with the meaning of the Federal Power Act, thereby triggering federal licensing requirements. *See Turlock Irrigation Dist. and Modesto Irrigation Dist.*, 141 FERC ¶ 62,211, (2012) ("Licensing Order"), *order on reh'g*, 144 FERC ¶ 61,051 (2013) ("Rehearing Order").

On appeal Petitioners Turlock Irrigation District and Modesto Irrigation District (collectively, "Districts") challenge each of the Commission's jurisdictional determinations. The Conservation Groups claim the Commission abused its discretion in declining to determine whether the Project also required licensing as a component of the Don Pedro Project.

STATEMENT OF FACTS

I. STATUTORY BACKGROUND

The Federal Power Act vests the Commission with authority to oversee development of the Nation's water resources. Section 23(b)(1) of the Act makes it unlawful for any person, State, or municipality to "construct, operate, or maintain" a hydroelectric power project that is within FERC's jurisdiction without a valid license from the Commission. 16 U.S.C. § 817(1). A hydroelectric project falls within the Commission's jurisdiction if it is (a) located on a navigable waterway of the United States; *or* (b) occupies federal lands; *or* (c) utilizes surplus water or

water power from a government dam; *or* (d) is located on a non-navigable stream over which Congress has Commerce Clause jurisdiction, affects interstate or foreign commerce, and is constructed or enlarged after the 1935 amendments to the Federal Power Act. *Id*.

II. THE LA GRANGE HYDROELECTRIC PROJECT

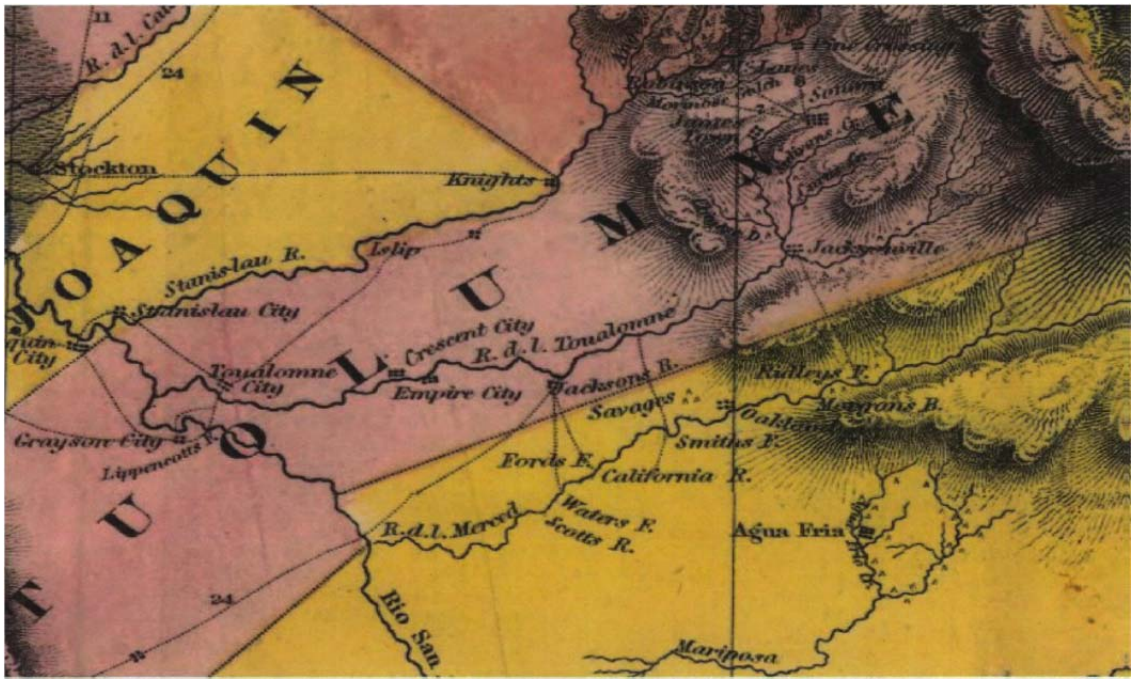
Petitioners Turlock Irrigation District and Modesto Irrigation District are local governmental entities that provide irrigation, drinking water, and electrical service to customers in California's San Joaquin Valley. They jointly own the La Grange Hydroelectric Project, which is located on the Tuolumne River near the town of La Grange in Stanislaus and Tuolumne Counties California. *See* Licensing Order P 1 (2012), JA 1.

A. Historical Development Of The Tuolumne River

The headwaters of the Tuolumne River begin in the Sierra Nevada mountains in Yosemite National Park. The river flows 148.5 miles westward from the mountains to its confluence with the San Joaquin River in California's Central Valley. *See* FERC Staff, Navigation Status Report (filed May 29, 2012), (R. 21) ("Navigation Report") at 1, JA 262.

The San Joaquin Valley was originally inhabited by two Native American groups, the Miwok and Yokut peoples. *Id*. at 4, JA 265. Spanish explorers entered the region in 1806, followed later by Canadian and American trappers. *Id*. When

California declared its independence from Mexico in 1846, a flood of American settlers moved into the San Joaquin Valley. *Id*. at 5, JA 266. Thousands of prospectors entered the area following gold strikes in 1848. The area around the La Grange Dam "proved to be one of the richest mining areas in the world," and led to numerous settlements, such as Crescent City, located at river mile ("RM") 30, French Bar (renamed La Grange in 1854), and Jacksonville (RM 70.5). *Id*.[1]



Id. at 9, JA 270.

During this period, the Tuolumne River was used to transport men and supplies in whaleboats between Stockton (on the San Joaquin River at the San Francisco Bay) and La Grange and perhaps as far upstream as Jacksonville. *Id*. at

[1] River Miles are measured from the mouth of a river (RM 0) to its headwaters. *See* Rehearing Order P 34 n.36, JA 34.

8, JA 269. But those river towns began to fade when railroads reached the area in the 1870s. When "'the locomotive whistle was heard, … the river towns, almost in a day, were deserted and became cities of history only.'" *Id*. at 11, JA 272 (quoting George H. Tinkham, *History of Stanislaus County California*, at 83-85 (1921)).

B. Construction Of The Project

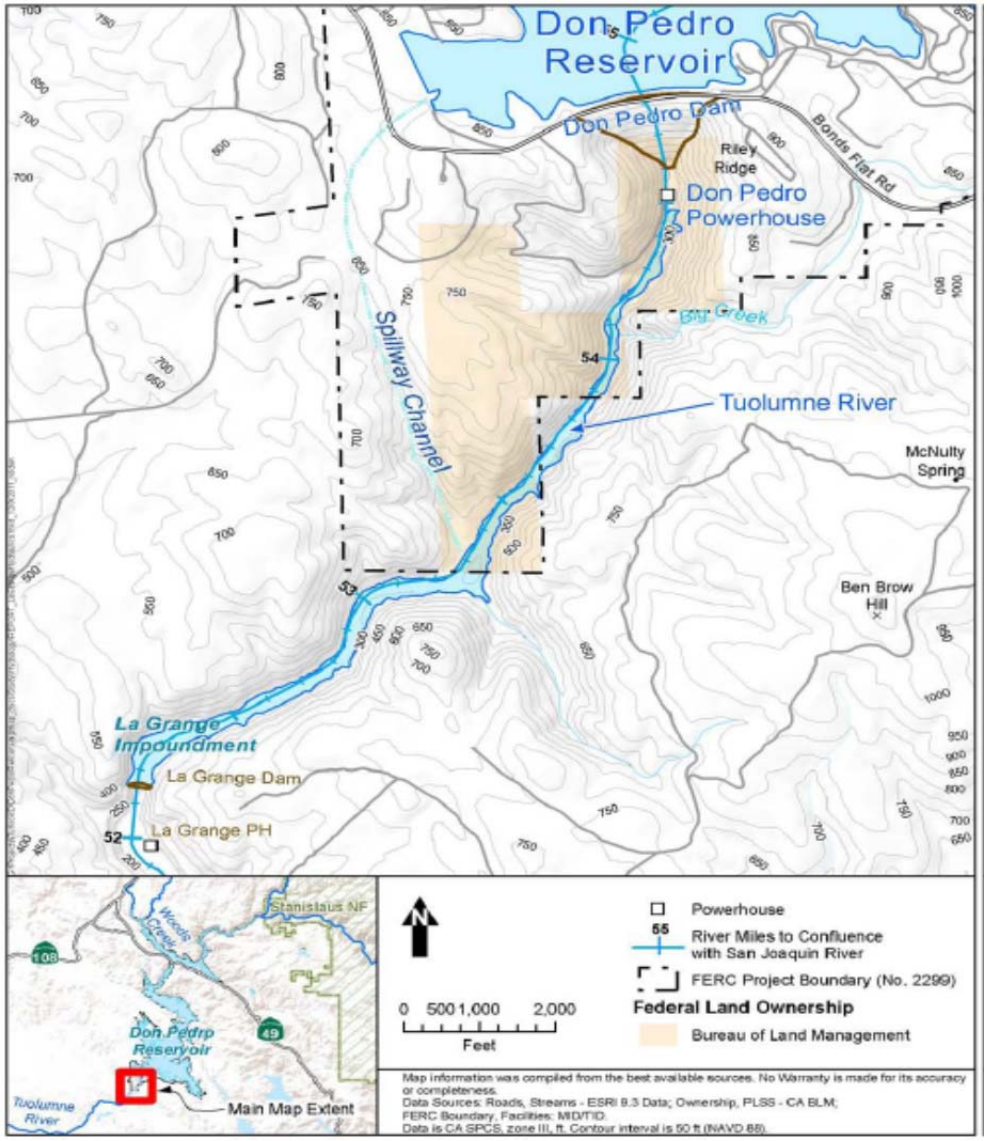
In 1887, the California legislature passed the Wright Act, which permitted farming regions to form irrigation districts for the purpose of building dams and allocating water to users. *See Wright v. E. Riverside Irr. Dist*., 138 F. 313, 317 (9th Cir. 1905) (discussing Wright Act). The Turlock and Modesto Irrigation Districts were subsequently formed to facilitate the irrigation of crops. Navigation Report at 6, JA 267.

In 1893, the Districts constructed the La Grange Dam (at RM 52.2), a 300-foot-long rubble masonry dam, which raised the level of the Tuolumne River in order to allow water to be diverted into the subsequently-constructed irrigation canals. *See* Licensing Order P 2, JA 1. In 1924, the Turlock Irrigation District constructed a powerhouse at RM 52.0, containing two turbine generating units rated at 1,000 kilowatts (Unit 1) and 3,750 kilowatts (Unit 2), that are connected to Turlock's electrical system. *Id*. *See* Turlock Report on La Grange Project (Oct. 11, 2011) ("La Grange Report") (R. 4) at 9, JA 10. The turbine generating units

were replaced in 1989 with units rated at 1,231 kilowatts (Unit 1) and 3,693 kilowatts (Unit 2). Licensing Order P 2, JA 1. Water discharges from the turbines flow into a tailrace that joins the river about one-half mile before the La Grange Dam (roughly RM 51.7). *See* La Grange Report at 5, JA 76.

C. The Don Pedro Project

The Districts also own and operate the federally-licensed Don Pedro Project, which is located on the Tuolumne River, 2.3 miles upstream of the La Grange Dam (at RM 54.5). *See California v. FPC*, 345 F.2d 917, 920-21 (9th Cir. 1965) (upholding Don Pedro licensing order). The Don Pedro Project began commercial operations in 1971, and provides irrigation storage, hydroelectric power, flood control storage, recreational benefits, fish and wildlife conservation, and municipal water supply. *Turlock Irrigation Dist. & Modesto Irrigation Dist.*, 128 FERC ¶ 61,035, P 2 (2009). The U.S. Bureau of Land Management administers federal lands within the boundary of the Don Pedro Project that are located approximately 5,800 feet upstream of the La Grange Dam. *See* La Grange Report at 11, JA 82.



See Turlock Response (filed Dec. 15, 2011) (R.12) at 2, JA 154.

III. THE CHALLENGED ORDERS

In June 2011, the National Marine Fisheries Service asked the Commission to determine whether the La Grange Project requires licensing under the Federal Power Act. The Service's request was motivated by the fact that the Project lacks fish passage facilities and thus impedes the movement of anadromous fish

travelling upstream on the Tuolumne River. Rehearing Order P 3, JA 23. To inform its determination, FERC Staff conducted a study of the historic and current navigability of the Tuolumne River. The Navigation Report found that the river was used, and is suitable for use, to transport persons and property above, past, and below the La Grange Project. *See, e.g.*, Navigation Report at 14-15, JA 275-76.

The Districts submitted comments in response to the Navigation Report, including a competing report prepared by Dr. Alan Peterson. *See* District Comments (filed Aug. 2, 2012) at Ex. 1 (R. 28), JA 291-308. The Tuolumne River Trust filed information regarding the suitability of the river for use by commercial and recreational boaters. *See* Tuolumne River Trust Comments (filed Aug. 2, 2012 and Oct. 3, 2012) (R. 27, 33), JA 279, 361. And the California Department of Fish and Game submitted comments explaining that its crews navigate the river to conduct salmon surveys. *See* Cal. Dep't of Fish and Game Comments (filed Sept. 21, 2012) (R. 30), JA 323.

The Districts also filed data and analyses regarding the geographic scope of the reservoir created by the La Grange Dam. *See* Turlock Irrigation Comments (filed Oct. 11, 2011, Nov. 17, 2011, Dec. 15, 2011, Dec. 22, 2011, Jan. 5, 2012) (R. 6, 9, 12, 14, 17). The National Marine Fisheries Service filed satellite imagery, geographic information system output, and mapping evidence in support of its contention that the reservoir occupies upstream federal lands. *See, e.g.*, NMFS

Comments (filed Oct. 18, 2011, Dec. 15, 2011, Apr. 12, 2012) (R. 7, 13, 18). FERC Staff reviewed the analyses and prepared a report regarding the upstream extent of the La Grange reservoir. *See* FERC Backwater Analysis (issued Dec. 19, 2012) (R. 38), JA 404-27.

A. The Licensing Order

On December 19, 2012, FERC Staff issued an order determining that the La Grange Project required licensing under section 23(b)(1) of the Federal Power Act for three independent reasons. Licensing Order P 1, JA 1.[2] First, Staff found that the Project was located on a navigable river. Historical evidence established that, in the 1850s, the Tuolumne River was navigable by small craft at least as far as the site of the La Grange Dam (RM 52.2). *Id*. PP 17, 21-22, JA 8, 10-11. The record also demonstrated that the river was currently navigable to the La Grange Dam and suitable for simpler forms of commercial navigation. *Id*. PP 21-22, JA 10-11.

Second, FERC Staff found that the Project required licensing because it occupies public land. The data and analyses submitted by the Districts and the National Marine Fisheries Service demonstrated that the upstream extent of the reservoir created by the La Grange Dam extended well beyond the Bureau of Land Management's property boundary. *See id*. PP 27-33, JA 13-16.

[2] Pursuant to 18 C.F.R. § 375.308(h) the Director of FERC's Division of Hydropower Administration and Compliance is authorized to issue jurisdictional determinations with respect to unlicensed hydropower projects.

Third, FERC Staff found that, even if the Tuolumne River was not navigable, the Project would require licensing based on its location on a non-navigable Commerce Clause stream, effect on interstate commerce through its connection to the interstate electrical grid, and post-1935 construction. *Id*. P 22 n.44, JA 11. When the Turlock Irrigation District replaced the Project's generating units in 1989, it increased the Project's installed capacity by 174 kilowatts ("kw"), which constitutes post-1935 construction within the meaning of section 23(b)(1) of the Federal Power Act. *Id*.

FERC Staff also responded to a request from the Conservation Groups to consider whether the La Grange Project required licensing as an integral part of the Don Pedro Project. *See* Tuolumne River Trust Comments (filed Nov. 18, 2011) (R. 10) at 2, JA 146. FERC Staff first analyzed the Groups' contention that the La Grange Project served as a "re-regulating" reservoir for the Don Pedro Project.[3] It found, however, that the amount of available storage in the La Grange reservoir was insufficient to re-regulate releases from the Don Pedro Project. *See* Licensing Order P 44, JA 20.

[3] A re-regulating reservoir stores widely fluctuating discharges from powerhouses during periods of peak-demand and then releases them in a relatively uniform manner downstream in order to minimize any adverse environmental impacts. Rehearing Order P 110, JA 64.

FERC Staff also considered whether use of the La Grange Project is necessary to ensure compliance with the minimum flow release requirements in the Don Pedro Project's license. In order to maintain these flows, the Districts can pass them over the La Grange Dam or through the La Grange powerhouse. *See id.* P 36, JA 17. FERC Staff recognized that, given this relationship, the La Grange Project could be viewed as a necessary component for operation of the Don Pedro Project. On the other hand, if the requirements can be met by simply passively passing the flows through the La Grange Project, rather than by operating the Project to regulate the flows, there may be no need to include those structures as part of the Don Pedro Project. *Id.* P 38, JA 18. "Because the La Grange Project requires licensing on other grounds," FERC Staff found it unnecessary to "determine whether the La Grange Project might also require licensing as part of a complete unit of development with the Don Pedro Project." *Id.* P 39, JA 19.

B. The Rehearing Order

On rehearing, the Commission affirmed all three aspects of FERC Staff's determination that the La Grange Project is subject to federal licensing jurisdiction. With respect to navigability, the Commission found that there is substantial evidence that the Tuolumne River was and is navigable from its confluence with the San Joaquin River up to and through the Project's powerhouse and at least as far as the base of the La Grange Dam. Rehearing Order PP 48, 70, JA 41, 49.

The Commission further found that "Turlock's backwater analysis and [National Marine Fisheries Service's] contour projection method, each of which staff replicated, conclusively demonstrate that the La Grange Reservoir occupies federal lands." *Id*. P 86, JA 54. Such occupancy is a separate reason why the Project requires licensing under the Federal Power Act. The Commission also affirmed FERC Staff's finding that the increase in the Project's installed capacity resulting from the 1989 generating unit replacement constitutes post-1935 construction within the meaning of section 23(b)(1). This provided a third, independent ground for mandatory federal licensing. *Id*. PP 87-102, JA 55-60.

The Commission also affirmed Staff's finding that the La Grange Project does not require licensing as part of the Don Pedro Project based on any re-regulation of flows. *Id*. P 106, JA 62. But the Commission found that it lacked sufficient evidence to determine whether there might some other basis to license the La Grange Project as a component of the Don Pedro Project. *Id*. P 115, JA 65. It found no "need [to] resolve this issue" because the "La Grange Project requires licensing under [Federal Power Act] section 23(b)(1)." *Id*. P 116, JA 65.

C. The Ongoing Licensing Proceedings

The Don Pedro Project's license expires in 2016. Relicensing proceedings began in February 2011 and a final application for relicensing was filed on April 28, 2014. On May 9, 2014, the Commission issued a tentative schedule which

estimated that preliminary terms and fishway prescriptions would be filed in July 2016, and a final Environmental Impact Statement would be issued in July 2017. *See* Notice of Application at 3, filed May 9, 2014 in FERC Dkt. No. 2299-082.[4]

Licensing proceedings for the La Grange Project commenced in January 2014, when the Districts filed their Pre-Application Document. In the filing, which identifies studies needed to acquire information for the development of license terms, the Districts noted that "[f]ish passage at La Grange has been identified as a resource issue during the Don Pedro relicensing and is likely to be of interest to the agencies during the [La Grange Project] licensing proceedings." *See* Pre-Application Document at 5-15, filed Jan. 29, 2014 in FERC Dkt. No. P-14581.[5]

SUMMARY OF ARGUMENT

The Districts' Petition: The Commission reasonably determined that the La Grange Project requires licensing under section 23(b)(1) of the Federal Power Act for three independent reasons. The Districts' objections to certain aspects of the analyses underlying each of the Commission's jurisdictional determinations fail to establish that any of them was erroneous, much less that all three were not supported by substantial evidence.

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[4] The notice is available on the Commission's on-line docket at: http://elibrary.ferc.gov/idmws/file_list.asp?document_id=14214756.

[5] The Pre-Application Document is available on the Commission's on-line docket at: http://elibrary.ferc.gov/idmws/file_list.asp?document_id=14181906.

1. Navigability: The Commission reasonably found that the Tuolumne River is currently navigable from its confluence with the San Joaquin River up to the Project site. During the course of this proceeding, two independent groups – the California Department of Fish and Game and the Tuolumne River Trust – successfully navigated the river to the lowermost features of the La Grange Project. While the Districts argue that these successful trips cannot support a finding of present navigability, the record establishes that the boaters' testimony regarding navigability was based on their personal experiences and observations and demonstrate the river's suitability for commercial navigation by simple craft.

The Commission also reasonably determined that, in 1849-50, the Tuolumne River had been navigated by whaleboats at least as far as the present-day La Grange Dam site. While the Districts assert that this finding was based on a single newspaper article, they acknowledge that evidence of historic navigation may often be scarce. And they ignore other historical evidence that supports the report of upstream whaleboat navigation, including an 1851 declaration from the California Legislature that the Tuolumne River was navigable up to the rapids that then existed at the site of the La Grange Dam.

2. Occupancy of Federal Lands: The Commission's finding that the La Grange Reservoir occupies federal lands was based on a backwater analysis utilizing the same methods and data employed by the Districts, but using the

Commission's established definition of "backwater." The Districts' objections to certain aspects of the Commission's analysis are unfounded. And they fail to rebut an alternative contour elevation analysis performed by National Marine Fisheries Service establishing that the La Grange Reservoir extends into federal lands.

3. Post-1935 Construction: The Commission reasonably found that the 1989 replacement of the Project's turbine generator units increased its installed capacity by 174 kw and constituted post-1935 "construction" within the meaning of the Federal Power Act. While the Districts contend that the Commission's analysis was flawed, it was based on the evidence supplied by the Districts, the Districts' own characterization of that evidence, and standard industry terminology. And contrary to the Districts' claim, the Federal Power Act does not provide the Commission with the discretion to decline to assert jurisdiction over hydroelectric projects that fall within the terms of section 23(b)(1).

Conservation Groups' Petition: In the proceedings below, the Commission agreed with the Conservation Group's position that the La Grange Project must be licensed under the Federal Power Act, but declined to reach an alternative jurisdictional theory that they advanced. The Conservation Group's disagreement with the Commission's rationale for a substantively favorable decision does not constitute the "aggrievement" necessary to establish this Court's jurisdiction under the Federal Power Act.

Moreover, even if the La Grange Project is properly characterized as a "complete unit of development" with the Don Pedro Project, the Federal Power Act does not require that all constituent parts of a project be placed under a single license. In addition, the Commission enjoys broad discretion as to the manner and timing of its own proceedings. Here, cumulative impacts to aquatic resources in the Tuolumne River will be evaluated in both the Don Pedro and La Grange proceedings. The Conservation Groups will have the opportunity to present their views as to the necessary license terms – terms which the Commission can reserve the authority to modify to account for the two proceedings – and seek judicial review of those terms if they are unsatisfied. Nothing would be gained at this point in finding another basis for jurisdiction.

ARGUMENT

I. STANDARD OF REVIEW

In hydropower licensing decisions, the Court's role is "narrowly circumscribed." *U.S. Dep't of Interior v. FERC*, 952 F.2d 538, 543 (D.C. Cir. 1992). Deference to the agency's expertise is due "so long as its decision is supported by 'substantial evidence' in the record and reached by 'reasoned decisionmaking.'" *Id*. (citing *Electricity Consumers Resource Council v. FERC*, 747 F.2d 1511, 1513 (D.C. Cir. 1984)). The Commission's factual determinations are governed by section 313(b) of the Federal Power Act, which provides that

"[t]he finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." 16 U.S.C. § 825*l*(b). *See also Consol. Hydro Inc. v. FERC*, 968 F.2d 1258, 1261 (D.C. Cir. 1992).

Further, because substantial evidence is more than a scintilla, but something "less than a preponderance of the evidence," the possibility of drawing two inconsistent conclusions from the same evidence does not prevent one of those conclusions from being supported by substantial evidence. *Burns v. Dir. Off. Of Workers Comp. Programs*, 41 F.3d 1555, 1562 n.10 and 1564 n.13 (D.C. Cir. 1994). Thus, the Commission's reasonable inference of how the evidence is to be viewed should not be disturbed if supported by substantial evidence. Moreover, the Court grants "considerable deference to the Commission's interpretation of a statute it administers so long as its interpretation is permissible." *See City of Oconto Falls, Wis. v. FERC*, 204 F.3d 1154, 1159 (D.C. Cir. 2000) (finding FERC decision to award hydropower license entitled to deference).

II. THE COMMISSION REASONABLY FOUND THAT THE LA GRANGE PROJECT REQUIRES LICENSING.

The Commission found that the La Grange Project is located on a navigable river and occupies federal lands, either of which is independently sufficient for mandatory licensing under section 23(b) of the Federal Power Act. Additionally, even if the Tuolumne River was non-navigable, the Project would nevertheless require licensing because it is located on a non-navigable stream subject to

Congress' Commerce Clause jurisdiction and experienced post-1935 construction when it was enlarged in 1989. The Districts take issue with particular aspects of each of these findings. But even if their objections as to certain pieces of evidence were well-founded – which they are not – they fail to establish that the Commission's conclusions were not based on substantial evidence. *See Ariz. Corp. Comm'n v. FERC*, 397 F.3d 952, 954 (D.C. Cir. 2005) (FERC's orders do not lack substantial evidence "simply because petitioners offered some contradictory evidence") (internal quotations omitted).

A. The Commission Reasonably Found That The La Grange Project Is Located On A Navigable River.

1. Navigability can be based on present, past, or future suitability for use in commerce.

Pursuant to section 23(b)(1) of the Federal Power Act, a non-federal hydroelectric project must be licensed if it is located on "navigable waters" of the United States. Section 3(8) of the Federal Power Act defines navigable waters as

> Those parts of streams … which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce.

16 U.S.C. § 796(8).

A waterway is navigable if "(1) it *presently* is being used or is suitable for use, or (2) it has been used or was suitable for use in the *past*, or (3) it could be made suitable for use in the *future* by reasonable improvements." *Rochester Gas*

& Elec. Corp. v. FPC, 344 F.2d 594, 596 (2d Cir.1965) (emphases in original), *see also FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1154-55 (D.C. Cir. 2002) (same). "Navigability can be established based on any of these three requirements; each alone is sufficient." *FPL Energy*, 287 F.3d at 1155.

A river's suitability for use need not be demonstrated by actual commercial traffic. Navigability may be found "where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation." *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 416 (1940). In addition, to be navigable for purposes of the Federal Power Act, a waterway must form a highway for commerce with other states or with foreign countries, by itself or by connecting with other waters. *See, e.g., The Montello*, 87 U.S. (20 Wall.) 430, 439 (1874). Here, "[t]he Tuolumne River flows into the navigable San Joaquin River, which flows into the San Francisco Bay and the Pacific Ocean, thus providing the necessary link for interstate and foreign commerce." Rehearing Order P 34, JA 34.

2. The Commission's finding as to navigability was based on substantial evidence.

a. Present navigability

If any part of a project is located in navigable waters, the entire project requires licensing under the Federal Power Act. *See* Rehearing Order P 37, JA 35;

see also id. P 39 n.49 (collecting cases).[6] The La Grange Project's tailrace – the channel leading away from the powerhouse – is its lowermost feature, located at approximately RM 51.7. *See* License Order P 4, JA 2; Rehearing Order P 34, JA 34. Here, the Commission found that the Tuolumne River is presently navigable from its confluence with the navigable San Joaquin River (RM 0) up to at least the La Grange Project tailrace and, with a short portage, to the base of the La Grange Dam at RM 52.2. *See* Rehearing Order P 48, JA 41.

That finding was based, in part, on the undisputed fact "that recreational boaters use the Tuolumne River from the La Grange Bridge (RM 50.5) downstream to its confluence with the San Joaquin River." Rehearing Order P 42, JA 38. *See also* Navigation Report at 13, JA 274; Tuolumne River Trust Comments (filed Oct. 2, 2012), JA 361-64. In addition, California Department of Fish and Game field crews use motorized drift boats to conduct salmon surveys on the Tuolumne River, beginning just below the La Grange powerhouse (at RM 51.5 or 51.6) and travelling down river to RM 21.5 and, on occasion, to the mouth of the Tuolumne River (RM 0). *See Appalachian Elec. Power Co*., 311 U.S. at 416 (upholding navigability determination based, in part, on government survey boats).

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[6] Before the Commission, the Districts argued that navigability determinations must be made as to all aspects of a project, not only its lowermost portion. *See* Rehearing Order PP 35-40, JA 34-37 (discussing and rejecting the District's argument). The Districts did not raise this argument in their opening brief and it is therefore waived. *See New York v. EPA*, 413 F.3d 3, 20 (D.C. Cir. 2005).

Timothy Heyne, who participated in the surveys, testified that the base of the La Grange Dam could be reached by portaging a 200-foot rock section of the river immediately upstream of the powerhouse. *See* Cal. DFG Comments (filed Sept. 21, 2012), Ex. 4 ("Heyne Decl.") at PP 4-9, JA 358-59. *See also* License Order P 21, JA 10 (discussing surveys); Rehearing Order PP 42-43, JA 38 (same). The Tuolumne River Trust also submitted evidence from John Dye, who kayaked, with a short portage, from the La Grange Bridge (RM 50.5) to the base of the La Grange Dam and then back down to the bridge. *See* Tuolumne River Trust Answer (filed Feb. 12, 2012) (R.48) at Ex. 1 ("Dye Decl."), JA 502. *See also* License Order P 21, JA 10 (discussing kayak trip); Rehearing Order PP 44-48, JA 38-41.

The record also established that the Tuolumne River above the La Grange Project is currently used for commercial navigation by whitewater boating companies. *See* License Order PP 18-19, JA 8-9; Rehearing Order PP 49-51, JA 41-42. The Conservation Groups asserted that the area between the Don Pedro Dam and La Grange Dam could be navigated – and thus the entire river could be used as a continuous highway for commerce – but for the fact that the Districts and other landowners prohibited public access to that stretch of the river. *See* Rehearing Order PP 53, 55, JA 42, 43. The Districts disputed this point, arguing that boaters do not utilize this reach of the river because it is unsafe. *See id*. P 54, JA 43. The Commission chose not to resolve the parties' competing claims since

licensing was otherwise required because the Project itself was located on a navigable river. *Id*. P 56, JA 44.

b. Past navigability

The Commission also found that, in the mid-19th century, the Tuolumne River was navigated by whaleboats and other small craft at least as far as the present-day site of the La Grange Dam. *See* Rehearing Order P 70, JA 49. That finding was based on historic texts which discussed gold miners transporting supplies and equipment from the San Francisco Bay as far upstream as French Bar (near La Grange) and perhaps as far upstream as Jacksonville (RM 70). *See* Navigation Report at 8-10, JA 269-71; License Order P 17, JA 8; Rehearing Order PP 57-58, JA 44-45. It was buttressed by evidence of seasonal use of the lower Tuolumne River by steamboats during the winter months, which corresponded to the reported December and January time frame of whaleboat use in 1849-50. *See* Navigation Report at 10-11, JA 271-72; License Order PP 13, 17, JA 6, 8; Rehearing Order PP 61-62, JA 46. The Commission's finding of past navigability was further supported by the California Legislature's 1851 declaration that the Tuolumne River was navigable up to the rapids that existed at the present-day site

of the La Grange Dam. *See* License Order P 21, JA 10; Rehearing Order P 63, JA 46.[7]

3. The Districts' objections are without merit.

a. Identification of type of commercial use

The Districts' primary challenge to the Commission's navigability finding is based on a footnote in which the Commission opined that the river could be used for commercial fishing or sightseeing trips, or to transport goods downstream. ID Br. 15 (citing Rehearing Order P 44 n.59, JA 39). While the Districts characterize this observation as "sheer speculation" (ID Br. 16), the record demonstrates that the Tuolumne River is used for commercial boating above and below the La Grange Dam and the area near the Dam is scenic and is a bountiful fishing spot. *See, e.g.*, Rehearing Order P 49-52, JA 41-42; Dye Decl. ¶ 9, JA 503. Moreover, a river's suitability for commercial use may be shown by recreational use and test trips. *See United States v. Utah*, 283 U.S. 64, 83 (1931).

In any event, the Federal Power Act does not impose "a requirement that FERC identify a specific type of commerce." *FPL Energy*, 287 F.3d at 1158. The

[7] The Commission acknowledged that the California Legislature moved the official head of navigation downstream in 1854. Rehearing Order P 64, JA 47. But "that does not mean that the earlier determination was incorrect; conditions could have changed in the intervening years. Moreover, once a river is found navigable, it remains so." *Id*. *See also Appalachian Elec. Power Co.*, 311 U.S. at 408 ("once found to be navigable, a waterway remains so"); *Consol. Hydro*, 968 F.2d at 1260 (same).

statutory test for navigability "is whether the waterway is presently 'suitable for use for transportation of persons or property in interstate or foreign commerce,' not whether the water is presently suitable for a specific type of commercial activity named by FERC and approved by an opposing party." *Id.* (quoting 16 U.S.C. § 796(8)).

b. Boating evidence

The Districts contend that it was improper for the Commission to rely upon the boating surveys conducted by the California Department of Fish and Game because the survey crews did not actually portage the rocky section immediately upstream of the Project's powerhouse. ID Br. 17. But the Districts do not dispute that the "survey crews using motorized drift boats routinely navigate the river from approximately RM 51.5 or 51.6, just below the La Grange powerhouse." Rehearing Order P 42, JA 38. And Mr. Heyne's testimony was based on his "actual experience of navigating the river in the type of boats that demonstrate the river's suitability for the simpler types of commercial navigation." *Id*. P 43, JA 38. His observation about the ability to portage a rocky section in order to reach the pool at the base of the Dam was based on personal observations. Heyne Decl. ¶ 6, JA 359. It was appropriate for the Commission to rely upon such evidence. *See, e.g.*, FED. R. EVID. 701 (authorizing the testimony of lay witnesses "in the form of opinions" that are "(a) rationally based on the witness's perception; (b) helpful to

clearly understanding the witness's testimony or to determining a fact in issue, [and] (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702").

The Districts also assert that the Commission may not rely upon Mr. Dye's evidence because it reflects a "single trip by an expert kayaker." ID Br. 18. But Mr. Dye "did not need to make use of any expert kayaking skills to reach the dam," nor was there any evidence that "a kayak was required to navigate the easy rapids in this stretch of river." Rehearing Order P 44, JA 38; *see also id*. P 45, JA 39 (discussing Mr. Dye's testimony); License Order P 21, JA 10 (same). While the Districts note that Mr. Dye's trip occurred during relatively low flows, they offer nothing to challenge his testimony – based on personal experience on the river at higher flows – that "the river [would] be very forgiving at flows up to 1,500 to 2,000 cfs, and [would] be boat-able well past 8,000 cfs." Dye Decl. ¶ 7, JA 503. And a "single round trip is sufficient if, as in this case, it occurs under conditions that demonstrate a river's suitability for commercial navigation by simple craft." Rehearing Order P 44, JA 38. *See also FPL Maine*, 287 F.3d at 1160 (upholding navigability finding based on three test canoe trips, without evidence of historical or present recreational use).

c. Historic evidence

The Districts contend that the Commission unreasonably relied on texts discussing historic navigation of the Tuolumne River up to and past the site of the La Grange Dam because those texts cite to a single newspaper article discussing whaleboat transports to Jacksonville (RM 70). ID Br. 18-19. In doing so, the Districts ignore that the discussion in those texts was buttressed by the use of steamboats on the lower Tuolumne at timeframes that corresponded to the reported whaleboat use. *See, e.g.*, Rehearing Order PP 61-62, JA 46. And they ignore the California Legislature's 1851 declaration that the river was navigable up to the rapids that then existed at the site of the La Grange Dam. *See id*. P 64, JA 47. Moreover, as the Districts concede, "evidence of past navigational use need not be large." ID Br. 19.[8] And "the fact that other sources quoted and relied on the article suggests that the authors considered it reliable." Rehearing Order P 58, JA 45.

[8] *See also* Rehearing Order P 58, JA 45; *Appalachian Elec. Power Co.*, 311 U.S. at 416 ("Use of a stream long abandoned by water commerce is difficult to prove by abundant evidence"); *Conn. Light & Power Co. v. FPC*, 557 F.2d 349, 356 (2d Cir. 1977) (although "the evidence of navigability was 'not overwhelming[,]' [t]his does not drain it of substance"); *Puget Sound Power & Light Co. v. FERC*, 644 F.2d 785, 789-90 (9th Cir. 1981) (upholding finding of navigability despite fact that "[t]he evidence in this case is not overwhelming," and noting that when "analyzing the quantum of evidence necessary to support a finding of navigability we must take due account of the changes and complexities in the circumstances of a river").

The Districts also point to their historian's analysis of the physical characteristics of the Tuolumne River in the mid-19th century. ID Br. 19. But, as the Commission explained, the Districts' historian "simply infer[ed], based on Turlock's gradient calculations and photographs, that this part of the river was non-navigable and could not be portaged." Rehearing Order P 59, JA 45. Those inferences were not supported by any independent sources. *Id*. The Commission further explained how river gradient calculations can give a misleading impression of the overall gradient of the river and its navigability. *Id*. Moreover, "it is not possible to determine from the photographs whether it would be necessary or possible to portage the falls." *Id*.

In any event, the Commission need not find that the falls could be portaged or that the river was navigable either through the falls where the La Grange Dam is now located. Rather, "it is sufficient to find, as we do here, that the river was navigable in the past at least up to the falls, where the La Grange Dam is now located. This necessarily means that the river was navigable through the part of the river where the La Grange Project powerhouse and tailrace are now located, downstream of the La Grange Dam." *Id*. P 60, JA 46.

B. The Commission Reasonably Found That The La Grange Project Occupies Lands Of The United States.

1. The Commission's findings were based on analyses and data supplied by the Districts and the National Marine Fisheries Service.

A hydroelectric project must be licensed if it occupies federal lands. 16 U.S.C. § 817(1). Here, the Commission affirmed FERC Staff's determination that the La Grange Reservoir occupies lands of the United States. *See* Rehearing Order P 71, JA 49.

In reaching this conclusion, FERC Staff reviewed conflicting analyses submitted by the Districts (purportedly establishing that the La Grange reservoir ends roughly 450 feet below the closest federal land) and the National Marine Fisheries Service (demonstrating that the reservoir does, in fact, inundate federal lands). *See, e.g.*, Licensing Order PP 23-26, JA 12-13. FERC Staff requested all data used by the Districts and replicated the analyses using the same methods. But unlike the Districts, FERC Staff applied the Commission's definition of "backwater" – *i.e.*, the amount the depth of flow has been increased by a dam. Under this definition, the upstream extent of a reservoir is the point where the "with-dam" and "without-dam" surface elevations for a given flow are equal. *Id*. P 28, JA 14.

Applying the Commission's backwater definition, FERC Staff determined that the La Grange reservoir extends 11,325.5 feet upstream of the dam, which is

more than a mile upstream of the boundary of the property managed by the Bureau of Land Management. *Id*. P 29, JA 14. That conclusion was confirmed by the contour projections made by the National Marine Fisheries Service, and affirmed by the Commission. *Id*. P 32, JA 15; Rehearing Order P 86, JA 54.

2. The Districts' objections fail to establish that the Commission's determinations were not based on substantial evidence.

In challenging the Commission's finding, the Districts first assert that the Commission "totally ignored the results of [their] on-the-ground field survey of water level gradient changes." ID Br. 21. While the challenged orders focused on the more detailed backwater analysis, FERC Staff did explain that determining a reservoir's extent based on the gradient of water surface elevation could be "misleading" and fail to "account for the full backwater effect of the dam." License Order P 31, JA 15. Doing so "assumes that reservoir water surface gradients generally appear flat and uniform," but in fact they "are influenced by the terrain and can have a gradient such that their surface level varies, depending on where it is measured." *Id*.

The Districts next contend that the Commission's attempt to precisely determine where the "with dam" and "without dam" conditions are equal is inappropriate given the theoretical limitations of backwater analyses. ID Br. 22. But these limitations "apply equally to both the Districts' and staff's analysis and

are therefore not significant in this particular case." Rehearing Order P 78, JA 52. Here, the different conclusions reached by the Districts and the FERC Staff stemmed not from those theoretical limitations, but from the fact that the Districts "plot[ted] their results on small graphs with a more compressed scale and use [of] thicker lines to depict the with-dam and without-dam conditions." *Id*. P 77, JA 51. FERC Staff, on the other hand, "us[ed] slightly larger graphs with a less compressed scale and thinner lines" and found "the correct point of tangency as occurring much farther upstream, … well upstream of the BLM boundary." *Id*.[9]

The Districts attempt to support their position with a reference to a hydraulics textbook. CG Br. 22-23. But the textbook explains that the endpoint of a reservoir can be determined by "finding 'the point of tangency of the normal-depth line to the backwater curve.'" Rehearing Order P 76, JA 51 (citing Chow, Ven Te, *Open Channel Hydraulics*, 313 (McGraw-Hill 1959)). This is what FERC Staff did here by determining "the point where the line showing the normal depth of the river (the without-dam condition) appears to meet up with the backwater curve (the with-dam condition)." *Id*.

[9] The National Marine Fisheries Services also performed backwater analyses demonstrating that, at low flows, the La Grange Reservoir occupies Bureau of Land Management Lands. *See* License Order P 26, JA 13; NMFS Add'l Information for Jurisdiction Review (filed April 12, 2012) (R.18), JA 181-241.

Finally, the Districts suggest that the Commission does not always require a backwater analysis to establish the extent of reservoirs. ID Br. 23. It is certainly true that the "Commission routinely uses contour elevations to establish the upstream … boundary of reservoirs." Rehearing Order P 84, JA 53. And here, "using a contour elevation simply confirms that the La Grange Reservoir occupies BLM lands." *Id*. P 85, JA 53. The National Marine Fisheries Service, "without considering any backwater analysis, … demonstrated that the upper extent of the La Grange Reservoir occurs more than two miles upstream of La Grange Dam, crossing BLM lands at two different upstream locations." *Id*., JA 53. FERC Staff replicated that analysis "with essentially the same results." *Id*.

C. The Commission Reasonably Found That The La Grange Project Underwent Post-1935 Construction.

Under section 23(b)(1) of the Federal Power Act, a project must be licensed if: (1) the operator intends to "construct a dam or other project works" in non-navigable waters; (2) construction commences after the 1935 amendments to the Act; and (3) the project is located on Commerce Clause waters. 16 U.S.C. § 817(1). *See also Thomas Hodgson & Sons, Inc. v. FERC*, 49 F.3d 822, 826 (1st Cir. 1995) (discussing FERC jurisdiction over project works on non-navigable waters). The Commission views an increase in a project's generating capacity as the relevant factor in the jurisdictional determination of post-1935 "construction," which is an undefined term in the Act. *See* Rehearing Order P 92, JA 57*; L.S.*

Starrett Co. v. FERC, 650 F.3d 19, 27 (1st Cir. 2011) (Commission could reasonably interpret "construction" to include all increases in generating capacity); *Puget Sound Power & Light Co. v. FPC*, 557 F.2d 1311, 1316 (9th Cir. 1977) (no post-1935 construction where "the electrical generating capacity remains the same today as before 1935").

Here, the Commission found that, even if the Tuolumne River were not navigable at the lowermost feature of the Project, licensing would still be required based on the Project's location on a non-navigable Commerce Clause stream, effect on interstate commerce through its connection to the interstate grid, and the 1989 replacement of the generating units that increased the Project's installed capacity by 174 kilowatts. *See* Licensing Order P 22 n.44, JA 11; Rehearing Order P 103, JA 60. The Commission reached this conclusion by comparing the kilowatt ratings for the old generating units (4,740 kw) with the new generating units (4,924 kw). Licensing Order P 2, JA 1. The underlying information was drawn from the Districts' La Grange Report and an accompanying report prepared by the Bechtel engineering firm evaluating the proposals for the 1989 replacement of the Project's generating units ("Bechtel Report"). *Id.*

The Districts do not dispute that the Project is located on a Commerce Clause stream and affects interstate commerce. ID Br. 5. They contend, however, that the Commission erred in concluding that the Project's installed capacity

increased as a result of the 1989 replacement of the generating units. That contention lacks merit.

1. The Commission reasonably found that the capacity of the Project's original units was 4,750 kilowatts.

The Districts challenge the Commission's use of 4,750 kw as the original generating capacity, arguing that the "capacity [of the original units] when installed at La Grange may have been different from what was stated on the units." ID Br. 25. But in assessing installed capacity, the Commission uses a generator's "nameplate rating" (*i.e.*, manufacturer's rating) unless there is information that the "nameplate no longer accurately describes the generator's actual capacity." Rehearing Order P 91, JA 56. The Districts do not point to any analysis in the record establishing that the generators' actual capacity differed from its rating. *See also id*. P 92, JA 57 (because "precise information … might not be available, … the Commission considers whether the available information demonstrates" an increase in capacity).

Here, the available information – the Bechtel Report – described the original Unit 1 as a "S. Morgan Smith horizontal Francis unit with two-500 kw generators coupled to each side." *See* La Grange Report, Ex. E at 1, JA 103. Unit 2 was described as a "S. Morgan Smith vertical Francis unit with one directly coupled 3,750 kw Allis-Chalmers generator." *Id*. *See also* Rehearing Order P 94, JA 57. Thus, using the best available information – all of which was provided by the

Districts – the Commission reasonably found that nameplate installed capacity of the original equipment was 4,750 kw. *Id*. P 94, JA 57.

2. The Commission reasonably found that the Project's installed capacity increased as a result of the 1989 replacement of the turbine generator units.

The Districts contend that, even if the Project's original capacity was 4,750 kw, the Commission erred by comparing the capacity of the new *turbines* to the capacity of the old *generators*. ID Br. 26. Specifically, the Districts view the kilowatt values in the Bechtel Report as referring to the capacity of the new turbines, not the new generators, and therefore comparing those values to that of the old generators "was comparing apples to oranges." ID Br. 26. The Districts are wrong.

A hydroelectric generating unit consists of a turbine and a generator. The turbine converts the energy from flowing water to mechanical power and transmits it to the generator. The generator converts that power to electrical energy, which is then moved through transmission lines. The rated output of a generator is generally chosen to match the output of the turbine. Turbines are selected based on the design best suited for the operating conditions of the project. *See* Rehearing Order P 90, JA 56.

A licensed project's "authorized installed capacity" is the lesser of the ratings (*i.e.*, capacity) of the generator or turbine units. *See* 18 C.F.R. § 11.1(i).

"Installed capacity" for an unlicensed project is determined the same way. *See* Rehearing Order P 92, JA 57. If precise information about an unlicensed project's installed capacity is not available, "the Commission considers whether the available information demonstrates that there has been an increase in the project's electrical generating capacity." *Id.*

With respect to the Commission's determination of the Project's current generating capacity, Table 2 of the Bechtel Report states that the generating capacity of new Unit 1 is 1,231 kw and the capacity of new Unit 2 is 3,693 kw. La Grange Report, Ex. E at 6, JA 108. "Taken together, the total generating capacity of the new units is 4,924 kw." Rehearing Order P 95, JA 58.

Table 2 of the Bechtel Report expressed the values of the replacement units in both kilowatts (the standard expression of generator capacity) and horsepower (the standard expression of turbine capacity). *See* La Grange Report, Ex. E at 6, JA 108; Rehearing Order P 96, JA 58. The Commission compared the kilowatt values of the new generators (4,924 kw) to the kilowatt values of the old generators (4,750 kw), which "yields an increase in generating capacity of 174 kw." Rehearing Order P 95, JA 58; *see also id.* P 96, JA 58.

The Districts now claim that it can be inferred from the Bechtel Report that "both the 'kw' and 'hp' numbers were for the capacity of the new turbines." ID Br. 26. But in their rehearing request, the Districts explained that, under industry

standards, "[t]urbines are rated as horsepower (hp) at design head and flow conditions," and "[g]enerator capacity is … rated as kilowatt output." Districts Rehearing Request (filed Jan. 18, 2013) (R. 43) at 29, JA 456. And in their filing accompanying the Bechtel Report, the Districts advised that replacement of the original two-generator configuration associated with Unit 1 would "require a generator capable of an output of about 1,230 kw" – which corresponds to the 1,231 kw figure referenced in Table 2 of the Bechtel Report for the new Unit 1 generator. *See* La Grange Report at 8, JA 79; *id*. Ex. E at 6, JA 108.[10] The Districts' attempt to buttress their current claim with the fact that the kilowatt numbers in Table 2 match the horsepower figures after they are converted to kilowatts is unavailing. ID Br. 27. "[I]t is general practice to match the capacity of the turbines and generators." Rehearing Order P 98, JA 59.

Finally, the Districts contend that the Commission "apparently did not know whether the new units would produce any more electricity than the old units." ID Br. 28. While the Districts did not "provide sufficient information to allow a precise comparison of the pre- and post-construction conditions" (Rehearing Order P 98, JA 59), the Bechtel Report concludes that the La Grange Project will have an

[10] The Districts' filing also stated that Unit 1's "replacement generator [has a] capability of 1,220 kw." La Grange Report at 8, JA 79. "Thus, the information that Turlock supplied indicates that, at a minimum, the generating capacity of Unit 1 [(which was originally 1,000 kw)] increased by 220 kw." Rehearing Order P 94, JA 58.

"approximate 200 HP increase in output with improved efficiency, [which] reflects a favorable return on investment." La Grange Report, Ex. E at 22, JA 124. In light of the $2.31 million cost of the 1989 upgrade, the Commission found it "reasonable to assume that Turlock would not likely have undertaken" the upgrade "without a corresponding benefit." Rehearing Order P 98, JA 59. Whether that benefit is the capacity increase of 174 kw calculated by the Commission, or the 200 HP increase (an increase of 150 kw) described in the Bechtel Report is immaterial. "The fact remains that the construction increased the project's generating capacity and therefore constitutes post-1935 construction." *Id*.

3. If a Project meets the jurisdictional criteria of section 23(b) of the Federal Power Act, it must be licensed.

The Districts assert that, even if the 1989 construction increased the Project's generating capacity, the Commission should have exercised its purported discretion to decline jurisdiction in light of the supposed "*de-minimis*" increase. ID Br. 28-30. The supposed basis for this authority is a fleeting reference to "administrative discretion" in a footnote to the *Starrett* decision, which contains no analysis of the issue whatsoever. 650 F.3d at 29 n.15. And, as the Commission

explained, "[t]here is no recognized *de-minimis* exception or waiver authority under the FPA." Rehearing Order P 102, JA 60.[11]

The Districts note (ID Br. 30) that the Commission will decline to characterize upstream reservoirs as part of a "complete unit of development" with downstream generation facilities, and thus not subject them to federal licensing jurisdiction, if the reservoirs' impact on downstream generation falls below a certain threshold. *See Domtar Maine Corp. v. FERC*, 347 F.3d 304, 312 (D.C. Cir. 2003). But in those circumstances, the Commission is assessing whether an upstream reservoir is "necessary or appropriate" in the operation of a licensed downstream facility – the statutory test for determining whether the facilities collectively constitute a complete unit of development, the constituent parts of which must be licensed. *See Chippewa & Flambeau Imp. Co. v. FERC*, 325 F.3d

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11 *See Escondido Mut. Water Co.*, 6 FERC ¶ 61,189, 61,461 (1979) ("The fact that Section 10(i) authorizes administrative waivers of most licensing provisions, rather than administrative exemptions from the Federal Power Act, indicates without question that even the smallest projects in terms of power production are required to be licensed"), *aff'd in pertinent part*, *Escondido Mut. Water Co. v. FERC*, 692 F.2d 1223, 1230 (9th Cir. 1983) ("No explicit language in the FPA limits the Commission's jurisdiction to projects where the primary, or a major, or significant, or non-*de minimis* purpose is to generate power"), *aff'd in part and rev'd in part on other grounds*, *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 n.12 (1984); *Nantahala Power & Light Co.*, 57 FPC 1033, 1034 (1977) (examining Supreme Court precedent and determining that assertion of jurisdiction over projects having a purportedly *de-minimis* effect on interstate commerce is the fulfillment of "a clear legislative mandate to attain comprehensive regulation and control, to the extent possible, over development of our Nation's water resources").

353, 358 (D.C. Cir. 2003) ("By enacting the 'necessary or appropriate' standard, the Congress invested the Commission with significant discretion."). In these circumstances, the Commission is not "waiving jurisdiction" (ID Br. 30); it is determining whether jurisdiction exists in the first place.

Finally, the Districts contend that characterizing the increase in the Project's generating capacity as post-1935 construction and asserting jurisdiction "would not appear consistent with Congress' intent in amending Section 23" of the Federal Power Act. ID Br. 30. But the "central purpose of the Federal Water Power Act was to provide for the comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest." *FPC v. Union Elec. Co.*, 381 U.S. 90, 98 (1965). Congress amended the Act in 1986 to make clear that licensing decisions should "give equal consideration to" power and development purposes and "the protection … and enhancement of fish and wildlife," and other aspects of environmental quality. 16 U.S.C. § 797(e). It is therefore reasonable "for the Commission to conclude that in order to ensure that the Nation's waterway be used in a 'harmonious' fashion, and to ensure that fish and wildlife were protected, it could interpret 'construction' as including all increases in capacity." *Starrett*, 650 F.3d at 27.

III. THE COURT LACKS JURISDICTION TO CONSIDER THE CONSERVATION GROUPS' CLAIMS.

A. Conservation Groups Are Not Aggrieved By The Commission's Orders.

The Federal Power Act requires, as a precondition to judicial review, that a party be "aggrieved" by the orders in question. *See* 16 U.S.C. § 825*l*(b); *La. Pub. Serv. Comm'n v. FERC*, 551 F.3d 1042, 1046 (D.C. Cir. 2008) ("A party may invoke our jurisdiction only if 'aggrieved by an order issued by the Commission,' 16 U.S.C. § 825*l*(b)"). And all parties invoking this Court's jurisdiction must satisfy Article III's requirements of constitutional standing. *See, e.g.*, *Interstate Natural Gas Ass'n of Am. v. FERC*, 285 F.3d 18, 45 (D.C. Cir. 2002). "Common to both these thresholds is the requirement that petitioners establish, at a minimum, 'injury in fact' to a protected interest." *Shell Oil Co. v. FERC*, 47 F.3d 1186, 1200 (D.C. Cir. 1995).

A party does not suffer an injury-in-fact, and "may not appeal from[,] a disposition in its favor." *Showtime Networks Inc. v. FCC*, 932 F.2d 1, 4 (D.C. Cir. 1991). Here, the Commission agreed with the Conservation Groups' position that the La Grange Project must be licensed under the Federal Power Act. *See* Rehearing Order P 1, JA 22. In doing so, the Commission accepted two of the jurisdictional theories advanced by the Conservation Groups – *i.e.*, that licensing is required either because the Project is located on navigable waters or occupies

federal lands.[12] As result, the Commission found it unnecessary to reach the Groups' additional theory that the Project could also be licensed under section 4(e) of the Act as a component of the Don Pedro Project.[13] *See* Rehearing Order P 116, JA 65 ("because licensing is required on other grounds, we need not resolve this issue now"). While the Conservation Groups take issue with this decision, "mere disagreement with an agency's rationale for a substantively favorable decision … does not constitute the sort of injury necessary for purposes of Article III standing." *Shell Oil Co*., 47 F.3d at 1202 (internal quotations omitted). *See also Telecomms. Research & Action Ctr. v. FCC*, 917 F.2d 585, 588 (D.C. Cir. 1990) (dismissing for lack of standing petition by party who endorsed the end result reached by the FCC, but disagreed with the rationale employed).

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[12] *See* Conservation Groups' Comments (filed Nov. 18, 2011), at 2, JA 146 ("La Grange is subject to licensing, regardless of construction history, if it occupies federal lands"); Tuolumne River Trust Comments (filed Aug. 2, 2012) (R.27) at 3, JA 281 (submitting "important evidence supporting the conclusion that the river is navigable") and (filed Oct. 2, 2012) (R.33), at 4, JA 364 ("TRT believes the River is navigable and respectfully requests that the Commission accept FERC Reports conclusion regarding navigability"); Conservation Groups' Rehearing Request (filed Jan. 18, 2013) (R.44), at 1, JA 469 ("We support the Order's finding that La Grange is subject to the Commission's mandatory licensing jurisdiction based on its location on a navigable waterway and occupation of federal lands.").

[13] *See* Conservation Groups' Comments (filed Nov. 18, 2011) at 2, JA 146 (asking FERC staff to evaluate whether La Grange is a component of the Don Pedro Project).

B. The Conservation Groups Lack Organizational Standing.

In an effort to establish the requisite concrete injury, the Conservation Groups contend that the challenged orders require them to participate in "separate licensing proceeding[s] for [the] La Grange" and Don Pedro Projects. CG Br. 14-15. But "[t]he mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient" for standing purposes. *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995) (quoted in parenthetical, quoted citation omitted). *See also Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 12 (D.C. Cir. 2011) (expenditure of "staff time and monetary resources … [in] submitting comments to the EPA, … testifying before the United States Senate and participating in numerous court cases … do not suffice" to establish standing); *Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1140 (D.C. Cir. 2011) ("litigation expenses cannot establish standing").[14]

[14] *See also Fair Hous. Council v. Montgomery Newspapers*, 141 F.3d 71, 79 (3rd Cir.1998) ("We align ourselves with those courts holding that litigation expenses alone do not constitute damage sufficient to support standing."); *Ass'n for Retarded Citizens v. Dallas Cnty. Mental Health & Mental Retardation Ctr. Bd. of Trs.*, 19 F.3d 241, 244 (5th Cir.1994) ("The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization.").

The Conservation Groups also assert that the challenged orders will hamper their fundraising efforts because (a) separate licensing proceedings will somehow exacerbate existing fish passage problems on the Tuolumne River, (b) which will decrease the number of salmon that spawn in the River, (c) thereby causing people to choose not to participate in guided canoe trips sponsored by the Groups. CG Br. 16. But this hypothetical chain of events is an entirely speculative prediction of future actions by third parties. *See Nat'l Taxpayers Union*, 68 F.3d at 1433 ("The impact NTU assumes Section 13208 will have on its future fundraising initiatives is entirely speculative"); *United Transp. Union v. ICC*, 891 F.2d 908, 912 (D.C. Cir. 1989) ("When considering any chain of allegations for standing purposes, we may reject as overly speculative … predictions of future events (especially future actions by third parties)"). Moreover, it is based on the completely illogical premise that the licensing proceedings – which will analyze fish passage issues and develop any necessary license terms – will actually worsen any existing fish passage issues.

C. The Conservation Groups Do Not Have Standing On Their Members' Behalf.

In an effort to establish representational standing, the Conservation Groups contend that separate licensing proceedings for the Don Pedro and La Grange Projects will lead to "lack of coordinated fish passage," which will harm the trout

and steelhead populations of the Tuolumne River and the related recreation activities of its members. CG Br. 16-17.[15] But this too is entirely speculative.

The Conservation Groups are participating in the Don Pedro relicensing proceeding. "Many of the studies conducted" in that proceeding have focused on aquatic resources and "provide a scientific basis to understand and potentially address the cumulatively affected resources of the lower Tuolumne River." Don Pedro Final Licensing Application, Executive Summary at 1, 3.[16] Likewise, fish passage has been flagged as a significant issue in the La Grange proceeding. *See* Pre-Application Document at 5-15, 5-16.[17] The proceedings will provide the Commission and relevant resource agencies with the necessary information to develop whatever license terms may be necessary to protect aquatic resources on the Tuolumne River. To the extent the Conservation Groups are not satisfied with the environmental conditions developed in either proceeding, they can seek redress through rehearing and, if necessary, appellate review. In light of the multiple avenues to address environmental concerns, the Conservation Groups lack present

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[15] The declarations cited by the Conservation Groups in support of this claim (CG Br. 17 n,.14) simply recount the declarant's "understanding" that only a single proceeding will permit adequate fish passage licensing measures. *See* CG Br. at A-28 (¶ 18)A-32 (¶ 9).

[16] The Relicensing Application is available on the Commission's on-line docket at: http://elibrary.ferc.gov/idmws/file_list.asp?document_id=14209655.

[17] The Pre-Application Document is available on the Commission's on-line docket at: http://elibrary.ferc.gov/idmws/file_list.asp?document_id=14181906.

aggrievement. *See Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 35 (D.C. Cir. 1992) ("Allegations of injury based on predictions regarding future legal proceedings are … too speculative to invoke the jurisdiction of an Article III Court."); *N.C. Utils. Comm'n v. FERC*, 653 F.2d 655, 663 (D.C. Cir. 1981) ("Given the availability of alternate and more direct forums of judicial review, we see no reason to allow review here and now").

IV. THE COMMISSION REASONABLY DECLINED TO DETERMINE WHETHER THE LA GRANGE PROJECT ALSO REQUIRES LICENSING AS A COMPONENT OF THE DON PEDRO PROJECT.

A. Even If The Projects Were A Complete Unit Of Development, The Federal Power Act Does Not Require That They Be Licensed Together.

The Federal Power Act defines "project" as the "complete unit of development" of a power plant, including all "structures used and useful in connection with said unit," and all "ditches, dams [and] reservoirs" which are "necessary or appropriate in the maintenance and operation of such unit." 16 U.S.C. § 796(11). "Project works" are the physical structures of a project. *Id*. § 796(12). The Conservation Groups assert that the La Grange Project is properly characterized as one of the Don Pedro Project's "project works" because it benefits the Don Pedro Project by re-regulating the project's flows (CG Br. 21-32), and by maintaining Don Pedro's required minimum flows (*id*. 32-34). In their view, this triggers the Commission's "statutory obligation … to license La Grange and Don

Pedro as a complete unit of development," since "[p]rojects that comprise a complete unit of development *may* be included in a single license." CG Br. 21 (emphasis added).

As discussed more fully below, the Commission reasonably rejected the re-regulating argument and found insufficient evidence to resolve the minimum flow release arguments. As a threshold matter, however, it should be noted that there is no requirement to license projects in a single license, even if they are a complete unit of development.

The Federal Power Act "empowers the Commission to license … 'project works'; it does not authorize the licensing of 'projects' as such." *Mont. Power Co. v. FPC*, 298 F.2d 335, 339 (D.C. Cir. 1962).[18] And while "[t]he complete unit of development must be licensed," nothing in the Act requires the Commission "to place all parts of the unit of development under a single license." *Hudson River-Black River Regulating Dist*., 100 FERC ¶ 61319, P 6 n.8 (2002).[19] Thus even if

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[18] *See also Lake Ontario Land Dev. & Beach Prot. Ass'n v. FPC*, 212 F.2d 227, 232 (D.C. Cir. 1954) ("The Commission licenses facilities – dams, powerhouses, transmission lines, and other 'project works' of various sorts – not projects as such"); 16 U.S.C. § 797(e) (FERC is authorized "[t]o issue licenses … for the purpose of constructing, operating or maintaining … project works.").

[19] *See also* License Order P 37 n.73, JA 18 ("although all parts of a complete unit of development must be licensed, they do not necessarily have to be included in a single license"); Rehearing Order P 118, JA 66 (same); *Confederated Tribes of the Warm Springs Reservation of Oregon & Portland Gen. Elec. Co.,* 77

(footnote continued on next page)

the Conservation Groups' characterization of the relationship between the La Grange and Don Pedro Projects were correct, it would not establish that the Commission violated the Federal Power Act by having separate licenses for the Projects.

To the contrary, the cumulative impacts to aquatic resources in the Tuolumne River will be evaluated in both the Don Pedro and La Grange licensing proceedings. The Conservation Groups will have the opportunity to fully present their views on these issues and help shape – or challenge – any environmental license terms that are imposed. And, if necessary, the Commission can include a reservation of authority to amend any Don Pedro license to account for the resolution of issues in the La Grange proceedings. *See* Rehearing Order P 26, JA 49; 18 C.F.R. § 2.23 (if "it is not possible to explore and address all cumulative impacts at relicensing, the Commission will reserve authority to examine and address such impacts after the new license has been issued").

FERC ¶ 61,267, 62,113-14 (1996) ("although it may often be desirable to have a complete unit of development under a single license, the FPA does not require this"); *City of Tacoma, Wash.*, 71 FERC ¶ 61,381, 62,488 (1995) (while "all project works comprising a complete unit of development should be licensed, [the Commission] has not generally required that all such project works be covered under a single license").

B. The Commission Reasonably Found That The La Grange Project Does Not Serve As A Re-regulating Facility For The Don Pedro Project.

The Commission reasonably affirmed "staff's finding that the La Grange Project does not require licensing as part of the Don Pedro Project based on any re-regulation of flows." Rehearing Order P 106, JA 62. The Conservation Groups contend this finding was in error. But many of their arguments are jurisdictionally-barred as they were never presented to the Commission on rehearing. And none establishes that the Commission acted arbitrarily.

1. Many of the Conservation Groups' objections were not presented to the Commission on rehearing.

The Court lacks jurisdiction to consider any "objection" that was not "urged before the Commission in the application for rehearing." 16 U.S.C. § 825*l*(b); *see also Pub. Utils. Comm'n v. FERC*, 367 F.3d 925, 929 (D.C. Cir. 2004) ("This objection was not raised in CPUC's rehearing petition and we therefore lack jurisdiction to consider it"). The Conversation Groups failed to present the following arguments to the Commission on rehearing or otherwise:

- the supposed "abrupt, unexplained" departure from an earlier order relating to the Don Pedro Project which purportedly "acknowledged that La Grange is a 're-regulating facility.'" CG Br. 22. The Conservation Groups did not even cite the relevant order. *See* Rehearing Request at 5-16, JA 473-84;
- the purportedly "sharp[] depart[ure] from its own precedent" in *City of Norway, Mich.*, 96 FERC ¶ 62,032 (2001), in defining re-regulation as the "'storage' of flows in a reservoir for later release." CG Br. 23-25.

The Conservation Groups' rehearing request does not even cite *City of Norway*. *See* Rehearing Request at 5-16, JA 473-84; and

- the supposed deviation from the so-called "*Chippewa* test." CG Br. 26-28. The rehearing request makes no mention of this test. *See* Rehearing Request at 5-16, JA 473-84.

The failure to even cite or discuss the allegedly contrary authority demonstrates the failure to adequately raise the arguments. *See, e.g.*, *Int'l Mun. Gas Agency v. FERC*, 326 F.3d 1281, 1286 n.7 (D.C. Cir. 2003) (statutory objection not adequately raised where rehearing request did not cite the statute); *Constellation Energy Commodities Grp., Inc. v. FERC*, 457 F.3d 14, 21 (D.C. Cir. 2006) (failure to even cite tariff provision on rehearing on which petitioner now relies fails to raise a cognizable argument). In any event, as set forth below, the Commission reasonably found that the La Grange Project does not re-regulate flows from the Don Pedro Project.

2. Substantial evidence supports the Commission's conclusion that the La Grange Project does not re-regulate releases from the Don Pedro Project.

Under the Federal Power Act, dams and reservoirs are part of a "complete unit of development," if they are "necessary or appropriate in the maintenance and operation of the project." 16 U.S.C. § 796(11). A complete unit of development also includes "all miscellaneous structures used and useful in connection with said unit." *Id.*

In response to the Conservation Groups' request, FERC Staff gathered and analyzed operational data from the Districts in order to determine whether the La Grange Project is used to "re-regulate" flows from the Don Pedro Project. Licensing Order PP 40-43, JA 19-20. Re-regulation of flows is the process whereby a downstream reservoir stores the fluctuating discharges from a peaking plant and releases them in a relatively uniform manner downstream in order to reduce negative environmental effects. Rehearing Order P 110, JA 64. The Conservation Groups acknowledge that the La Grange reservoir is not used to re-regulate releases from the Don Pedro Project (*id*. P 107, JA 62), but contend that the La Grange irrigation canals serve as re-regulation facilities. CG Br. at 29-30.

In support, they point to evidence indicating that flows released from the La Grange reservoir are relatively uniform and do not show the variability of the flows released from the Don Pedro Project. CG Br. at 29-31. But this is not because the La Grange Project re-regulates flows from the Don Pedro Project. It is because "most of the flows are diverted from La Grange Reservoir into canals and are consumed for irrigation and municipal and industrial uses, and thus are not returned to the river." Rehearing Order P 111, JA 64. The La Grange Dam facilitates the consumption of flows, not their re-regulation, and the "La Grange Reservoir does not re-regulate the flows because it does not store them for later

release to the river." *Id*. In short, "Conservation Groups misunderstand the concept of re-regulation of flows." *Id*. P 110, JA 64.

C. The Commission Reasonably Declined To Determine Whether The La Grange Project Is Part Of a Complete Unit of Development With The Don Pedro Project By Maintaining Required Minimum Flows.

The license for the Don Pedro Project requires the Districts to maintain minimum stream flows in the Tuolumne River for fish protection purposes. License Order P 36 n.72, JA 17. The flows are measured at the La Grange Bridge, which is roughly 1.7 miles downstream from the La Grange Dam. *Id*. P 36, JA 17.

The Conservation Groups argue that the Districts affirmatively operate the La Grange Project to make these minimum flow releases through its powerhouse. CG Br. at 33-34. This, in their view, makes the La Grange Project part of the Don Pedro Project's "complete unit of development." CG Br. 34. In their answer to the Groups' rehearing request, the Districts disputed that characterization and asserted that the La Grange Project is not "necessary or appropriate" in the maintenance and operation of power generation at Don Pedro. *See* Districts' Answer (filed Feb. 19, 2013) at 10-13 (R.49).

The Commission did not believe it possessed the operational data and analysis necessary to resolve this issue. *See* Rehearing Order P 115, JA 65 (noting "lack of substantial evidence"); Licensing Order P 39, JA 18. The Conservation Groups ignore this conflict in the record and assert that "FERC simply dropped the

issue … [with] no rational explanation for doing so." CG Br. 34. But as the Commission explained, "because licensing is required on other grounds … there is no need … to determine whether the La Grange Project might also require licensing as part of a complete unit of development with the Don Pedro Project." Rehearing Order P 116, JA 65.

That determination falls comfortably within the Commission's "broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures." *Mobil Oil Exploration & Producing Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991). *See also Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305, 1315 (D.C. Cir. 1991) (noting the Commission's "well-established discretion to order its own proceedings and control its own docket"). The Court "cannot, absent congressional instruction, impose [its] own notions of the 'best' procedural format." *TRT Telecomm. Corp. v. FCC*, 876 F.2d 134, 152 n.20 (D.C. Cir. 1989).

This Court recognized the Commission's broad discretion in *Domtar Maine Corp.*, where the Commission declined to determine whether a project occupied federal lands because other bases for federal licensing existed. While the Court noted that "efficiency considerations" may have favored determining the federal land occupancy issue up front, the Court deferred to the Commission in light of the

"broad discretion" given to agencies "as to the manner in which they carry out their duties, including the timing of their own proceedings." 347 F.3d at 314.

Given the Conservation Groups' ability to raise their environmental concerns in both the Don Pedro and La Grange proceedings, they cannot establish any significant prejudice from the Commission's failure to decide this issue. *See La. Pub. Serv. Comm's v. FERC*, 482 F.3d 510, 520-21 (2007) ("The agency abuses that discretion only when its manner of proceeding significantly prejudices a party or unreasonably delays a resolution"). Thus, here, as in *Domtar*, "nothing would be gained by finding another basis for jurisdiction." 347 F.3d at 314.

CONCLUSION

For the foregoing reasons, the petitions should be denied or dismissed and the Commission's orders should be affirmed in all respects.

Respectfully submitted,

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July 17, 2014

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief contains 12,622 words, not including the tables of contents and authorities, the glossary, the addendum, the certificate of counsel and this certificate.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word 2010.

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July 17, 2014

ADDENDUM

STATUTES
AND
REGULATIONS

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trative Services Act of 1949, as amended, at end of section.

1949—Act Oct. 28, 1949, substituted ''Classification Act of 1949'' for ''Classification Act of 1923''.

1930—Act June 23, 1930, substituted provisions permitting the commission to appoint, prescribe the duties, and fix the salaries of, a secretary, a chief engineer, a general counsel, a solicitor, and a chief accountant, and to appoint such other officers and employees as are necessary in the execution of its functions and fix their salaries, and authorizing the detail of officers from the Corps of Engineers, or other branches of the United States Army, to serve the commission as engineer officers, or in any other capacity, in field work outside the seat of government, and the detail, assignment or transfer to the commission of engineers in or under the Departments of the Interior or Agriculture for work outside the seat of government for provisions which required the commission to appoint an executive secretary at a salary of $5,000 per year and prescribe his duties, and which permitted the detail of an officer from the United States Engineer Corps to serve the commission as engineer officer; and inserted provisions permitting the commission to make certain expenditures necessary in the execution of its functions, and allowing the payment of expenditures upon the presentation of itemized vouchers approved by authorized persons.

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89–554, Sept. 6, 1966, § 8, 80 Stat. 632, 655.

§ 793a. Repealed. Pub. L. 87–367, title I, § 103(5), Oct. 4, 1961, 75 Stat. 787

Section, Pub. L. 86–626, title I, § 101, July 12, 1960, 74 Stat. 430, authorized the Federal Power Commission to place four additional positions in grade 18, one in grade 17 and one in grade 16 of the General Schedule of the Classification Act of 1949.

§§ 794, 795. Omitted

CODIFICATION

Section 794, which required the work of the commission to be performed by and through the Departments of War, Interior, and Agriculture and their personnel, consisted of the second paragraph of section 2 of act June 10, 1920, ch. 285, 41 Stat. 1063, which was omitted in the revision of said section 2 by act June 23, 1930, ch. 572, § 1, 46 Stat. 798. The first and third paragraphs of said section 2 were formerly classified to sections 793 and 795 of this title.

Section 795, which related to expenses of the commission generally, consisted of the third paragraph of section 2 of act June 10, 1920, ch. 285, 41 Stat. 1063. Such section 2 was amended generally by act June 23, 1930, ch. 572, § 1, 46 Stat. 798, and is classified to section 793 of this title. The first and second paragraphs of said section 2 were formerly classified to sections 793 and 794 of this title.

§ 796. Definitions

The words defined in this section shall have the following meanings for purposes of this chapter, to wit:

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

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

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

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

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

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

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

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

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

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

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

priate in the maintenance and operation of such unit;

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

(13) ''net investment'' in a project means the actual legitimate original cost thereof as defined and interpreted in the ''classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission'', plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term ''cost'' shall include, insofar as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published and promulgated as a part of the rules and regulations of the Commission;

(14) ''Commission'' and ''Commissioner'' means the Federal Power Commission, and a member thereof, respectively;

(15) ''State commission'' means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy to consumers within the State or municipality;

(16) ''security'' means any note, stock, treasury stock, bond, debenture, or other evidence of interest in or indebtedness of a corporation subject to the provisions of this chapter;

(17)(A) ''small power production facility'' means a facility which is an eligible solar, wind, waste, or geothermal facility, or a facility which—

(i) produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof; and

(ii) has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts;

(B) ''primary energy source'' means the fuel or fuels used for the generation of electric energy, except that such term does not include, as determined under rules prescribed by the Commission, in consultation with the Secretary of Energy—

(i) the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and

(ii) the minimum amounts of fuel required to alleviate or prevent—

(I) unanticipated equipment outages, and

(II) emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages;

(C) ''qualifying small power production facility'' means a small power production facility that the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe;

(D) ''qualifying small power producer'' means the owner or operator of a qualifying small power production facility;

(E) ''eligible solar, wind, waste or geothermal facility'' means a facility which produces electric energy solely by the use, as a primary energy source, of solar energy, wind energy, waste resources or geothermal resources; but only if—

(i) either of the following is submitted to the Commission not later than December 31, 1994:

(I) an application for certification of the facility as a qualifying small power production facility; or

(II) notice that the facility meets the requirements for qualification; and

(ii) construction of such facility commences not later than December 31, 1999, or, if not, reasonable diligence is exercised toward the completion of such facility taking into account all factors relevant to construction of the facility.[1]

(18)(A) ''cogeneration facility'' means a facility which produces—

(i) electric energy, and

(ii) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes;

(B) ''qualifying cogeneration facility'' means a cogeneration facility that the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe;

(C) ''qualifying cogenerator'' means the owner or operator of a qualifying cogeneration facility;

(19) ''Federal power marketing agency'' means any agency or instrumentality of the United States (other than the Tennessee Valley Authority) which sells electric energy;

(20) ''evidentiary hearings'' and ''evidentiary proceeding'' mean a proceeding conducted as provided in sections 554, 556, and 557 of title 5;

(21) ''State regulatory authority'' has the same meaning as the term ''State commission'', except that in the case of an electric utility with respect to which the Tennessee Valley Authority has ratemaking authority (as defined in section 2602 of this title), such term means the Tennessee Valley Authority;

(22) ELECTRIC UTILITY.—(A) The term ''electric utility'' means a person or Federal or State agency (including an entity described in section 824(f) of this title) that sells electric energy.[1]

(B) The term ''electric utility'' includes the Tennessee Valley Authority and each Federal power marketing administration.[1]

(23) TRANSMITTING UTILITY.—The term ''transmitting utility'' means an entity (in-

[1] So in original. The period probably should be a semicolon.

cluding an entity described in section 824(f) of this title) that owns, operates, or controls facilities used for the transmission of electric energy—

(A) in interstate commerce;

(B) for the sale of electric energy at wholesale.[1]

(24) WHOLESALE TRANSMISSION SERVICES.—The term ''wholesale transmission services'' means the transmission of electric energy sold, or to be sold, at wholesale in interstate commerce.[1]

(25) EXEMPT WHOLESALE GENERATOR.—The term ''exempt wholesale generator'' shall have the meaning provided by section 79z–5a[2] of title 15.[1]

(26) ELECTRIC COOPERATIVE.—The term ''electric cooperative'' means a cooperatively owned electric utility.[1]

(27) RTO.—The term ''Regional Transmission Organization'' or ''RTO'' means an entity of sufficient regional scope approved by the Commission—

(A) to exercise operational or functional control of facilities used for the transmission of electric energy in interstate commerce; and

(B) to ensure nondiscriminatory access to the facilities.[1]

(28) ISO.—The term ''Independent System Operator'' or ''ISO'' means an entity approved by the Commission—

(A) to exercise operational or functional control of facilities used for the transmission of electric energy in interstate commerce; and

(B) to ensure nondiscriminatory access to the facilities.[3]

(29) TRANSMISSION ORGANIZATION.—The term ''Transmission Organization'' means a Regional Transmission Organization, Independent System Operator, independent transmission provider, or other transmission organization finally approved by the Commission for the operation of transmission facilities.

(June 10, 1920, ch. 285, pt. I, §3, 41 Stat. 1063; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§201, 212, 49 Stat. 838, 847; Pub. L. 95–617, title II, §201, Nov. 9, 1978, 92 Stat. 3134; Pub. L. 96–294, title VI, §643(a)(1), June 30, 1980, 94 Stat. 770; Pub. L. 101–575, §3, Nov. 15, 1990, 104 Stat. 2834; Pub. L. 102–46, May 17, 1991, 105 Stat. 249; Pub. L. 102–486, title VII, §726, Oct. 24, 1992, 106 Stat. 2921; Pub. L. 109–58, title XII, §§1253(b), 1291(b), Aug. 8, 2005, 119 Stat. 970, 984.)

REFERENCES IN TEXT

Section 79z–5a of title 15, referred to in par. (25), was repealed by Pub. L. 109–58, title XII, §1263, Aug. 8, 2005, 119 Stat. 974.

AMENDMENTS

2005—Par. (17)(C). Pub. L. 109–58, §1253(b)(1), amended subpar. (C) generally. Prior to amendment, subpar. (C) read as follows: '''qualifying small power production facility' means a small power production facility—

''(i) which the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe; and

''(ii) which is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);''.

Par. (18)(B). Pub. L. 109–58, §1253(b)(2), amended subpar. (B) generally. Prior to amendment, subpar. (B) read as follows: '''qualifying cogeneration facility' means a cogeneration facility which—

''(i) the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe; and

''(ii) is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);''.

Pars. (22), (23). Pub. L. 109–58, §1291(b)(1), added pars. (22) and (23) and struck out former pars. (22) and (23) which read as follows:

''(22) 'electric utility' means any person or State agency (including any municipality) which sells electric energy; such term includes the Tennessee Valley Authority, but does not include any Federal power marketing agency.

''(23) TRANSMITTING UTILITY.—The term 'transmitting utility' means any electric utility, qualifying cogeneration facility, qualifying small power production facility, or Federal power marketing agency which owns or operates electric power transmission facilities which are used for the sale of electric energy at wholesale.''

Pars. (26) to (29). Pub. L. 109–58, §1291(b)(2), added pars. (26) to (29).

1992—Par. (22). Pub. L. 102–486, §726(b), inserted ''(including any municipality)'' after ''State agency''.

Pars. (23) to (25). Pub. L. 102–486, §726(a), added pars. (23) to (25).

1991—Par. (17)(E). Pub. L. 102–46 struck out '', and which would otherwise not qualify as a small power production facility because of the power production capacity limitation contained in subparagraph (A)(ii)'' after ''geothermal resources'' in introductory provisions.

1990—Par. (17)(A). Pub. L. 101–575, §3(a), inserted ''a facility which is an eligible solar, wind, waste, or geothermal facility, or''.

Par. (17)(E). Pub. L. 101–575, §3(b), added subpar. (E).

1980—Par. (17)(A)(i). Pub. L. 96–294 added applicability to geothermal resources.

1978—Pars. (17) to (22). Pub. L. 95–617 added pars. (17) to (22).

1935—Act Aug. 26, 1935, §201, amended definitions of ''reservations'' and ''corporations'', and inserted definitions of ''person'', ''licensee'', ''commission'', ''commissioner'', ''State commission'' and ''security''.

FERC REGULATIONS

Pub. L. 101–575, §4, Nov. 15, 1990, 104 Stat. 2834, provided that: ''Unless the Federal Energy Regulatory Commission otherwise specifies, by rule after enactment of this Act [Nov. 15, 1990], any eligible solar, wind, waste, or geothermal facility (as defined in section 3(17)(E) of the Federal Power Act as amended by this Act [16 U.S.C. 796(17)(E)]), which is a qualifying small power production facility (as defined in subparagraph (C) of section 3(17) of the Federal Power Act as amended by this Act)—

''(1) shall be considered a qualifying small power production facility for purposes of part 292 of title 18, Code of Federal Regulations, notwithstanding any size limitations contained in such part, and

''(2) shall not be subject to the size limitation contained in section 292.601(b) of such part.''

STATE AUTHORITIES; CONSTRUCTION

Pub. L. 102–486, title VII, §731, Oct. 24, 1992, 106 Stat. 2921, provided that: ''Nothing in this title [enacting sections 824*l*, 824m, and 825*o*–1 of this title and former sec-

[2] See References in Text note below.

[3] So in original. The period probably should be ''; and''.

tions 79z–5a and 79z–5b of Title 15, Commerce and Trade, and amending this section, sections 824, 824j, 824k, 825n, 825*o*, and 2621 of this title, and provisions formerly set out as a note under former section 79k of Title 15] or in any amendment made by this title shall be construed as affecting or intending to affect, or in any way to interfere with, the authority of any State or local government relating to environmental protection or the siting of facilities.''

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

Federal Power Commission terminated and functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

ABOLITION OF INTERSTATE COMMERCE COMMISSION AND TRANSFER OF FUNCTIONS

Interstate Commerce Commission abolished and functions of Commission transferred, except as otherwise provided in Pub. L. 104–88, to Surface Transportation Board effective Jan. 1, 1996, by section 702 of Title 49, Transportation, and section 101 of Pub. L. 104–88, set out as a note under section 701 of Title 49. References to Interstate Commerce Commission deemed to refer to Surface Transportation Board, a member or employee of the Board, or Secretary of Transportation, as appropriate, see section 205 of Pub. L. 104–88, set out as a note under section 701 of Title 49.

§ 797. General powers of Commission

The Commission is authorized and empowered—

(a) Investigations and data

To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water-power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the Commission may deem necessary or useful for the purposes of this chapter.

(b) Statements as to investment of licensees in projects; access to projects, maps, etc.

To determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall, upon oath, within a reasonable period of time to be fixed by the Commission, after the construction of the original project or any addition thereto or betterment thereof, file with the Commission in such detail as the Commission may require, a statement in duplicate showing the actual legitimate original cost of construction of such project addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands. The licensee shall grant to the Commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto. The statement of actual legitimate original cost of said project, and revisions thereof as determined by the Commission, shall be filed with the Secretary of the Treasury.

(c) Cooperation with executive departments; information and aid furnished Commission

To cooperate with the executive departments and other agencies of State or National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the Commission, to furnish such records, papers, and information in their possession as may be requested by the Commission, and temporarily to detail to the Commission such officers or experts as may be necessary in such investigations.

(d) Publication of information, etc.; reports to Congress

To make public from time to time the information secured hereunder, and to provide for the publication of its reports and investigations in such form and manner as may be best adapted for public information and use. The Commission, on or before the 3d day of January of each year, shall submit to Congress for the fiscal year preceding a classified report showing the permits and licenses issued under this subchapter, and in each case the parties thereto, the terms prescribed, and the moneys received if any, or account thereof.

(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 ma-

[1] So in original. The colon probably should be a period.

terial 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.

(f) Preliminary permits; notice of application

To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 802 of this title: *Provided, however*, That upon the filing of any application for a preliminary permit by any person, association, or corporation the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part hereof or the lands affected thereby are situated.

(g) Investigation of occupancy for developing power; orders

Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or 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 by any person, corporation, State, or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

(June 10, 1920, ch. 285, pt. I, §4, 41 Stat. 1065; June 23, 1930, ch. 572, §2, 46 Stat. 798; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§202, 212, 49 Stat. 839, 847; July 26, 1947, ch. 343, title II, §205(a), 61 Stat. 501; Pub. L. 97–375, title II, §212, Dec. 21, 1982, 96 Stat. 1826; Pub. L. 99–495, §3(a), Oct. 16, 1986, 100 Stat. 1243; Pub. L. 109–58, title II, §241(a), Aug. 8, 2005, 119 Stat. 674.)

AMENDMENTS

2005—Subsec. (e). Pub. L. 109–58, which directed amendment of subsec. (e) by inserting after ''adequate protection and utilization of such reservation.'' at end of first proviso ''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.'', was executed by making the insertion after ''adequate protection and utilization of such reservation:'' at end of first proviso, to reflect the probable intent of Congress.

1986—Subsec. (e). Pub. L. 99–495 inserted provisions that in deciding whether to issue any license under this subchapter, the Commission, in addition to power and development purposes, is required to give equal consideration to purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife, the protection of recreational opportunities, and the preservation of environmental quality.

1982—Subsec. (d). Pub. L. 97–375 struck out provision that the report contain the names and show the compensation of the persons employed by the Commission.

1935—Subsec. (a). Act Aug. 26, 1935, §202, struck out last paragraph of subsec. (a) which related to statements of cost of construction, etc., and free access to projects, maps, etc., and is now covered by subsec. (b).

Subsecs. (b), (c). Act Aug. 26, 1935, §202, added subsec. (b) and redesignated former subsecs. (b) and (c) as (c) and (d), respectively.

Subsec. (d). Act Aug. 26, 1935, §202, redesignated subsec. (c) as (d) and substituted ''3d day of January'' for ''first Monday in December'' in second sentence. Former subsec. (d) redesignated (e).

Subsec. (e). Act Aug. 26, 1935, §202, redesignated subsec. (d) as (e) and substituted ''streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations

[2] So in original. The period probably should be a colon.

CODIFICATION

Section consists of subsec. (a) of section 23 of act June 10, 1920, as so designated by act Aug. 26, 1935. Subsec. (b) of section 23 of act June 10, 1920, is set out as section 817 of this title.

AMENDMENTS

1935—Act Aug. 26, 1935, § 210, amended section generally, substituting ''part'' for ''chapter'' wherever appearing, substituting ''heretofore'' for ''then'', and substituting the last sentence for ''Such fair value may, in the discretion of the commission, be determined by mutual agreement between the commission and the applicant or, in case they cannot agree, jurisdiction is hereby conferred upon the district court of the United States in the district within which such project or projects may be located, upon the application of either party, to hear and determine the amount of such fair value.''

§ 817. Projects not affecting navigable waters; necessity for Federal license, permit or right-of-way; unauthorized activities

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

(2) No person may commence any significant modification of any project licensed under, or exempted from, this chapter unless such modification is authorized in accordance with terms and conditions of such license or exemption and the applicable requirements of this subchapter. As used in this paragraph, the term ''commence'' refers to the beginning of physical onsite activity other than surveys or testing.

(June 10, 1920, ch. 285, pt. I, § 23(b), 41 Stat. 1075; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§ 210, 212, 49 Stat. 846, 847; Pub. L. 99–495, § 6, Oct. 16, 1986, 100 Stat. 1248.)

CODIFICATION

Section consists of subsec. (b) of section 23 of act June 10, 1920, as so designated by act Aug. 26, 1935. Subsec. (a) of section 23 of act June 10, 1920, is set out as section 816 of this title.

AMENDMENTS

1986—Pub. L. 99–495 designated existing provisions as par. (1) and added par. (2).

1935—Act Aug. 26, 1935, § 210, amended section generally, inserting first sentence, and substituting ''with foreign nations'' for ''between foreign nations'', ''shall before such construction'' for ''may in their discretion'' and ''shall not construct, maintain, or operate such dam or other project works'' for ''shall not proceed with such construction''.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–495 applicable to licenses, permits, and exemptions without regard to when issued, see section 18 of Pub. L. 99–495, set out as a note under section 797 of this title.

§ 818. Public lands included in project; reservation of lands from entry

Any lands of the United States included in any proposed project under the provisions of this subchapter shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located. Whenever the Commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public-land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, for such purpose or purposes and under such restrictions as the Commission may determine, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the Commission, for the purposes of this subchapter, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes. The United States or any licensee for any such lands hereunder may enter thereupon for the purposes of this subchapter, upon payment of any damages to crops, buildings, or other improvements caused thereby to the owner thereof, or upon giving a good and sufficient bond to the United States for the use and benefit of the owner to secure the payment of such damages as may be determined and fixed in an action brought upon the bond in a court of competent jurisdiction, said bond to be in the form prescribed by the Commission: *Provided*, That locations, entries, selections, or filings heretofore made for lands

vertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

(June 10, 1920, ch. 285, pt. III, § 312, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859.)

CODIFICATION

''Sections 1535 and 1536 of title 31'' substituted in text for ''sections 601 and 602 of the Act of June 30, 1932 (47 Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

§ 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(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.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, § 313, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 860; amended June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, § 1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted ''electric utility,'' after ''Any person,'' and ''to which such person,'' and substituted ''brought by any entity unless such entity'' for ''brought by any person unless such person''.

1958—Subsec. (a). Pub. L. 85–791, § 16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85–791, § 16(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and in third sentence, substituted ''jurisdiction, which upon

Subpart B—Charges for Headwater Benefits

Subpart C—General Procedures

AUTHORITY: 16 U.S.C. 792–828c; 42 U.S.C. 7101–7352.

Subpart A—Charges for Costs of Administration, Use of Tribal Lands and Other Government Lands, and Use of Government Dams

§ 11.1 Costs of administration.

(a) *Authority*. Pursuant to section 10(e) of the Federal Power Act and section 3401 of the Omnibus Budget Reconciliation Act of 1986, the Commission will assess reasonable annual charges against licensees and exemptees to reimburse the United States for the costs of administration of the Commission's hydropower regulatory program.

(b) *Scope*. The annual charges under this section will be charged to and allocated among:

(1) All licensees of projects of more than 1.5 megawatts of installed capacity; and

(2) All holders of exemptions under either section 30 of the Federal Power Act or sections 405 and 408 of the Public Utility Regulatory Policies Act of 1978, as amended by section 408 of the Energy Security Act of 1980, but only if the exemption was issued subsequent to April 21, 1995 and is for a project of more than 1.5 megawatts of installed capacity.

(3) If the exemption for a project of more than 1.5 megawatts of installed capacity was issued subsequent to April 21, 1995 but pursuant to an application filed prior to that date, the exemptee may credit against its annual charge any filing fee paid pursuant to §381.601 of this chapter, which was removed effective April 21, 1995, 18 CFR 381.601 (1994), until the total of all such credits equals the filing fee that was paid.

(c) *Licenses and exemptions other than State or municipal*. For licensees and exemptees, other than State or municipal:

(1) A determination shall be made for each fiscal year of the costs of administration of Part I of the Federal Power Act chargeable to such licensees or exemptees, from which shall be deducted any administrative costs that are stated in the license or exemption or fixed by the Commission in determining headwater benefit payments.

(2) For each fiscal year the costs of administration determined under paragraph (c)(1) of this section will be assessed against such licenses or exemptee in the proportion that the annual charge factor for each such project bears to the total of the annual charge factors under all such outstanding licenses and exemptions.

(3) The annual charge factor for each such project shall be found as follows:

(i) For a conventional project the factor is its authorized installed capacity plus 112.5 times its annual energy output in millions of kilowatt-hours.

(ii) For a pure pumped storage project the factor is its authorized installed capacity.

(iii) For a mixed conventional-pumped storage project the factor is its authorized installed capacity plus 112.5 times its gross annual energy output in millions of kilowatt-hours less 75 times the annual energy used for pumped storage pumping in million of kilowatt-hours.

(iv) For purposes of determining their annual charges factor, projects that are operated pursuant to an exemption will be deemed to have an annual energy output of zero.

(4) To enable the Commission to determine such charges annually, each licensee whose authorized installed capacity exceeds 1.5 megawatts must file with the Commission, on or before November 1 of each year, a statement

under oath showing the gross amount of power generated (or produced by nonelectrical equipment) and the amount of power used for pumped storage pumping by the project during the preceding fiscal year, expressed in kilowatt hours. If any licensee does not report the gross energy output of its project within the time specified above, the Commission's staff will estimate the energy output and this estimate may be used in lieu of the filings required by this section made by such licensee after November 1.

(5) For unconstructed projects, the assessments start on the date of commencement of project construction. For constructed projects, the assessments start on the effective date of the license or exemption, except for any new capacity authorized therein. The assessments for new authorized capacity start on the date of commencement of construction of such new capacity. In the event that construction commences during a fiscal year, the charges will be prorated based on the date on which construction commenced.

(d) *State and municipal licensees and exemptees.* For State or municipal licensees and exemptees:

(1) A determination shall be made for each fiscal year of the cost of administration under Part I of the Federal Power Act chargeable to such licensees and exemptees, from which shall be deducted any administrative costs that are stated in the license or exemption or that are fixed by the Commission in determining headwater benefit payments.

(2) An exemption will be granted to a licensee or exemptee to the extent, if any, to which it may be entitled under section 10(e) of the Act provided the data is submitted as requested in paragraphs (d) (4) and (5) of this section.

(3) For each fiscal year the total actual cost of administration as determined under paragraph (d)(1) of this section will be assessed against each such licensee or exemptee (except to the extent of the exemptions granted pursuant to paragraph (d)(2) of this section) in the proportion that the authorized installed capacity of each such project bears to the total such capacity under all such outstanding licenses or exemptions.

(4) To enable the Commission to compute on the bill for annual charges the exemption to which State and municipal licensees and exemptees are entitled because of the use of power by the licensee or exemptee for State or municipal purposes, each such licensee or exemptee must file with the Commission, on or before November 1 of each year, a statement under oath showing the following information with respect to the power generated by the project and the disposition thereof during the preceding fiscal year, expressed in kilowatt-hours:

(i) Gross amount of power generated by the project.

(ii) Amount of power used for station purposes and lost in transmission, etc.

(iii) Net amount of power available for sale or use by licensee or exemptee, classified as follows:

(A) Used by licensee or exemptee.

(B) Sold by licensee or exemptee.

(5) When the power from a licensed or exempted project owned by a State or municipality enters into its electric system, making it impracticable to meet the requirements of this section with respect to the disposition of project power, such licensee or exemptee may, in lieu thereof, furnish similar information with respect to the disposition of the available power of the entire electric system of the licensee or exemptee.

(6) The assessments commence on the date of commencement of project operation. In the event that project operation commences during a fiscal year, the charges will be prorated based on the date on which operation commenced.

(e) *Transmission lines.* For projects involving transmission lines only, the administrative charge will be stated in the license.

(f) *Maximum charge.* No licensed or exempted project's annual charge may exceed a maximum charge established each year by the Commission to equal 2.0 percent of the adjusted Commission costs of administration of the hydropower regulatory program. For every project with an annual charge determined to be above the maximum charge, that project's annual charge

will be set at the maximum charge, and any amount above the maximum charge will be reapportioned to the remaining projects. The reapportionment will be computed using the method outlined in paragraphs (c) and (d) of this section (but excluding any project whose annual charge is already set at the maximum amount). This procedure will be repeated until no project's annual charge exceeds the maximum charge.

(g) *Commission's costs.* (1) With respect to costs incurred by the Commission, the assessment of annual charges will be based on an estimate of the costs of administration of Part I of the Federal Power Act that will be incurred during the fiscal year in which the annual charges are assessed. After the end of the fiscal year, the assessment will be recalculated based on the costs of administration that were actually incurred during that fiscal year; the actual costs will be compared to the estimated costs; and the difference between the actual and estimated costs will be carried over as an adjustment to the assessment for the subsequent fiscal year.

(2) The issuance of bills based on the administrative costs incurred by the Commission during the year in which the bill is issued will commence in 1993. The annual charge for the administrative costs that were incurred in fiscal year 1992 will be billed in 1994. At the licensee's option, the charge may be paid in three equal annual installments in fiscal years 1994, 1995, and 1996, plus any accrued interest. If the licensee elects the three-year installment plan, the Commission will accrue interest (at the most recent yield of two-year Treasury securities) on the unpaid charges and add the accrued interest to the installments billed in fiscal years 1995 and 1996.

(h) In making their annual reports to the Commission on their costs in administering Part I of the Federal Power Act, the United States Fish and Wildlife Service and the National Marine Fisheries Service are to deduct any amounts that were deposited into their Treasury accounts during that year as reimbursements for conducting studies and reviews pursuant to section 30(e) of the Federal Power Act.

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

(j) *Transition.* For a license having the capacity of the project for annual charge purposes stated in horsepower, that capacity shall be deemed to be the capacity stated in kilowatts elsewhere in the license, including any amendments thereto.

[60 FR 15047, Mar. 22, 1995, as amended by Order 584, 60 FR 57925, Nov. 24, 1995]

§ 11.2 Use of government lands.

(a) Reasonable annual charges for recompensing the United States for the use, occupancy, and enjoyment of its lands (other than lands adjoining or pertaining to Government dams or other structures owned by the United States Government) or its other property, will be fixed by the Commission.

(b) *General rule.* Annual charges for the use of government lands will be payable in advance, and will be set on the basis of an annual schedule of per-acre rental fees, as set forth in Appendix A of this part. The Executive Director will publish the updated fee schedule in the FEDERAL REGISTER.

(c) The annual per-acre rental fee is the product of four factors: the adjusted per-acre value multiplied by the encumbrance factor multiplied by the

and decision making procedures, including voting procedures.

(c) *Other components.* (1) An RTG agreement should impose on member transmitting utilities an obligation to provide transmission services for other members, including the obligation to enlarge facilities, on a basis that is consistent with sections 205, 206, 211, 212 and 213 of the FPA. To the extent practicable and known, the RTG agreement should specify the terms and conditions under which transmission services will be offered.

(2) An RTG agreement should require, at a minimum, the development of a coordinated transmission plan on a regional basis and the sharing of transmission planning information, with the goal of efficient use, expansion, and coordination of the interconnected electric system on a grid-wide basis. An RTG agreement should provide mechanisms to incorporate the transmission needs of non-members into regional plans. An RTG agreement should include as much detail as possible with regard to operational and planning procedures.

(3) An RTG agreement should include voluntary dispute resolution procedures that provide a fair alternative to resorting in the first instance to section 206 complaints or section 211 proceedings.

(4) An RTG agreement should include an exit provision for RTG members that leave the RTG, specifying the obligations of a departing member.

(d) *Filing procedures.* Any proposed RTG agreement that in any manner affects or relates to the transmission of electric energy in interstate commerce by a public utility, or rates or charges for such transmission, must be filed with the Commission. Any public utility member of a proposed RTG may file the RTG agreement with the Commission on behalf of the other public utility members under section 205 of the FPA.

[58 FR 41632, Aug. 5, 1993]

§ 2.22 Pricing policy for transmission services provided under the Federal Power Act.

(a) The Commission has adopted a Policy Statement on its pricing policy for transmission services provided under the Federal Power Act. That Policy Statement can be found at 69 FERC 61,086. The Policy Statement constitutes a complete description of the Commission's guidelines for assessing the pricing proposals. Paragraph (b) of this section is only a brief summary of the Policy Statement.

(b) The Commission endorses transmission pricing flexibility, consistent with the principles and procedures set forth in the Policy Statement. It will entertain transmission pricing proposals that do not conform to the traditional revenue requirement as well as proposals that conform to the traditional revenue requirement. The Commission will evaluate ''conforming'' transmission pricing proposals using the following five principles, described more fully in the Policy Statement.

(1) Transmission pricing must meet the traditional revenue requirement.

(2) Transmission pricing must reflect comparability.

(3) Transmission pricing should promote economic efficiency.

(4) Transmission pricing should promote fairness.

(5) Transmission pricing should be practical.

(c) Under these principles, the Commission will also evaluate ''non-conforming'' proposals which do not meet the traditional revenue requirement, and will require such proposals to conform to the comparability principle. Non-conforming proposals must include an open access comparability tariff and will not be allowed to go into effect prior to review and approval by the Commission under procedures described in the Policy Statement.

[59 FR 55039, Nov. 3, 1994]

§ 2.23 Use of reserved authority in hydropower licenses to ameliorate cumulative impacts.

The Commission will address and consider cumulative impact issues at original licensing and relicensing to the fullest extent possible consistent with the Commission's statutory responsibility to avoid undue delay in the relicensing process and to avoid undue delay in the amelioration of individual project impacts at relicensing.

To the extent, if any, that it is not possible to explore and address all cumulative impacts at relicensing, the Commission will reserve authority to examine and address such impacts after the new license has been issued, but will define that reserved authority as narrowly and with as much specificity as possible, particularly with respect to the purpose of reserving that authority. The Commission intends that such articles will describe, to the maximum extent possible, reasonably foreseeable future resource concerns that may warrant modifications of the licensed project. Before taking any action pursuant to such reserved authority, the Commission will publish notice of its proposed action and will provide an opportunity for hearing by the licensee and all interested parties. Hydropower licenses also contain standard ''reopener'' articles (see §2.9 of this part) which reserve authority to the Commission to require, among other things, licensees of projects located in the same river basin to mitigate the cumulative impacts of those projects on the river basin. In light of the policy described above, the Commission will use the standard ''reopener'' articles to explore and address cumulative impacts only (except in extraordinary circumstances) where such impacts were not known at the time of licensing or are the result of changed circumstances. The Commission has authority under the Federal Power Act to require licensees, during the term of the license, to develop and provide data to the Commission on the cumulative impacts of licensed projects located in the same river basin. In issuing both new and original licenses, the Commission will coordinate the expiration dates of the licenses to the maximum extent possible, to maximize future consideration of cumulative impacts at the same time in contemporaneous proceedings at relicensing. The Commission's intention is to consider to the extent practicable cumulative impacts at the time of licensing and relicensing, and to eliminate the need to resort to the use of reserved authority.

[59 FR 66718, Dec. 28, 1994]

§ 2.24 Project decommissioning at relicensing.

The Commission issued a statement of policy on project decommissioning at relicensing in Docket No. RM93–23–000 on December 14, 1994.

[60 FR 347, Jan. 4, 1995]

§ 2.25 Ratemaking treatment of the cost of emissions allowances in coordination transactions.

(a) *General Policy*. This Statement of Policy is adopted in furtherance of the goals of Title IV of the Clean Air Act Amendments of 1990, Pub. L. 101–549, Title IV, 104 Stat. 2399, 2584 (1990).

(b) *Costing Emissions Allowances in Coordination Sales*. If a public utility's coordination rate on file with the Commission provides for recovery of variable costs on an incremental basis, the Commission will allow recovery of the incremental costs of emissions allowances associated with a coordination sale. If a coordination rate does not reflect incremental costs, the public utility should propose alternative allowance costing methods or demonstrate that the coordination rate does not produce unreasonable results. The Commission finds that the cost to replace an allowance is an appropriate basis to establish the incremental cost.

(c) *Use of Indices*. The Commission will allow public utilities to determine emissions allowance costs on the basis of an index or combination of indices of the current price of emissions allowances, provided that the public utility affords purchasing utilities the option of providing emissions allowances. Public utilities should explain and justify any use of different incremental cost indices for pricing coordination sales and making dispatch decisions.

(d) *Calculation of Amount of Emissions Allowances Associated With Coordination Transactions*. Public utilities should explain the methods used to compute the amount of emissions allowances included in coordination transactions.

(e) *Timing*. (1) Public utilities should provide information to purchasing utilities regarding the timing of opportunities for purchasers to stipulate whether they will purchase or return emissions allowances. A public utility may require a purchasing utility to declare,

conformity with § 385.2001 of this chapter, if it fails patently to comply with applicable statutory requirements or Commission rules, regulations and orders; and

(v) Take appropriate action on petitions to permit after an initial 60-day period one additional 60-day period of exemption pursuant to § 284.264(b) of this chapter where the application for extension arrives at the Commission no later than 45 days after the commencement of the initial period of exemption and where only services are involved.

(10) *Regulation of Oil Pipelines Under the Interstate Commerce Act.* (i) Accept any uncontested item that has been filed consistent with Commission regulations and policy;

(ii) Reject any filing, unless accompanied by a request for waiver in conformity with § 385.2001 of this chapter, that patently fails to comply with applicable statutory requirements and with all applicable Commission rules, regulations and orders; and

(iii) Prescribe for carriers the classes of property for which depreciation charges may be properly included under operating expenses, review the fully documented depreciation studies filed by the carriers, and authorize or revise the depreciation rates reflected in the depreciation study with respect to each of the designated classes of property.

(b) *General, Non-Program-Specific Delegated Authority.* (1) Take appropriate action on:

(i) Any notice of intervention or motion to intervene, filed in an uncontested proceeding processed by the Office of Energy Market Regulation;

(ii) Applications for extensions of time to file required filings, reports, data and information and to perform other acts required at or within a specific time by any rule, regulation, license, permit, certificate, or order by the Commission; and

(iii) Filings for administrative revisions to electronic filed tariffs.

(2) Take appropriate action on requests or petitions for waivers of:

(i) Filing requirements for the appropriate statements and reports processed by the Office of Energy Market Regulation under Parts 46, 141, 260 and 357 of this chapter, §§ 284.13 and 284.126 of this chapter, and other relevant Commission orders; and

(ii) Fees prescribed in §§ 381.403 and 381.505 of this chapter in accordance with § 381.106(b) of this chapter.

(3) Undertake the following actions:

(i) Issue reports for public information purposes. Any report issued without Commission approval must:

(A) Be of a noncontroversial nature, and

(B) Contain the statement, ''This report does not necessarily reflect the views of the Commission,'' in bold face type on the cover;

(ii) Issue and sign requests for additional information regarding applications, filings, reports and data processed by the Office of Energy Market Regulation; and

(iii) Accept for filing, data and reports required by Commission regulations, rules or orders, or presiding officers' initial decisions upon which the Commission has taken no further action, if such filings are in compliance with such regulations, rules, orders or decisions and, when appropriate, notify the filing party of such acceptance.

[Order 699, 72 FR 45326, Aug. 14, 2007, as amended by Order 701, 72 FR 61054, Oct. 29, 2007; Order 714, 73 FR 57537, Oct. 3, 2008; Order 766, 77 FR 59747, Oct. 1, 2012]

§ 375.308 Delegations to the Director of the Office of Energy Projects.

The Commission authorizes the Director or the Director's designee to:

(a) Take appropriate action on uncontested applications and on applications for which the only motion or notice of intervention in opposition is filed by a competing preliminary permit or exemption applicant that does not propose and substantiate materially different plans to develop, conserve, and utilize the water resources of the region for the following:

(1) Licenses (including original, new, and transmission line licenses) under part I of the Federal Power Act;

(2) Exemptions from all or part of the licensing requirements of part I of the Federal Power Act; and

(3) Preliminary permits for proposed projects.

(b) Take appropriate action on uncontested applications for:

(1) Amendments (including changes in the use or disposal of water power project lands or waters or in the boundaries of water power projects) to licenses (including original, new, and transmission line licenses) under part I of the Federal Power Act, exemptions from all or part of the requirements of part I of the Federal Power Act, and preliminary permits; and

(2) Surrenders of licenses (including original and new), exemptions, and preliminary permits.

(c) Take appropriate action on the following:

(1) Determinations or vacations with respect to lands of the United States reserved from entry, location, or other disposal under section 24 of the Federal Power Act;

(2) Transfer of a license under section 8 of the Federal Power Act;

(3) Applications for the surrender of transmission line licenses pursuant to part 6 of this chapter;

(4) Motions filed by licensees, permittees, exemptees, applicants, and others requesting an extension of time to file required submittals, reports, data, and information and to do other acts required to be done at or within a specific time period by any rule, regulation, license, exemption, permit, notice, letter, or order of the Commission in accordance with §385.2008 of this chapter;

(5) Declarations of intent and petitions for declaratory orders concerning the Commission's jurisdiction over a hydropower project under the Federal Power Act;

(6) New or revised exhibits, studies, plans, reports, maps, drawings, or specifications, or other such filings made voluntarily or in response to a term or condition in a preliminary permit, license, or exemption issued for a hydropower project, or in response to the requirements of an order of the Commission or presiding officer's initial decision concerning a hydropower project;

(7) Requests by applicants to withdraw, pursuant to §385.216 of this chapter, any pleadings under part I of the Federal Power Act and any pleadings related to exemptions from all or part of part I of the Federal Power Act;

(8) Requests by licensees for exemption from:

(i) The requirement of filing FERC Form No. 80, Licensed Projects Recreation, under §8.11 of this chapter; and

(ii) The fees prescribed in §381.302(a) of this chapter in accordance with §381.302(c) of this chapter and the fees in §381.601 of this chapter, in accordance with §381.106 of this chapter;

(9) Requests for waivers incidental to the exercise of delegated authority provided the request conforms to the requirements of §385.2001 of this chapter;

(10) Proposals for the development of water resources projects submitted by other agencies of the Federal government for Commission review or comment. The Director shall direct comments, when necessary, to the sponsoring agency on matters including, but not limited to, the need for, and appropriate size of, any hydroelectric power installation proposed by any other agency of the Federal government;

(11) The reasonableness of disputed agency cost statements pursuant to §4.303(e) of this chapter.

(d) Issue an order pursuant to section 5 of the Federal Power Act to cancel a preliminary permit if the permittee fails to comply with the specific terms and conditions of the permit; provided:

(1) The Director gives notice to the permittee of probable cancellation no less than 30 days prior to the issuance of the cancellation order, and

(2) The permittee does not oppose the issuance of the cancellation order.

(e) Issue an order to revoke an exemption of a small conduit hydroelectric facility from the licensing provisions of part I of the Federal Power Act granted pursuant to §4.93 of this chapter, or an exemption of a small hydroelectric power project from the licensing provisions of part I of the Federal Power Act granted pursuant to §4.105 of this chapter if the exemption holder fails to begin or complete actual construction of the exempted facility or project within the time specified in the order granting the exemption or in Commission regulations at §4.94(c) or §4.106(c) of this chapter, provided:

(1) The Director gives notice to the exemption holder by certified mail of probable revocation no less than 30 days prior to the issuance of the revocation order, and

(2) The holder of the exemption does not oppose the issuance of the revocation order.

(f) Issue an order pursuant to section 13 of the Federal Power Act to terminate a license granted under part I of the Federal Power Act if the licensee fails to commence actual construction of the project works within the time prescribed in the license, provided:

(1) The Director gives notice by certified mail to the licensee of probable termination no less than 30 days prior to the issuance of the termination order, and

(2) The licensee does not oppose the issuance of the termination order.

(g) Require licensees and applicants for water power projects to make repairs to project works, take any related actions for the purpose of maintaining the safety and adequacy of such works, make or modify emergency action plans, have inspections by independent consultants, and perform other actions necessary to comply with part 12 of this chapter or otherwise protect human life, health, property, or the environment.

(h) For any unlicensed or unexempted hydropower project, take the following actions:

(1) Conduct investigations to ascertain the Commission's jurisdiction,

(2) Make preliminary jurisdictional determinations, and

(3) If a project has been preliminarily determined to require a license, issue notification of the Commission's jurisdiction; require the filing of a license application; and require that actions necessary to comply with part 12 of this chapter or otherwise protect human life, health, property, or the environment are taken.

(i) Take appropriate action on uncontested settlements among non-Federal parties involving headwater benefits.

(j) Dismiss applications for licenses and approve the withdrawal of applications for hydropower project licenses, in instances where no petition for or notice of intervention contending that licensing is required under part I of the Federal Power Act has been filed and the Director determines that licensing is not required by such Part I.

(k) Reject or dismiss an application filed under Part I of the Federal Power Act or an application for an exemption from some or all of the requirements of Part I of the Federal Power Act if:

(1) An application is patently deficient under §4.32(e)(2)(i);

(2) A revised application

(i) Does not conform to the requirements of §§4.32(a), 4.32(b), or 4.38, under §4.32(d)(1) or

(ii) If revisions to an application are not timely submitted under §4.32(e)(1)(iii); or

(3) The applicant fails to provide timely additional information, documents, or copies of submitted materials under §4.32(g).

(l) Redesignate proceedings, licenses, and other authorizations and filings to reflect changes in the names of persons and municipalities subject to or invoking Commission jurisdiction under the Federal Power Act, where no substantive changes in ownership, corporate structure or domicile, or jurisdictional operation are involved.

(m) Determine payments for headwater benefits from the operation of Federal reservoir projects.

(n) Determine whether to allow a credit against annual charges for the use of government dams or other structures billed to licensees each year for contractual payments for the construction, operation, and maintenance of a Federal dam.

(o) Prepare and issue comments on general water policy and planning issues for the use of the Director of the Water Resources Council or the Assistant Secretaries of the Department of Energy.

(p) Prepare and transmit letters concerning power site lands to the Bureau of Land Management and the U.S. Geological Survey; respond to routine requests for information and any non-docketed correspondence; prepare and transmit letters requesting comments or additional information on applications for hydropower project licenses, preliminary permits, exemptions, amendments of licenses, permits, or exemptions, and other similar matters from Federal, state, and local agencies,

from applicants, and from other appropriate persons; and prepare and transmit letters regarding whether transmission lines are works of a hydropower project and are required to be licensed.

(q) Reject an application or other filing under Section 405 of the Public Utility Regulatory Policies Act of 1978, unless accompanied by a request for waiver in conformity with § 385.2001 of this chapter, if it fails patently to comply with applicable statutory requirements or Commission rules, regulations, and orders.

(r) Pass upon petitions filed under §§ 292.210 and 292.211 of this chapter.

(s) Make any preliminary determination of inconsistency between a fish and wildlife agency's fish and wildlife recommendation and applicable law, and conduct through staff whatever consultation with the agency that is necessary or appropriate in order to attempt to resolve any inconsistency, under section 10(j) of the Federal Power Act, and to take such related actions as are required under that section.

(t) Waive the pre-filing consultation requirements in §§ 4.38 and 16.8 of this title whenever the Director, in his discretion, determines that an emergency so requires, or that the potential benefit of expeditiously considering a proposed improvement in safety, environmental protection, efficiency, or capacity outweighs the potential benefit of requiring completion of the consultation process prior to the filing of an application.

(u) Approve, on a case-specific basis, and issue such orders as may be necessary in connection with the use of alternative procedures, under § 4.34(i) of this chapter, for the development of an application for an original, new or subsequent license, exemption, or license amendment subject to the pre-filing consultation process, and assist in the pre-filing consultation and related processes.

(v) Take appropriate action on the following types of uncontested applications for authorizations and uncontested amendments to applications and authorizations and impose appropriate conditions:

(1) Applications or amendments requesting authorization for the construction or acquisition and operation of facilities that have a construction or acquisition cost less than the limits specified in column 2 of table I in § 157.208(d) of this chapter;

(2) Applications by a pipeline for the abandonment of pipeline facilities;

(3) Applications for temporary certificates for facilities pursuant to § 157.17 of this chapter;

(4) Petitions to amend certificates to conform to actual construction;

(5) Applications for temporary certificates for facilities pursuant to § 157.17 of this chapter;

(6) Dismiss any protest to prior notice filings made pursuant to § 157.205 of this chapter and involving pipeline facilities that does not raise a substantive issue and fails to provide any specific detailed reason or rationale for the objection;

(7) Applications for temporary or permanent certificates (and for amendments thereto) for the transportation, exchange or storage of natural gas, provided that the cost of construction of the applicant's related facility is less than the limits specified in column 2 of table 1 in § 157.208(d) of this chapter; and

(8) Applications for blanket certificates of public convenience and necessity pursuant to subpart F of part 157 of this chapter, including waiver of project cost limitations in §§ 157.208 and 157.215 of this chapter, and the convening of informal conferences during the 30-day reconciliation period pursuant to the procedures in § 157.205(f).

(w) Take appropriate action on the following:

(1) Any notice of intervention or petition to intervene, filed in an uncontested application for pipeline facilities;

(2) An uncontested request from one holding an authorization, granted pursuant to the Director's delegated authority, to vacate all or part of such authorization;

(3) Petitions to permit after an initial 60-day period one additional 60-day period of exemption pursuant to § 284.264(b) of this chapter where the application or extension arrives at the Commission later than 45 days after

the commencement of the initial period of exemption when the emergency requires installation of facilities;

(4) Applications for extensions of time to file required reports, data, and information and to perform other acts required at or within a specific time by any rule, regulation, license, permit, certificate, or order by the Commission; and

(5) Requests for waiver of the landowner notification requirements in §157.203(d) of this chapter.

(x) Undertake the following actions:

(1) Compute, for each calendar year, the project limits specified in table I of §157.208 and table II of §157.215(a) of this chapter, adjusted for inflation, and publish such limits as soon as possible thereafter in the FEDERAL REGISTER;

(2) Issue reports for public information purposes. Any report issued without Commission approval must:

(i) Be of a noncontroversial nature, and

(ii) Contain the statement, ''This report does not necessarily reflect the view of the Commission,'' in bold face type on the cover;

(3) Issue and sign deficiency letters regarding natural gas applications;

(4) Accept for filing, data and reports required by Commission orders, or presiding officers' initial decisions upon which the Commission has taken no further action, if such filings are in compliance with such orders or decisions and, when appropriate, notify the filing party of such acceptance;

(5) Reject requests which patently fail to comply with the provisions of 157.205(b) of this chapter;

(6) Take appropriate action on requests or petitions for waivers of any action incidental to the exercise of delegated authority, including waiver of notice as provided in section 4(d) of the Natural Gas Act, provided the request conforms to the requirements of §385.2001 of this chapter; and

(7) Take whatever steps are necessary to ensure the protection of all environmental resources during the construction or operation of natural gas facilities, including authority to design and implement additional or alternative measures and stop work authority.

(y) Take appropriate action on the following:

(1) Any action incidental to the exercise of delegated authority, including waiver of notice as provided in section 4(d) of the Natural Gas Act, provided the request conforms to the requirements of §385.2001 of this chapter; and

(2) Requests or petitions for waivers of filing requirements for statements and reports under §§260.8 and 260.9 of this chapter.

(z) Approve, on a case-specific basis, and make such decisions and issue guidance as may be necessary in connection with the use of the pre-filing procedures in §157.21, '' Pre-filing procedures and review process for LNG terminal facilities and other natural gas facilities prior to filing of applications.''

(aa) Take the following actions to implement part 5 of this chapter on or after October 23, 2003:

(1) Act on requests for approval to use the application procedures of parts 4 or 16, pursuant to §5.3 of this chapter;

(2) Approve a potential license applicant's proposed study plan with appropriate modifications pursuant to §5.13 of this chapter;

(3) Resolve formal study disputes pursuant to §5.14 of this chapter; and

(4) Resolve disagreements brought pursuant to §5.15 of this chapter.

(bb) Establish a schedule for each Federal agency or officer, or State agency or officer acting pursuant to delegated Federal authority, to issue or deny Federal authorizations required for natural gas projects subject to section 3 or 7 of the Natural Gas Act.

[Order 492, 53 FR 16065, May 5, 1988]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §375.308, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

§ 375.309 Delegations to the General Counsel.

The Commission authorizes the General Counsel or the General Counsel's designee to:

(a) Designate officers empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance and testimony, take evidence, compel the filing of special reports and interrogatories, gather information,

United States Code Annotated
Federal Rules of Evidence (Refs & Annos)
Article VII. Opinions and Expert Testimony

Federal Rules of Evidence Rule 701, 28 U.S.C.A.

Rule 701. Opinion Testimony by Lay Witnesses

Currentness

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

CREDIT(S)

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat.1937; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011.)

ADVISORY COMMITTEE NOTES

1972 Proposed Rules

The rule retains the traditional objective of putting the trier of fact in possession of an accurate reproduction of the event.

Limitation (a) is the familiar requirement of first-hand knowledge or observation.

Limitation (b) is phrased in terms of requiring testimony to be helpful in resolving issues. Witnesses often find difficulty in expressing themselves in language which is not that of an opinion or conclusion. While the courts have made concessions in certain recurring situations, necessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration. McCormick § 11. Moreover, the practical impossibility of determining by rule what is a "fact," demonstrated by a century of litigation of the question of what is a fact for purposes of pleading under the Field Code, extends into evidence also. 7 Wigmore § 1919. The rule assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness. See Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 415-417 (1952). If, despite these considerations, attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule.

The language of the rule is substantially that of Uniform Rule 56(1). Similar provisions are California Evidence Code § 800; Kansas Code of Civil Procedure § 60-456(a); New Jersey Evidence Rule 56(1).

1987 Amendments

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), I hereby certify that I have, this 17th day of July, 2014, served the foregoing upon the counsel listed in the Service Preference Report via email or via U.S. Mail, as indicated below:

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