

103 FERC ¶ 61,315  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, and Nora Mead Brownell.

James M. Knott, Sr.

Docket No. JR00-2-002  
Project No. 9100-018

ORDER DENYING REHEARING

(Issued June 9, 2003)

1. This order denies rehearing of an order finding that the licensed Riverdale Mills Project, located on the Blackstone River in Worcester County, Massachusetts, is subject to the Federal Energy Regulatory Commission's mandatory licensing jurisdiction.

**BACKGROUND**

2. The Riverdale Mills Hydro Project, originally built in the 19th century,<sup>1</sup> consists of a 142-foot-long, 10-foot-high dam with 6 bays containing numerous stoplogs or flashboards for a crest elevation of 262.35 feet mean sea level; an 11.8-acre impoundment; three sluiceways, one of which is currently in use; a 150-kilowatt generator located within a mill building; a 231-foot-long tailrace; and appurtenant facilities. In 1987, the Commission granted James M. Knott, Sr.'s application for a license to operate and maintain the constructed project.<sup>2</sup> The license expires in 2017.

3. In 2001, in the context of a compliance case involving the project, Mr. Knott asserted that the project is not required to be licensed. The Commission treated Mr. Knott's assertion as a petition for a declaratory order on the jurisdictional status of the project,<sup>3</sup> and commenced a proceeding thereon (in docket JR00-2).<sup>4</sup>

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<sup>1</sup>The original dam was washed out in 1955 and was replaced in 1957. 39 FERC ¶ 62,308 at 63,681.

<sup>2</sup>*James M. Knott*, 39 FERC ¶ 62,308 (1987).

<sup>3</sup>As explained in our February 28 order, 102 FERC ¶ 61,241 at 61,725-26, the

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4. By order issued February 28, 2003, the Commission held that the Riverdale Mills Project is required to be licensed, based on two separate findings: (1) the project is located on a navigable stream of the United States, and (2) the project is located on a body of water over which Congress has Commerce Clause jurisdiction, project construction occurred on or after August 26, 1935, and the project affects the interests of interstate or foreign commerce.<sup>5</sup>

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<sup>3</sup>(...continued)

Commission has two types of hydropower licensing jurisdiction: permissive and mandatory. Permissive licensing is authorized rather than required, and is governed by Section 4(e) of the FPA, 16 U.S.C. § 797(e), which authorizes the Commission to issue a license for a hydropower project that develops power from any bodies of water over which Congress has jurisdiction under its Commerce Clause authority to regulate interstate and foreign commerce; that occupies public lands or reservations of the United States; or that uses the surplus water or waterpower from any federal dam. Mandatory licensing is governed by Section 23(b)(1) of the FPA, 16 U.S.C. § 817(1), which prohibits the unlicensed construction and operation of certain hydroelectric projects (discussed below). Thus, it is possible for a voluntary applicant to obtain a license under Section 4(e) for a project that would not require a license under Section 23(b)(1). Once a project owner has accepted a voluntary license, it is bound by the license's terms. In order for the project to achieve non-licensed status, the licensee must either wait until the expiration of the license term or file a surrender application under FPA Section 6, 16 U.S.C. § 799. *See Pennsylvania Electric Co.*, 56 FERC ¶ 61,435 (1991).

<sup>4</sup>The Commission issued notice of the petition for declaratory order On May 15, 2002. Timely motions to intervene and supporting a finding that licensing is required based on navigability were filed by the Massachusetts Department of Environmental Protection, Rhode Island Department of Environmental Management, and National Park Service. The Massachusetts Division of Fisheries and Wildlife filed a timely motion to intervene but expressed no position on the jurisdictional issue.

<sup>5</sup>Under Section 23(b)(1) of the FPA, a non-federal hydroelectric project must (unless it has a still-valid pre-1920 federal permit) be licensed if it (1) is located on a navigable stream of the United States; (2) occupies lands of the United States; (3) utilizes surplus water or waterpower from a federal dam; or (4) is located on a body of water over which Congress has Commerce Clause jurisdiction, project construction occurred on or after August 26, 1935, and the project affects the interests of interstate or foreign commerce. The project does not occupy any public lands or reservations of the United

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5. Mr. Knott filed a timely request for rehearing on March 28, 2003, disputing the Commission's findings that the Blackstone River is navigable, that the project affects interstate commerce, and that there was post-1935 construction at the project. He also asks for a trial-type evidentiary hearing on what he asserts are disputes regarding essential facts, and again argues that requiring his project to be licensed constitutes an uncompensated taking, in violation of the Fifth Amendment.<sup>6</sup> We address these topics below.

## DISCUSSION

### A. Navigable Waters

6. Pursuant to Section 3(8) of the FPA, 16 U.S.C. § 796(8),<sup>7</sup> 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

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<sup>5</sup>(...continued)

States, nor does it use surplus water or waterpower from a federal dam.

<sup>6</sup>Rehearing request at 1.

<sup>7</sup>Section 3(8) states:

"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.

improvements"<sup>8</sup> as a highway for commerce with other states or foreign countries, by itself or by connecting with other waters.<sup>9</sup>

7. From its source near the City of Worcester, the Blackstone River flows through Massachusetts for 27 miles and then enters Rhode Island, where it changes name to the Seekonk River and flows for another 17 miles to the City of Providence and Narragansett Bay.

8. Our February 28 order held that the Blackstone Mill Project is located on a navigable waterway, based on our finding in *Blackstone Mill Depot Street Trust*, 93 FERC ¶ 61,247 (2000). That order determined that the Blackstone River is navigable from above the Riverdale Mills Project to the bay, based on a September 2000 trip made by about 30 people in canoes and kayaks from Worcester to the bay. Before we issued our February 28 order, we sent Mr. Knott the staff evidentiary documents for his comments, and in our February order we addressed Mr. Knott's arguments that the river is not navigable.

9. On rehearing, Mr. Knott repeats his assertion that the Commission's navigability finding relies on "incorrect facts and law," and again requests a trial-type evidentiary hearing.<sup>10</sup> However, as is shown below, there are no disputes over the material facts; rather,

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<sup>8</sup>*Rochester Gas & Electric Corp. v. Federal Power Commission*, 344 F.2d 594, 596 (2nd Cir. 1965) (emphasis in the original).

<sup>9</sup>*See, e.g., Sierra Pacific Power Co. v. FERC*, 681 F.2d 1134, 1138 (9th Cir. 1982).

<sup>10</sup>Knott characterizes the 1987 Riverdale Mills license order as finding the river non-navigable, since it didn't state that it was navigable. In fact, the license order made no finding as to navigability; no such finding was necessary, since Knott had applied for the license voluntarily (in 1985). However, by order issued June 17, 1988, the Commission's Office of Hydropower Licensing (OHL) acted on Mr. Knott's June 23, 1986 request for a determination of the Commission's jurisdiction over the Riverdale Mills Project (docket UL96-1), finding licensing required because the Blackstone River, in conjunction with the Blackstone Canal, had been used for transporting persons and property in interstate commerce. 43 FERC ¶ 62,308 (1988). The order made no finding with regard to post-1935 construction. Mr. Knott did not seek rehearing of the order. In 1996, in an order on the upstream Farnumsville Project, OHL relied in part on the navigation report performed for the 1988 order, although it did not cite that order. 75 FERC ¶ 62,108 (1996). In 1999, the Commission reversed the 1996 order, finding that at the Farnumsville Project site neither the river nor the canal was available for commercial transport 87 FERC ¶ 61,337

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Mr. Knott seeks to interpret these facts in a manner that is contrary to the plain language of FPA Section 3(8)<sup>11</sup> and judicial case law.

10. Mr. Knott asserts that, to find the Blackstone River navigable, the Commission must show that the river "supports meaningful interstate commerce;"<sup>12</sup> carries "a level of activity related to interstate commerce that is far from nominal;"<sup>13</sup> and has "'at least a practical possibility of it being used as a highway' for commerce of a 'substantial and permanent character.'"<sup>14</sup> However, the court decisions Mr. Knott cites for this proposition predate the Supreme Court's landmark decision in *United States v. Appalachian Power Co.*, 311 U.S. 377 (1940),<sup>15</sup> a case Mr. Knott's rehearing request does not mention, or deal with the definition of navigable waters under admiralty law, a definition narrower than the definition for FPA purposes.<sup>16</sup> As we noted in our prior order, *Appalachian Power* held that a lack of

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<sup>10</sup>(...continued)

(1999). Finally, in 2000, the Commission found the river from above the Farnumsville Project navigable, based on the September 2000 canoe trip described above. 93 FERC ¶ 61,247 (2000).

<sup>11</sup>See n. 7, above.

<sup>12</sup>Rehearing request at 8.

<sup>13</sup>*Id.* at 9.

<sup>14</sup>*Id.* at 12, quoting *Att'y Gen. v. Woods*, 108 Mass. 436 (1871).

<sup>15</sup>See n. 14, above; and rehearing request at 9-12 (*United States v. Daughton*, 62 F.2d 936 (4th Cir. 1933); *Leovy v. United States*, 177 U.S. 621 (1900); *Broznan v. Gage*, 133 N.E. 622 (1921).)

<sup>16</sup>Mr. Knott cites to *LeBlanc v. Cleveland*, 198 F.3d 353 (2d Cir. 1999), for the proposition that a river is not navigable if there is a present-day "artificial obstruction" that is not "reasonably amenable" to improvement on behalf of commerce. *LeBlanc v. Cleveland* was a personal injury suit dismissed from federal district court because the waterway where the boating accident occurred was not "navigable" for purposes of admiralty jurisdiction, whose primary purpose is to protect commercial shipping. The court's opinion describes the different definitions, and the different purposes they reflect, of "navigable waterway" under the Commerce Clause (U.S. Const. Art. I, 8, clause 2) and under Article III of the U.S. Const. Art. III, 2 (extending federal judicial power "to all Cases of admiralty and maritime Jurisdiction"). Whereas the navigability of a waterway under the

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commercial traffic is not a bar to a conclusion of navigability where "personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation."<sup>17</sup> Pursuant to this ruling, the court in *Consolidated Hydro v.*

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<sup>16</sup>(...continued)

Commerce Clause (and FPA Section 3(8)) can, as noted above, be demonstrated based on past or present use or suitability for use in interstate or foreign commerce, or on a showing that with reasonable improvements it could be suitable for such use, the concept of "navigability" in admiralty is limited to describing a present capability of the waters to sustain commercial shipping. See 198 F.3d 353 at 359. In *LeBlanc v. Cleveland* the waterway was not navigable in admiralty law, because a dam blocked commercial shipping.

Mr. Knott asserts (rehearing request at 7) that our prior order misapplied the law regarding navigability by omitting reference to, and lacking evidence to fulfill, Section 3(8)'s "requirement that if improvements are needed to a waterway to make it useful for commercial navigation, the improvements are to have been authorized by Congress or recommended to Congress for such improvement." It is not clear what Mr. Knott is arguing; however, our finding that the Blackstone River is navigable at the project site did not rely on the need for improvements.

<sup>17</sup>311 U.S. at 416. In his rehearing request (at 9), Mr. Knott states:

FERC argues that it should be able to establish "commerce clause jurisdiction" over a project based on a waterway's potential conduit for interstate commerce, without any showing of actual commerce, which would mean just about any activity anywhere might someday, with technological innovation or sufficient alteration of natural limitations, be made suitable for interstate commerce. By contrast, courts give attention to the history and use of a waterway . . . .

This argument blurs two separate elements of a navigability showing. FPA Section 3(8) refers to waters that "either in their natural or improved condition . . . are used or suitable for use" for interstate or foreign commercial transportation. This is the criterion met by the record evidence in this proceeding: the interstate canoe trip down the Blackstone River demonstrated the current availability of the stream "for the simpler types of commercial navigation." Section 3(8) also holds navigable such streams as have been "authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement." Our finding in this proceeding does not invoke that provision.

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*FERC*, 968 F.2d 1258 (D.C. Cir. 1992), sustained a Commission finding that a canoe race (involving portages) along the Damariscotta River provided grounds for concluding that the river is navigable.<sup>18</sup>

11. Most recently, the court in *FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151 (D.C. Cir. 2002) (*FPL Energy*) affirmed the Commission's reliance for its navigability finding on three non-commercial, non-recreational test canoe trips. FPL Energy had

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<sup>17</sup>(...continued)

Mr. Knott also asserts that our February 28 order cited *Connecticut Power & Light Co. v. Federal Power Commission*, 557 F.2d 349 (2d Cir. 1977), with respect to establishing the "commerce clause" element of federal jurisdiction," but "did not cite correctly the substantive aspects of the case," namely that the court found the river there at issue to be navigable based on a long history of commercial shipping. Rehearing request at 14. However, our citation to *Connecticut Power & Light* was for the proposition that the Commission is not precluded by prior findings from holding that the project is required to be licensed. 102 FERC ¶ 61,241 at 61,726 n. 12.

<sup>18</sup>Mr. Knott asserts that the Commission has taken evidence of "wholly intrastate recreational commerce (small, local canoe and kayak vendors and floating dinner boats) as evidence of jurisdictional interstate commerce," but argues that this activity lacks the interstate element needed for a finding of navigability. Rehearing request at 6, 11-12. Indeed, because the referenced recreational boating does not cross state lines, we did not rely on it in our February 28, 2003 order, noting only that the National Park Service and Rhode Island Department of Environmental Management cited to this boating. 102 FERC ¶ 61,241 at 61,725 n. 6.

Mr. Knott also repeats his assertion that boating on the Blackstone is sufficiently difficult that it does not support a finding that the river is capable of being used for commerce. We answered this argument in our prior order, 102 FERC ¶ 61,241 at 61,728 n. 28. On rehearing, Mr. Knott cites for his proposition *Niagara Mohawk Power Corp.*, 54 FERC ¶ 61,100 (1991), involving the Salmon River, which flows into Lake Ontario. The Commission found the river to be non-navigable, concluding among other things that the recreational use of the Salmon River "did not support a finding of present recreational boating from the site of the projects to the mouth of the river; rather, it indicated only that particular isolated reaches were canoeable, but that substantial reaches of the river are too steep for that purpose." *Id.* at 61,330. However, the Commission was reversed on appeal, *New York State Dept. of Environmental Protection v. FERC*, 954 F.2d 56 (2d Cir. 1992). The court's opinion included the ruling that the river's navigability from the site of the projects to the mouth of the river was demonstrated by recreational canoeing with occasional portages. *Id.* at 62.

argued that in order for non-commercial boating to demonstrate the suitability of a stream for commercial navigation, there must be a showing of "regular and substantial recreational use." The court disagreed, noting that the statute and the case law make clear that the test is whether the river "is used, or capable of being used,"<sup>19</sup> as a highway for commerce, and that this test requires neither that the actual boating be recreational nor that it be regular and substantial. 287 F.3d at 1157.

12. In sum, Mr. Knott does not dispute the fact that some 30 people canoed, with occasional portages, down the Blackstone/Seekonk River from above the Riverdale Mills Project in Massachusetts, through Rhode Island, and to Narragansett Bay. Rather, he argues that the canoe trip did not meet the statutory and judicial standards for demonstrating the navigability of the river pursuant to Section 3(8) of the FPA. As we have explained above, Mr. Knott has not correctly applied these standards. We therefore deny rehearing on this issue.

#### **B. Effect on Interstate or Foreign Commerce**

13. Our February 28, 2003 order found that the Riverdale Mills Project affects the interests of interstate commerce by dint of its connection to an interstate electrical grid, which makes it a member of a class of small hydroelectric projects in the contiguous 48 states that affects the interests of interstate commerce. On rehearing, Mr. Knott disputes this finding, arguing that the test is whether the project alone affects interstate commerce.<sup>20</sup> However, as our order noted, in *Habersham Mills v. FERC*, 976 F.2d 1381, 1384 (11th Cir. 1992), the court rejected a dam owner's argument that the Commission

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<sup>19</sup>"Capable of being used" does not in this context mean that the capacity for use is dependent on "improvements" (artificial aids). 287 F.3d at 1157.

<sup>20</sup>Mr. Knott asserts that his project is not using interstate power. Rehearing request at 10. However, an effect on interstate commerce can be from the displacement of electricity that otherwise would be generated by facilities connected to the interstate grid. *Habersham Mills v. FERC*, 976 F.2d 1381, 1385 (11th Cir. 1992).

was required to investigate each individual project.<sup>21</sup> We therefore deny rehearing on this issue.

### C. Post-1935 Construction

14. Ordinary maintenance, repair, and reconstruction activity with respect to a project built before 1935 does not constitute post-1935 construction for Section 23(b)(1) purposes. Rather, such construction must entail the enlargement of generating capacity, of the impoundment/diversion structure, or of other significant physical plant. *See Puget Sound Power & Light v. Federal Power Commission*, 557 F.2d 1311 (9th Cir. 1977) (*Puget*). Under the *Puget* rule, our prior order held that there has been no post-1935 construction at the Riverdale Mills Project.<sup>22</sup>

15. An exception to the *Puget* rule, however, is where there is repair and reconstruction to a pre-1935 project that had been shut down and abandoned. In this context, abandonment entails a cessation of both project generation and project maintenance.

#### 1. Abandonment

16. Before Mr. Knott acquired the Riverdale Mills Project, it and the mill it served were owned and operated by Kupfer Bros. Paper Company (Kupfer). In 1976 the company shut down its operations at the site and departed the scene, leaving the mill and the project works without maintenance or repairs until Mr. Knott bought them in 1979. A newspaper article quoted Mr. Knott as stating that the mill "'was a mess,' . . . full of rotting materials and ancient machinery. 'It took a year to clean it out,' and even longer to renovate and

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<sup>21</sup>102 FERC ¶ 61,241 at 61,728 n. 34. The *Habersham Mills* opinion cited the landmark case of *Wickard v. Filburn*, 317 U.S. 111, 128 (1942), which held that full authority under the Commerce Clause includes the power to reach a local activity whose effect on commerce, "taken together with that of many others similarly situated, is far from trivial." The *Habersham Mills* court found substantial the Commission's evidence that the nation's small hydroelectric projects collectively account for a substantial portion of the nation's hydroelectric generating capacity. 976 F.2d at 1384-85. *See also Clifton Power Co.*, 39 FERC ¶ 61,117 at 61543-55 (1987), *cited in Habersham Mills*, 55 FERC ¶ 61,158 at 61,514 (1991).

<sup>22</sup>102 FERC ¶ 61,241 at 61,729.

restore the mill.<sup>23</sup> Mr. Knott asserts, however, that the mill is “factually and legally distinct from” the hydropower facilities it contains, and for purposes of our jurisdictional ruling we have assumed that the mill building is not a project work.<sup>24</sup>

17. Our February 28 order concluded that Kupfer's obvious abandonment of the mill building demonstrated as well its abandonment of the hydroelectric plant that is located in and under the mill building.<sup>25</sup> On rehearing, Mr. Knott does not dispute this factual finding. Instead, he repeats his argument that abandonment of the project for three years is an insufficient amount of time to qualify for exemption from the *Puget* rule.<sup>26</sup> We have answered this contention, stating that we do not think three years is too short a time to demonstrate the cessation of project generation and maintenance where, as here, the owner abandoned the project and made no effort to maintain it.<sup>27</sup> We therefore deny rehearing of our finding that the Riverdale Mills Hydroelectric Project was abandoned before Mr. Knott returned it to operation.

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<sup>23</sup>Making Use of Old Man River," *Blackstone Valley Tribune/Advertiser*, December 12, 1984. Mr. Knott does not take issue with the facts in this quote or with any of the other descriptions of the Riverdale Mills site that the February 28 order quotes from newspaper articles, some of which featured interviews with him. 102 FERC ¶ 61,241 at 61,730-31.

<sup>24</sup>We discussed the ambiguity in Mr. Knott's license application as to whether, and to what extent, the mill building is a project work, and will be requiring Mr. Knott to file more accurate Exhibit G maps specifying project works (*see, e.g.*, 18 C.F.R. § 4.61(f)(3)(A)). 102 FERC ¶ 61,241 at 61,731.

<sup>25</sup>*Id.* The project generator sits on the mill building floor. Its turbine pit is situated below the floor, and its sluiceway/tailrace runs under the building. There is no record evidence that Kupfer abandoned the mill building but continued to maintain the non-operating hydroelectric plant.

<sup>26</sup>Rehearing request at 16.

<sup>27</sup>102 FERC ¶ 61,241 at 61,731. Mr. Knott refers us to the "valid point" made in Judge Cyr's concurring opinion in *Hodgson* that "no legislative history had been cited on congressional intent regarding lengthy abandonments" for purposes of defining post-1935 construction (rehearing request at 15). However, Judge Cyr made this statement in the context of his argument that the word "construction" in FPA Section 23(b) includes the reconstruction of damaged project works, even if the works are merely restored to their original size, and that the *Puget* decision wrongly decided to make an "equitable exception" for such reconstruction. 49 F.3d 822 at 829-30.

## 2. Post-abandonment construction

18. Based on our reading of the three court decisions that have addressed post-1935 construction with and without abandonment,<sup>28</sup> we determined that post-abandonment construction does not require the enlargement of significant physical plant, but does require that there be some construction work to return the project to service.<sup>29</sup> On rehearing, Mr. Knott argues that we misread these court decisions on this issue, but does not explain what our error was.<sup>30</sup> He also asserts that we improperly imputed reconstruction of the mill building to construction on the hydroelectric facility.<sup>31</sup> However, we were careful not to do so; we based our finding of post-abandonment construction on the removal, rebuilding, and reinstallation of the project turbine, the installation of stoplogs in the project dam, and the refilling of the millpond behind the dam.<sup>32</sup> Mr. Knott has not disputed the fact that these actions were taken; rather, he argues that these actions do not qualify as post-abandonment construction. For the reasons stated above and in our prior order, we deny rehearing on this issue.

### D. Takings Argument

19. On rehearing, Mr. Knott repeats his assertion that by requiring his project to be licensed in order to divert or use the waters of the Blackstone River, the Commission is engaging in an uncompensated taking of Mr. Knott's deeded right to divert the waters of the Blackstone River as he shall see fit, in violation of the Fifth Amendment of the U.S.

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<sup>28</sup>*Puget*, above; *Aquenergy Systems, Inc. v. FERC*, 857 F.2d 227 (4th Cir. 1988); and *Thomas Hodgson & Sons v. FERC*, 49 F.3d 822 (1st Cir. 1995).

<sup>29</sup>*Id.* at 61,730.

<sup>30</sup>Rehearing request at 15.

<sup>31</sup>*Id.* at 16-17. Mr. Knott argues (*id.* at 17) that our finding of post-abandonment construction at his project is inconsistent with our finding in *City of Seattle, Washington*, 53 FERC ¶ 61,237 (1990), where we held that replacement of generating facilities and construction of an emergency spillway did not constitute post-1935 construction. However, the *Seattle* project had never been abandoned, and therefore was subject to the *Puget* rule.

<sup>32</sup>102 FERC ¶ 61,241 at 61,731-32.

Constitution.<sup>33</sup> Our prior order pointed out that the government may impose terms on a licensee's use of his water rights as a condition of the license that authorizes a right he does not otherwise have; in this case, the right to generate hydroelectric energy at a project that Congress has placed under the Commission's jurisdiction.<sup>34</sup>

20. Mr. Knott cites *Parks v. Watson*, 716 F.2d 646, 650 (9th Cir. 1983), for the proposition that the government is not permitted to impose a chose between the government benefit and the exercise of a constitutional right.<sup>35</sup> However, that decision pointed out that a condition requiring an applicant for a governmental benefit to forego a constitutional right is unlawful only if the condition is not rationally related to the benefit conferred. The court cited *Portland General Electric Co. v. Federal Power Commission*, 328 F.2d 165 (9th Cir, 1964), and *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), both of which we cited in our February 28 order, for examples of government-bestowed benefits – a hydroelectric license – to which conditions are related to the benefit conferred. We deny rehearing on this issue.

#### **E. Due Process**

21. Mr. Knott repeats his request for an evidentiary-type hearing. In our February 28 order we concluded that the proceeding involves no material facts in dispute that cannot reasonably be resolved in the "paper hearing" he has been afforded.<sup>36</sup> Based on our discussion above, we affirm that there are no material facts in dispute.<sup>37</sup> Mr. Knott's

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<sup>33</sup>Comments, attachment at 18.

<sup>34</sup>102 FERC ¶ 61,241 at 61,732-33.

<sup>35</sup>Rehearing request at 19.

<sup>36</sup>102 FERC ¶ 61,241 at 61,725 n. 5.

<sup>37</sup>Mr. Knott asserts that an evidentiary hearing is necessary "[w]hen bias and credibility of witnesses are at issue," and raises questions about the motivation of government officials participating in the canoe trip down the Blackstone River or who have otherwise been involved with monitoring project impacts on the river. Rehearing request at 20-22. However, the jurisdictional determinations made in this proceeding rest on the facts, to which any attendant motivations are irrelevant. *See, e.g.,* 102 FERC ¶ 241 at 61,727 n. 25 (*FPL Energy* affirmed Commission's reliance for navigability finding on canoe trips made for purpose of litigation).

arguments go, instead, to the legal significance to be attached to these facts. We deny rehearing on this issue.

The Commission orders:

James M. Knott, Sr.'s March 28, 2003 request for rehearing is denied.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>37</sup>(...continued)

Mr. Knott cites (rehearing request at 21) to *Cajun Electric Power Coop., Inc. v. FERC*, 28 F.3d 173 (D.C. Cir. 1994), and *Texaco v. FERC*, 148 F.3d 1091 (D.C. Cir. 1998), in support of his request for an evidentiary hearing. In *Cajun Electric Power Coop.*, the court ruled that the Commission erred in failing to hold an evidentiary hearing despite material issues of disputed fact concerning the impact of an open-access transmission tariff on an electric utility's market power. In *Texaco*, the court affirmed the Commission's decision not to hold a trial-type hearing, inasmuch as the Commission had accepted the validity of the facts proffered by the petitioner, and there were no issues of motive, intent, or credibility. These cases do not controvert the Commission's findings in the instant proceeding.