No. 02-1091

In the Supreme Court of the United States

COALITION FOR FAIR AND EQUITABLE REGULATION OF DOCKS ON LAKE OF THE OZARKS, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission (FERC) has statutory authority to authorize the licensee of a federal hydro-power project to collect permit fees from abutting landowners who build structures on project property.

2. Whether FERC abused its discretion when it determined that petitioner's administrative complaint could be decided without an evidentiary hearing.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes and regulations:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 297 F.3d 771. The orders of the Federal Energy Regulatory Commission are reported at 90 F.E.R.C. ¶ 61,249 (Pet. App. 21-42) and 93 F.E.R.C. ¶ 61,158 (App., *infra*, 1a-13a).

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2002. A petition for rehearing was denied on October 17, 2002 (Pet. App. 43). The petition for a writ of certiorari was filed on January 15, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 4(e) of the Federal Power Act (FPA), 16 U.S.C. 797(e), authorizes the Federal Energy Regulatory Commission (FERC) to license hydroelectric power projects on waterways within federal jurisdiction. Section 4(e) directs FERC, when deciding whether to issue a license for a hydro-power project, to consider, *inter alia*, environmental values and recreational opportunities. 16 U.S.C. 797(e). Similarly, Section 10(a)(1) of the FPA, 16 U.S.C. 803(a)(1), directs FERC to ensure that any licensed project is best adapted to a comprehensive plan for improving or developing the affected waterway for a variety of beneficial uses, including recreational purposes. Section 10(g) of the FPA, 16 U.S.C. 803(g), provides that hydro-power licenses shall be subject to "[s]uch other conditions not inconsistent with the provisions of this Chapter as the commission may require." Section 309 of the FPA, 16 U.S.C. 825h, authorizes the Commission "to perform any and all acts, and to prescribe * * * such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of th[e FPA]."

Pursuant to those requirements and authorizations, FERC has for many years required hydro-power licensees to allow the construction of wharfs and other recreational facilities within the boundaries of their projects, and also allowed the licensees to collect reasonable fees from the owners of such facilities. See, *e.g.*, *Kokajko* v. *FERC*, 873 F.2d 419, 420-421 & n.2 (1st Cir. 1989) (discussing conditions on 1954 hydro-power license). In 1965, FERC adopted a rule encouraging "the ultimate development" of the recreational resources of licensed hydro-power projects, "consistent

with the needs of the area" and "to the extent that such development is not inconsistent with the primary purpose of the project." 18 C.F.R. 2.7. In 1980, FERC adopted a standard license condition that authorizes the licensee to allow occupancy of project lands and waters for recreational purposes, and to charge a reasonable fee that covers the licensee's costs of administering an occupancy-permit program. See *Brazos River Auth.*, 11 F.E.R.C. ¶ 61,162, at 61,347, 61,348-61,349 (1980).

2. In April 1981, FERC issued a license to Union Electric Company (Union Electric) for the Osage Project, located on the Osage River in Missouri. The project works include the Bagnell Dam and a reservoir, known as Lake of the Ozarks, which has a surface area of more than 55,000 square miles. Pet. App. 21-22. Article 41 of Union Electric's license authorizes the company to grant permission for certain types of uses of project lands and waters—including docks—and assigns Union Electric the responsibility of supervising and controlling the uses and occupancies it allows. *Id.* at 8-9. Article 41 further provides that Union Electric may establish a program for issuing permits for use and occupancy of project lands and waters, and may impose "a reasonable fee to cover [Union Electric's] costs of administering the permit program." *Id.* at 9.

In 1998, after notice and comment, Union Electric modified its permit program for docks and other shoreline structures on project property. The revised permit program established new permit requirements, guidelines for structures and their maintenance, and fees. The new rules became effective in January 1999. See Pet. App. 9, 22. The new fee schedule included a one-time fee of $250 or $400 (depending on the dock's size) for new or modified docks. Docks larger than 3000 square feet were exempt from the one-time fee, but

subject to an annual fee of 4.5 cents per square foot. *Id.* at 9-10. Union Electric's permit instructions stated that fee receipts "will be applied to [Union Electric's] shoreline management costs at the Lake of the Ozarks." *Id.* at 10.

3. Petitioner is an organization comprised of owners of lakefront property on Lake of the Ozarks. Pet. ii; Pet. App. 7. Petitioner disputed Union Electric's authority to charge the new permit fees. See Pet. App. 22. Beginning in January 1999, Union Electric and petitioner submitted letters to FERC's staff in which Union Electric sought an informal advisory opinion confirming that its permit program is consistent with Article 41 of the license agreement, and petitioner contended that the new permit fees are not authorized. See *id.* at 22-24. The FERC staff advised Union Electric and petitioner that FERC authorized Union Electric's permit program pursuant to the FPA and that the new fees are consistent with Article 41 insofar as they recover Union Electric's costs of property management, permit processing and enforcement, removal of derelict docks, and monitoring and surveying. The staff further determined, however, that Union Electric should not use dock fees for other purposes, such as stocking fish and mosquito control. *Id.* at 23, 24.

In September 1999, petitioner filed a formal complaint with FERC in which it renewed its contention that the FPA does not empower FERC to authorize Union Electric to collect the contested permit fees. Petitioner also argued that the fees are excessive and violate Article 41. See Pet. App. 24-25. Petitioner requested an evidentiary hearing before an administrative law judge (ALJ). *Id.* at 12.

In March 2000, FERC denied the complaint. Pet. App. 21-42. In relevant part, FERC determined that it

has statutory authority to allow hydro-power licensees to charge user fees that recoup expenses caused by public use of project lands and waters. *Id.* at 26-30. FERC explained that Section 10(a)(1) of the FPA, 16 U.S.C. 803(a)(1), provides for recreational uses of licensed projects, and that Section 10(g) of the FPA, 16 U.S.C. 803(g), vests FERC with "wide latitude and discretion" to craft license conditions in the performance of its licensing and regulatory functions. Pet. App. 26 (quoting *Metropolitan Edison Co.* v. *FPC*, 169 F.2d 719, 723 (3d Cir. 1948)). That Section 10 authority, FERC noted, is further bolstered by Section 309 of the FPA, 16 U.S.C. 825h, which authorizes the issuance of orders that FERC "may find necessary or appropriate" to implement the FPA. Pet. App. 26-27.

FERC observed that Union Electric's charges are fees, not taxes, because they are "incident to a voluntary act" of the permit applicant, and assessed in exchange for "a benefit on the applicant, not shared by other members of society." Pet. App. 30-31 (quoting *National Cable Television Ass'n* v. *United States*, 415 U.S. 336, 340-341 (1974)). FERC explained that Union Electric "is not taxing the private property of the dock owners but imposing a fee for allowing the dock owners to extend their facilities onto project property." *Id.* at 31.

FERC likewise rejected petitioner's argument that Union Electric's permit fees for structures on project property violate 33 U.S.C. 565, which allows persons to place improvements in navigable rivers with the approval and under the control and supervision of the Secretary of the Army and the Chief of Engineers of the Army, but provides that "no toll shall be imposed on account thereof." FERC explained (Pet. App. 31) that Union Electric's fees recover "the costs of a permitting

program for boat docks and other structures within the project impoundment; they do not impose a toll for use of the river."

In determining (Pet. App. 32-35) that Union Electric's fees (to the extent approved by the FERC staff) are reasonable and consistent with Article 41 of the project license, FERC stated (*id.* at 35) that it was able to make that assessment based on written submissions in the record. FERC therefore determined not to assign the matter to an ALJ. *Ibid.*

4. In November 2000, FERC denied petitioner's request for rehearing. App., *infra*, 1a-13a. In its rehearing request, petitioner argued primarily that FERC should have referred the complaint to an ALJ because it presented contested factual issues, and because FERC's dismissal order relied on cost information submitted by Union Electric that was not verified or tested through discovery. See *id.* at 4a-5a.

FERC noted, in response, that "[t]he decision whether to grant a trial-type hearing is in the Commission's discretion." App., *infra*, 5a. FERC further explained that although petitioner challenged the level of Union Electric's permit fees, "it failed to identify any factual issues that require resolution" in a hearing, and did not explain—either in its complaint or in its request for rehearing—a factual basis for its challenge to the level of the fees. *Id.* at 6a. "The mere advancement of an allegation," FERC continued, "does not create a factual dispute as to the discriminatory or unreasonable nature of the fees." *Ibid.* FERC also rejected petitioner's contention that it should have referred the matter to an ALJ so that petitioner could clarify the allegations of the complaint. *Id.* at 7a; see 18 C.F.R. 385.206(b) (mandating detailed allegations in complaints filed with FERC).

Turning specifically to petitioner's argument that it should not have relied on Union Electric's cost information, FERC concluded that "[a]n evaluation of the reasonableness of [Union Electric's] permit program fees does not require that each individual expense item [claimed by Union Electric] be documented and verified." App., *infra*, 12a. Finding no basis in the record to conclude that the asserted expenses were "unsupportable or unrelated to the administration of the permit program," and noting that "the amount [Union Electric] anticipated collecting under the permit fee program does not come close to covering those expenditures," FERC determined that an evidentiary hearing was not required to investigate Union Electric's claimed costs. *Ibid.*

5. The United States Court of Appeals for the Eighth Circuit denied petitioner's ensuing petition for review. Pet. App. 1-20. The court of appeals determined that petitioner's principal argument—that the FPA does not authorize FERC to impose license conditions addressing the use of project lands by persons other than the licensee itself—"flies in the face" of *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U.S. 152 (1946), in which this Court emphasized that Congress intended through the FPA to establish "a complete scheme" of hydro-power regulation, "which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so." Pet. App. 14 (quoting 328 U.S. at 180). The court of appeals observed that "[a] holding that FERC could not take any action that would regulate the conduct of anyone other than the licensee, no matter how directly other persons' conduct might affect a hydro-power project, would deprive FERC of the power to effectuate the

goals it was directed to accomplish and would negate the broad grants of power and discretion in the Federal Power Act." *Id.* at 15.

The court of appeals further agreed with FERC that, under the standard of *National Cable Television Association*, *supra*, Union Electric's permit fees are not taxes because they are imposed when a landowner seeks and obtains the benefit of placing a dock on project property, and are based on the cost of providing that requested benefit. Pet. App. 15-16. The court also rejected petitioner's non-delegation and equal-protection claims. *Id.* at 16-17.

The court of appeals then determined that FERC's decision not to refer petitioner's complaint for an evidentiary hearing was not an abuse of discretion or violative of due process. Pet. App. 17-19. The court observed (*id.* at 18) that the FPA allows FERC to prescribe its own rules of practice and procedure, and specifies that "[n]o informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order [or] decision" under the FPA. 16 U.S.C. 825g(b). Furthermore, the court noted (Pet. App. 18), FERC's rules provide that the agency may decide cases on the pleadings, without referral to an ALJ for an evidentiary proceeding. See 18 C.F.R. 385.206(g)(2). The court determined that petitioner raised primarily legal issues rather than factual ones, Pet. App. 18-19, and "did not present FERC with any reason to doubt the accuracy of the information it received from Union Electric regarding its expenses," *id.* at 19. The court added that even if the objections to Union Electric's expenses that petitioner made in the court of appeals were accepted, Union Electric's expenses for functions covered by the permit fee still would exceed its permit-fee revenues. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct. There is no conflict with any decision of this Court or of another court of appeals, and the petition raises no issue that warrants this Court's review.

1. Petitioner first contends (Pet. 4-8) that Union Electric's permit fees are taxes, rather than user fees, and that FERC therefore lacks statutory authority to allow Union Electric to collect them. The court of appeals correctly determined (Pet. App. 14-15) that the Federal Power Act provides FERC the necessary authority to allow project licensees to collect fees for uses of project property that are consistent with the FPA, FERC rules, and the project license. As the court of appeals emphasized (*id.* at 14-15), the FPA establishes a "complete scheme of national regulation" of hydro-power projects within federal jurisdiction. *First Iowa Hydro-Elec. Coop.* v. *FPC*, 328 U.S. 152, 180 (1946). Consistent with that comprehensive regime, the FPA—after establishing recreation as a benefit that must be considered in hydro-power licensing decisions, 16 U.S.C. 797(e), 803(a)(1)—gives FERC broad discretion to impose license conditions, 16 U.S.C. 803(g), and to issue such orders as it finds necessary and appropriate to fulfill its obligations under the FPA, 16 U.S.C. 825h. The Commission's longstanding practice of allowing project licensees to impose fees that defray expenses associated with recreational uses of project property accords with each of those statutory directives. Indeed, allowing licensees to recover their costs associated with recreational uses of project property is similar in principle to permitting licensees to charge for electricity they generate at a project.

Contrary to petitioner's suggestion (Pet. 5-6), FERC's authorization of the dock fees in this case is not inconsistent with 33 U.S.C. 565, which prohibits the imposition of tolls on account of improvements to navigable rivers by private individuals. As FERC explained in its order (Pet. App. 31), Union Electric's permit fees for structures on project property are not "tolls." Furthermore, Section 565 applies to improvements that are under the supervision of the Army. See 33 U.S.C. 565. The Army Corps of Engineers does not issue permits for docks on Lake of the Ozarks. See C.A. App. 237.

Petitioner also contends (Pet. 6-8) that the permit charges are unauthorized because they are a tax, rather than a fee. As the court of appeals explained, however, "[a] tax is a general charge not correlated to a particular benefit, whereas a fee is a charge exacted in exchange for a benefit of which the payor has voluntarily availed itself." Pet. App. 15; see *National Cable Television Ass'n* v. *United States*, 415 U.S. 336, 340-341 (1974); see also *United States* v. *Sperry Corp.*, 493 U.S. 52, 60-61 (1989). The court of appeals was correct that Union Electric's permit charges are "fees," rather than a "tax" under that standard, because the charges are cost-based and imposed on persons who seek the special benefit, not generally shared by the public, of placing structures on project property. See Pet. App. 16; cf. *FPC* v. *New England Power Co.*, 415 U.S. 345, 351 (1974) (agency's charge is fee rather than tax where it is levied on identifiable recipients of services conveying special benefit).[1]

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[1] Petitioner's assertion (Pet. 6) that, if the permit fee were a tax, it would be subject to heightened scrutiny under the non-delegation doctrine, therefore is not relevant. That assertion also is

Petitioner disputes (Pet. 7-8) FERC's conclusion that the permit fees are calibrated to recovering expenses that particularly benefit permit holders. See Pet. App. 24, 32-34. That fact-bound objection to Union Electric's fees does not warrant this Court's review. Moreover, the court of appeals determined (*id.* at 19-20) that even if the costs petitioner challenged were removed from Union Electric's reported expenditures for the permit program, Union Electric's annual program costs still would be higher than its permit-fee revenues. See App., *infra*, 12a ("[T]he amount [Union Electric] anticipated collecting under the permit fee program does not come close to covering [its] expenditures.").

2. Petitioner also challenges (Pet. 8-12) FERC's decision to resolve the permit-fee dispute on the pleadings, without "the use of depositions and subpoenas" (Pet. 8). Agencies have broad discretion to choose their own administrative procedures. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543-545 (1978). The court of appeals correctly determined (Pet. App. 17-19) that FERC did not abuse its broad discretion, or deny petitioner due process, when it decided petitioner's case without referring it to an ALJ.

Petitioner is mistaken when it asserts (Pet. 8) that Congress has mandated that subpoena and deposition powers be provided to any party in a FERC proceeding. Section 307(a), (b) and (d) of the FPA, 16 U.S.C. 825f(a), (b) and (d), provides that the Commis-

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disproved by the very case petitioner cites. See *Skinner* v. *Mid-Am. Pipeline Co.*, 490 U.S. 212, 222 (1989) ("We find no support, then, for * * * the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power.").

sion *may* issue subpoenas or permit depositions; the deposition power is automatic only after a matter has been set for a hearing, see 18 C.F.R. 385.404. The FPA also does not require oral hearings. Instead, it requires that proceedings "shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied." 16 U.S.C. 825g(b); see 16 U.S.C. 825e (FERC may investigate complaints "in such manner and by such means as it shall find proper."). Consistent with the FPA, FERC's Rules of Practice provide that complaints may be decided on the pleadings or through alternative dispute resolution procedures, and need not be set for a hearing. 18 C.F.R. 385.206(g).

In this case, FERC reasonably determined (Pet. App. 35) that petitioner failed to demonstrate that the resolution of its administrative complaint required a hearing. As the court of appeals explained (*id.* at 18-19), petitioner's complaint focused primarily on a legal issue—whether FERC is authorized to allow project licensees to impose fees. *Ibid.* Moreover, and as the court of appeals also explained (*id.* at 19), petitioner failed to provide any specific factual basis for doubting the accuracy of the cost information Union Electric provided. See App., *infra*, 6a-7a, 12a.[2]

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[2] Petitioner's reliance (Pet. 11) on *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), is misplaced. *Goldberg* involved the termination of welfare benefits without a pre-termination hearing. *Id.* at 260. The Court concluded, in that context, that a pre-termination hearing was required under the Due Process Clause because "the recipient's interest in avoiding that loss outweigh[ed] the governmental interest in summary adjudication." *Id.* at 263. Here, by contrast, petitioner challenged a permit fee schedule of general applicability that was adopted after notice and comment, Pet. App. 9, and the validity of which did not turn on facts pertaining to any

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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particular landowner, cf. *Mobil Oil Exploration & Producing S.E., Inc.* v. *United Distribution Cos.*, 498 U.S. 211, 228-229 (1991). FERC considered the parties' written submissions and concluded that they did not raise any issue that required an oral hearing. Pet. App. 35.

APPENDIX

FEDERAL ENERGY REGULATORY COMMISSION
OPINIONS, ORDERS AND NOTICES

Project No. 459-108

UNION ELECTRIC COMPANY, D/B/A AMERENUE

(Issued: Nov. 13, 2000)

ORDER DENYING REHEARING AND STAY

Before: Commissioners JAMES J. HOECKER, Chairman; WILLIAM L. MASSEY, LINDA BREATHITT, and CURT H´EBERT, JR.

By order issued March 16, 2000,[1] the Commission denied a complaint filed by the Coalition for the Fair and Equitable Regulation of Docks on Lake of the Ozarks (Coalition), a non-profit corporation comprising property owners on the Lake of the Ozarks, in Missouri, against Union Electric Company, doing business as AmerenUE, licensee of the Osage Project No. 459, of which the lake is the reservoir. The Coalition filed a timely request for rehearing and a request for stay of that order. We are denying the requests.

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[1] 90 FERC ¶ 61,249.

Background

The Osage Project is located on the Osage River, in Benton, Camden, Miller, and Morgan Counties, Missouri. The Lake of the Ozarks, impounded by the Bagnell Dam, has a surface area of 55,342 acres and sustains heavy recreational use. In January 1999, AmerenUE began implementing a revised program for issuing permits and assessing permit fees for shoreline structures, most notably boat docks, on the lake.[2] Shortly thereafter, AmerenUE sought an informal advisory opinion from Commission staff regarding its authority to take these actions, because the Coalition was challenging that authority, as well as the Commission's right to authorize the actions under the license. The Director, Division of Licensing and Compliance, confirmed the Commission's authority to allow licensees to establish a permitting program, but found that some of the categories of expenses for which AmerenUE was assessing fees were not related to the permit program and should not be supported by dock permit fees.

The Coalition then filed its complaint, in which it asserted that the Commission could neither impose, nor delegate to a private entity the authority to impose, a tax or user fee of the kind established by the permit program; that the license authorizes the licensee to recover only the costs of issuing permits, not all of its shoreline management expenses; and that the fees imposed under AmerenUE's permit program were in

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[2] The revised permit program imposes an annual use fee of 4.5 cents per square foot for docks occupying more than 3,000 square feet, a one-time fee of $400 for docks occupying between 1,800 and 3,000 square feet, and a one-time fee of $250 for docks occupying less than 1,800 square feet.

excess of its license authority and unreasonable. The Coalition also contended that the permit program violated a federal statute prohibiting the collection of tolls for improvements to navigable waterways, and a prohibition in the Federal Power Act (FPA) of any action that is discriminatory or interferes with property rights.

In denying the Coalition's complaint, we explained that Congress had granted the Commission broad authority over non-federal hydropower development, and that this authority extends to ensuring, through licensees, that uses of project reservoirs are consistent with beneficial public purposes. We indicated that the Commission has long maintained a policy of allowing licensees to recoup expenses related to the use by others of project property or facilities, and that this policy was reflected in the Osage Project license's Article 41, a standard land use article placed in licenses since 1980 to provide licensees with expanded authority to grant permission for use and occupancy of project lands and waters without prior Commission approval. We explained that fees for administering a permit program are neither a tax nor a toll for use of the river, but rather a lawfully required payment for the benefit of extending boat docks and other structures into the project impoundment. Further, we concluded that permit program fees could be assessed to cover not only the costs of processing permit applications but all costs of administering the permit program, including those incurred in enforcing compliance with the program and removing derelict docks. We agreed with the Director's determination as to which expense categories were and were not related to administration of the permit program, and, on the record presented to us, found

that AmerenUE's fees or fee structure were not unreasonable or discriminatory.

On rehearing, the Coalition requests that we allow "investigation, discovery, an evidentiary hearing, briefs and oral argument," and that we grant it the relief requested in its complaint, which is to say, that we accept the Coalition's arguments and find AmerenUE's permit program to be unauthorized and unreasonable. In its request for stay, the Coalition asks that we enjoin and restrain AmerenUE from imposing the fees of and enforcing the permit program regulations until we have made a final determination regarding the complete validity of the fees and the reasonableness of the fee amounts.

Discussion

1. *Rehearing request*

The Coalition asserts that the Commission erred in numerous respects in the order on complaint. Many of the allegations of error are a recitation, nearly verbatim, of the positions that the Coalition advanced in its complaint. As they simply restate arguments that we have already addressed in the order on complaint, we see no need to repeat our responses. Therefore, we will confine our discussion here to new arguments on rehearing.

Most of these remaining arguments concern our decision to dispose of the complaint as submitted, rather than to institute a trial-type hearing to develop a record. The Coalition contends that a trial-type hearing was necessary because the issues involve disputed facts that could not have been properly resolved solely upon written submissions. It asserts that we should have allowed discovery and verification of documents that

had been submitted to us, followed by submission of briefs on the merits to ascertain fully the nature of the Coalition's filing. In addition, the Coalition contends that we should have assigned the proceeding to an administrative law judge for resolution, particularly in light of AmerenUE's "consistent refusal" to supply complete responses to it and to the Commission.

The Coalition continues to insist that the permit program is discriminatory, as outlined by material that accompanied its complaint. It contends that the permit program fees are not reasonable, and that discovery and an evidentiary hearing were particularly necessary as to the issue of reasonableness, because the Commission could not have resolved that issue based on the materials presented.

In our order addressing the complaint, we declined to assign the proceeding to an administrative law judge for a formal evidentiary hearing, as the Coalition had requested, because we found it possible to assess the reasonableness of AmerenUE's fees on the existing record. On rehearing, the Coalition does not persuade us that an evidentiary hearing was necessary.

The decision whether to conduct a trial-type hearing is in the Commission's discretion, and it is not an abuse of that discretion to deny a request for hearing when there are no material facts in dispute.[3] Further, mere allegations of disputed fact are insufficient to mandate a hearing; a petitioner must make an adequate proffer of

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[3] *Woolen Mill Associates* v. *FERC*, 917 F.2d 589, 592 (D.C. Cir. 1990); *Pennsylvania Pub. Utility Comm'n* v. *FERC*, 881 F.2d 1123, 1226 (D.C. Cir. 1989); *Cerro Wire & Cable Co.* v. *FERC*, 677 F.2d 124, 128-29 (D.C. Cir. 1982).

evidence to support them.[4] Even where material facts are disputed, an administrative agency has the discretion to deny an oral, trial-type hearing so long as the disputes can be adequately resolved through written submissions.[5]

In large part, the Coalition's attacks on the permit program and its fees were challenges to the authority of the Commission to allow, and of AmerenUE to institute, the assessment of fees related to the administration of a permit program for boat docks and other structures. The arguments advanced by the Coalition were legal ones, relating to the authority granted by Congress to the Commission, the interpretation of the FPA and other statutes, and the scope of AmerenUE's authority under its license. As discussed above, we addressed those legal arguments, which were not dependent on the resolution of any factual disputes.

While the Coalition alleged that the permit fees are discriminatory and unreasonable, it failed to identify any factual issues that require resolution. The mere advancement of an allegation does not create a factual dispute as to the discriminatory or unreasonable nature of the fees. Beyond challenging the scope of the Commission's and the licensee's authority, the Coalition did not explain in what respects it believes that the particular fees assessed are discriminatory or unreasonable, so that it was not clear from the complaint what facts would be relevant to its allegations. On rehearing, the Coalition does not attempt to remedy

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[4] *Woolen Mill*, 917 F.2d at 592; *Pennsylvania*, 881 F.2d at 1126; *Cerro*, 677 F.2d at 124.

[5] *Amador Stage Lines, Inc.* v. *United States*, 685 F.2d 333, 335 (9th Cir. 1982).

this omission but simply repeats its allegations. Although the Coalition claims that the material it submitted with its complaint outlines how the fees are discriminatory, we find no such explanation there. As to reasonableness, the Coalition argued principally that AmerenUE is not authorized to assess fees for a broad range of shoreline management expenses; this argument, which we addressed, turned on the interpretation of AmerenUE's license authority, not on any factual dispute.

The Coalition suggests that we should have permitted discovery, a hearing, and the submission of briefs, in order to ascertain fully the nature of its complaint. This is not the function of those procedural measures. The Commission's rules require a complaint not only to identify clearly the action that is alleged to violate applicable statutory standards or regulatory requirements, but to explain how the action violates those standards or requirements, and to include all documents in the complainant's possession that support the facts in the complaint.[6] While trial-type procedural measures may be used to develop a record and resolve issues of fact, they are not intended to be used as a cure for a complaint that fails to inform the Commission completely and clearly as to the issues and factual disputes that the complainant wishes the Commission to address. All issues that were presented clearly in the complaint were addressed in our previous order.

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[6] 18 C.F.R. § 385.206(b)(1), (2) and (8) (2000).

2. *Additional information*

Although the Coalition challenged mainly the existence and scope of AmerenUE's authority to assess fees under a permit program, it also alleged that the amounts of the fees are not reasonable. The Coalition presented no argument to develop this allegation, other than the arguments as to the scope of the licensee's assessment authority. In our order addressing the complaint, we concluded that, with respect to the categories of expenses that AmerenUE could seek to recover, the fees did not appear excessive or unreasonable, because AmerenUE had provided details as to the nature of its property management, permit processing, enforcement, derelict dock removal, and lake survey expenses, and because those expenses considerably exceeded the fees that AmerenUE expected to collect under the permit program.

Nevertheless, in a letter of July 17, 2000, Commission staff requested AmerenUE to provide a detailed breakdown or accounting for the costs associated with each of the cost categories that the Commission had determined were appropriate. AmerenUE was directed to provide sufficiently detailed information for the Commission to determine how AmerenUE calculates the total cost under each category. Staff directed AmerenUE to provide a copy to the Coalition and solicited the Coalition's comments on AmerenUE's submission.

On August 16, 2000, AmerenUE filed its response, in which it provided a detailed description of its 1999 expenses in the three categories: property management, permit processing, and enforcement; derelict dock removal; and lake survey. AmerenUE states that the actual 1999 expenses totaled $1,228,344, or $283,344

more than the projected expenses on which we based our discussion in our earlier order. A description of these expenses follows.

By far the greatest expense incurred during 1999 was for labor, totaling $810,007. Of this amount, $712,132 was for salary and benefits paid to personnel of the company's real estate department for property management, permit processing, and enforcement. AmerenUE describes the duties of these personnel, which include a real estate supervisor, several real estate representatives, and support personnel, in distributing, reviewing, evaluating, and obtaining comments on permit applications; handling calls, conducting investigations and field inspections, attempting resolutions, and assessing fines relating to permit violations; and developing and implementing the shoreline permit program. This latter responsibility includes ensuring compliance with the license; coordination of policy changes with federal, state, and local agencies; filing annual reports with the Commission; testifying in legal proceedings involving property issues at the lake; researching property interests; resolving encroachments; preparing documents and valuing property interests in connection with granting property rights to others; dealing with real estate companies, surveyors, developers, subdivision associates, dock builders, and agencies; interpreting and implementing the permitting guidelines; contracting with companies for dock removal; and coordinating legal action with outside counsel. AmerenUE provided a breakdown of the payroll and benefit expenses for these personnel on a monthly basis.

The remaining $97,875 in labor expenses for 1999 was for salary and benefits paid to personnel at the Osage

facility. The responsibilities of these personnel include reviewing applicants' proposals for seawalls, decks, dredging activities, pump intakes, boat ramps, piers, and other structures or facilities to be placed in the lake. These personnel also, among other duties, perform site inspections and evaluate the impacts of the proposed activities; coordinate changes in shoreline management policy with state and federal resource agencies and with the public; make recommendations regarding the appropriate legal action to be taken with regard to unpermitted activities; and review inspection reports.

AmerenUE also provided information as to two other categories of expenses related to property management, permit processing, and enforcement in 1999. AmerenUE paid $28,965 to an independent contractor as a shoreline inspector, whose responsibilities are primarily to perform field inspections on proposed and completed fill and excavation requests. Together, the shoreline inspector and the shoreline supervisor, an Osage facility employee, conduct 500 to 700 investigations a year. AmerenUE also incurred $54,056 in miscellaneous shoreline expenses in 1999. These included office expenses, record-keeping, and various services performed at the shoreline management offices by outside contractors. AmerenUE provided a breakdown of the miscellaneous expenses by month.

Finally, AmerenUE incurred legal fees of $258,479 in 1999 to enforce compliance with permit requirements and to defend itself in legal actions relating to shoreline management. AmerenUE provided a breakdown of this expense by opposing party.

AmerenUE incurred more modest expenses during 1999 in connection with the two remaining categories,

derelict dock removal and lake survey. AmerenUE paid $58,413 to outside contractors to remove derelict docks and $18,424 for a lake survey, which is performed bi-annually to determine which shoreline management issues are of greatest concern to the lake residents and visitors. The expenses in these categories are broken down by month.

In a September 15, 2000 response to AmerenUE's submission, the Coalition asserts that it is still not possible to determine how AmerenUE calculates the total cost under each allowed category or to determine the validity of the fees, because AmerenUE has still not provided a detailed breakdown or accounting of these costs. However, the Coalition argues that, even though the information is deficient, it is adequate to demonstrate that AmerenUE is attempting to recover most of its operating expenses through the permit program, in disregard of the Commission's determination that it could not use the program to recover all of its shoreline management expenses. The Coalition states that it cannot even identify the duties for which the individuals named in AmerenUE's submission are responsible or whether the positions even exist, and that much of the "property management" expenses is not related to processing permit applications or enforcing the permits. The Coalition asserts that the information on derelict dock removal and lake survey expenses consists only of self-serving summaries that cannot be verified and have not been properly supported. The Coalition repeats its conviction that the validity and reasonableness of the permit program fees can only be evaluated through an evidentiary hearing with discovery.

We disagree that the additional information provided by AmerenUE is inadequate. Article 41 of the license allows the licensee to grant permission for non-project use and occupancy of project lands and waters, and to assess reasonable fees for administering such a permit program. An evaluation of the reasonableness of AmerenUE's permit program fees does not require that each individual expense item be documented and verified. The types of expenses that AmerenUE has described seem to us, on the whole, to be related to the granting of permission to other entities or individuals to place structures on project lands or in the project reservoir, or otherwise to obtain uses or interests in the project lands and waters, and to the enforcement of the program established for granting these types of permission. While AmerenUE's submission does not constitute proof of the truthfulness or accuracy of these expenses, we do not assume that a licensee is furnishing false or misleading information to the Commission, nor do we require an evidentiary hearing and discovery to verify the accuracy of all information that a licensee furnishes us on request. Given the types of expenditures that the licensee has described, the amounts it has attributed to those expenditures do not seem extraordinary or unreasonable. In any event, as we have previously noted, the amount AmerenUE anticipated collecting under the permit fee program does not come close to covering these expenditures.

The Coalition has not convinced us on rehearing that, on the basis of its complaint, AmerenUE's permit program fees are discriminatory or unreasonable, or that an evidentiary hearing was required to ascertain the fairness or reasonableness of the fees. The additional information solicited and obtained from the licensee

does not give us cause to believe that the expenses for which AmerenUE assesses the permit program fees are unsupportable or unrelated to the administration of the permit program. For these reasons, we deny the request for rehearing. In light of this determination, we deny the request for stay as moot.

The Commission orders:

(A) The request for rehearing filed April 14, 2000, by the Coalition for the Fair and Equitable Regulation of Docks on Lake of the Ozarks is denied.

(B) The request for stay filed by the Coalition on April 14, 2000, is denied as moot.