No. 03-1081

In the Supreme Court of the United States

DOMTAR MAINE CORPORATION, INC., PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

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

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission reasonably concluded that Section 23(b)(1) of the Federal Power Act, 16 U.S.C. 817(1), requires the licensing of two reservoirs that are necessary or appropriate in the maintenance and use of downstream hydroelectric projects that are exempt from FERC licensing.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Statutes—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-30) is reported at 347 F.3d 304. The orders of the Federal Energy Regulatory Commission are reported at 77 F.E.R.C. ¶ 62,189 (1996), 78 F.E.R.C. ¶ 61,223 (1997), 91 F.E.R.C. ¶ 61,047 (2000), 98 F.E.R.C. ¶ 61,312 (2002), and 99 F.E.R.C. ¶ 61,276 (2002).

JURISDICTION

The judgment of the court of appeals was entered on October 28, 2003. The petition for a writ of certiorari was filed on January 27, 2004. 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) "[t]o issue licenses * * * for the purpose of constructing, operating,[] and maintaining dams, * * * reservoirs, * * * or other project works necessary or convenient for * * * the development, transmission, and utilization of power across, along, from, or in" any waterway subject to regulation by Congress under the Commerce Clause. 16 U.S.C. 797(e). Section 3(12) of the FPA defines "project works" as "the physical structures of a project." 16 U.S.C. 796(12). Section 3(11) defines "project" as a "complete unit of improvement or development," including "reservoirs * * * the use and occupancy of which are necessary or appropriate in the maintenance and operation of said unit." 16 U.S.C. 796(11). Section 23(b)(1) makes it "unlawful for any person * * * for the purpose of developing electric power, to * * * operate, or maintain any * * * reservoir * * * across, along, or in any of the navigable waters of the United States * * * except under and in accordance with the terms of" either "a permit or * * * right-of-way granted prior to June 10, 1920," the FPA's date of enactment, or "a license granted pursuant to this chapter." 16 U.S.C. 817(1).

2. Petitioner operates two storage reservoirs that do not generate power, the Forest City Project and the West Branch Project. *Georgia Pac. Corp.*, 77 F.E.R.C. ¶ 62,189, at 64,350-64,351 (1996).[1] Forest City consists of a dam and a reservoir that are located on the east branch of the St. Croix River in Maine, and West

[1] Unless otherwise indicated, all citations to the *FERC Reports* are captioned *Georgia Pac. Corp.*

Branch consists of two reservoirs, West Grand Lake and Sysladobsis Lake, that are located on the west branch of the St. Croix. 78 F.E.R.C. ¶ 61,223, at 61,953 (1997). Both reservoirs ultimately feed into petitioner's two downstream hydroelectric projects, Grand Falls and Woodland, which are not licensed by FERC because the projects were authorized by an Act of Congress that pre-dated the FPA. Act of Aug. 25, 1916, ch. 407, 39 Stat. 534; 78 F.E.R.C. at 61,953. When FERC originally licensed Forest City and West Branch in 1980, it found that each project was operated to enhance generation at Grand Falls and Woodland. 77 F.E.R.C. at 64,351; 12 F.E.R.C. ¶ 62,141, at 63,271 (1980) (Forest City Project No. 2660); 12 F.E.R.C. ¶ 62,157, at 63,297 (1980) (West Branch Project No. 2618).

In 1995, petitioner requested a declaratory order stating that licenses are not required for Forest City and West Branch because they do not generate power and are upstream of generating facilities that are themselves exempt from the Act's licensing requirements. FERC denied the petition. 77 F.E.R.C. at 64,352. FERC explained that "[t]hese projects substantially benefit the generation of electricity at [petitioner's] downstream Grand Falls and Woodland Hydro Projects," and that "[t]he West Branch and Forest City Projects are pursuant to the terms of section 3(11) of the Act, part of the same unit of development as the Grand Falls and Woodland Projects." *Id.* at 64,351. FERC also rejected petitioner's reliance on the fact that the generation projects enhanced by West Branch and Forest City are not subject to a license under the FPA. FERC concluded that "[t]he requirements under section 23(b)(1) of the act (absent a pre-1920 permit) for the licensing of dams and reservoirs operated to develop electric power has no

such proviso." *Id.* at 64,352. FERC denied rehearing, reiterating that "section 23(b)(1) of the FPA does not state that dams and reservoirs operated to develop electric power must be connected to jurisdictional generating facilities to warrant licensing." 78 F.E.R.C. at 61,953.

In 1997, petitioner filed a second petition for a declaratory order, arguing that the reservoirs did not require FERC licensing because they were not part of the same project or unit. In light of a headwater benefits analysis presented to FERC in support of the petition, FERC concluded that it was "unable to determine that the reservoirs provide benefits to downstream generation." 81 F.E.R.C. ¶ 62,222, at 64,483 (1997). After several parties petitioned for rehearing, petitioner provided FERC with additional data concerning flows from the reservoirs. 91 F.E.R.C. ¶ 61,047, at 61,170 (2000).

FERC granted rehearing, concluding that the reservoirs are required to be licensed. 91 F.E.R.C. ¶ 61,047. FERC explained that, "in determining whether licensing is required for a facility such as a storage reservoir that is not directly connected to other project works, the FPA requires an examination of whether the facility is necessary or appropriate in the maintenance of a complete unit of hydropower improvement or development." *Id.* at 61,171. FERC found that the evidence established that "operation of the Forest City and West Branch Projects not only provides a significant increase in generation at the downstream Grand Falls Project, but also provides additional generation at times when that generation is particularly valuable." *Id.* at 61,172. FERC therefore concluded that "these facilities are necessary or appropriate in the maintenance and operation of the unit of development that

includes the Grand Falls Project." *Ibid.* FERC denied rehearing in two separate orders. 98 F.E.R.C. ¶ 61,312 (2002); *Domtar Me. Corp.*, 99 F.E.R.C. ¶ 61,276 (2002).

3. The court of appeals found no error in FERC's orders and denied a petition for review. Pet. App. 1-20. The court of appeals found that FERC's orders were not inconsistent with a prior FERC decision, *Union Water Power Co.*, 68 F.E.R.C. ¶ 61,180 (1994), reh'g denied, 73 F.E.R.C. ¶ 61,296 (1995), and that FERC's determination that petitioner's reservoirs enhanced petitioner's exempt downstream power generation facilities was not arbitrary and capricious. Pet. App. 11-16.

ARGUMENT

1. Petitioner argues (Pet. 17-25) that this Court's review is warranted to resolve whether FERC had the authority to license its reservoirs based on FERC's conclusion that the reservoirs enhanced petitioner's generational facilities that are exempt from FERC's licensing authority under a pre-1920 Act of Congress. We are aware of no other appellate decision—and petitioner cites none—that involves that issue, much less that conflicts with the court of appeals' ruling. Indeed, petitioner expressly concedes that the court of appeals in this case "correctly noted that there is no case law on the primary issue presented to it" concerning the licensing of the facilities at issue here. Pet. 17. This Court's review of the court of appeals' decision is accordingly not warranted.

Petitioner's contention that FERC erred is also without merit. Section 23(b)(1) speaks in sweeping terms and makes it unlawful to operate any reservoir "for the purpose of developing electric power" without appropriate authorization. 16 U.S.C. 817(1). Similarly,

FERC has the authority to issue licenses for "reservoirs * * * or other project works necessary or convenient for * * * the development, transmission, and utilization of power," 16 U.S.C. 797(e), and the Act broadly defines "project works" as "the physical structures," 16 U.S.C. 796(12), of any "complete unit of improvement or development," including, "reservoirs * * * the use and occupancy of which are necessary or appropriate in the maintenance and operation of said unit." 16 U.S.C. 796(11). As FERC concluded, "[n]othing in Section 23(b)(1) requires that storage facilities be connected to licensed generating facilities in order to be subject to licensing." 91 F.E.R.C. at 61,170. Indeed, FERC explained that acceptance of petitioner's counter-textual reading would create a huge loophole in which

> the holder of a valid pre-1920 permit that solely authorized construction of a generating project located on a navigable water could, in order to provide flows to the project, build a new reservoir miles upstream that impeded the flow of the navigable water or could construct bypass facilities that dewatered a stretch of the river, without the need to obtain any authorization from the Commission.

78 F.E.R.C. at 61,955. FERC reasonably interpreted the FPA to prevent that kind of circumvention of the Act.

Here, FERC concluded that petitioner's reservoirs, which themselves are not subject to a pre-1920 permit, Pet. App. 9, are necessary and appropriate in the maintenance of petitioner's downstream generation facilities. 91 F.E.R.C. at 61,171-61,172; see also 78 F.E.R.C. at 61,954 ("Section 23(b)(1) states that dams and reservoirs located on navigable waters and operated for the

purpose of generating electricity must * * * be licensed. The Forest City and West Branch Projects fit within this definition."). That fact-bound conclusion warrants no further review by this Court.[2]

2. Petitioner also argues (Pet. 18-19, 26) that FERC inadequately failed to explain a departure from its prior precedent in *Union Water Power Co.*, 68 F.E.R.C. ¶ 61,180. *Union Water*, however, did not involve a generational facility that was operating under a pre-1920 Act of Congress, and FERC accordingly had no occasion in that case to interpret the FPA in a context involving such a facility. As the court of appeals concluded, petitioner "cites no case in which FERC held * * * that the Commission lacked jurisdiction over a non-generating installation because the generation facilities to which the installation was connected were themselves exempt from the licensing requirement." Pet. App. 13.

3. Petitioner also argues (Pet. 25-29) that the court of appeals violated principles of administrative law by creating a *post-hoc* "two-level 'impact' test" rationale to justify one of FERC's rulings, and by holding that petitioner waived various arguments below. Those case-specific contentions lack merit.

As to the first contention, the court did not create a new rationale for FERC's orders, but simply compared the orders at issue with FERC's prior orders to discern the path of FERC's reasoning for its conclusion that

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[2] Petitioner errs in relying (Pet. 21-22 & n.18) on this Court's observations in *Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395, 409, 413 (1975), that FERC's licensing jurisdiction is limited to projects designed to produce water power. As discussed, FERC specifically found that petitioner's reservoirs enhanced the power of petitioner's downstream generational facilities.

petitioner's reservoirs enhanced the downstream generation facilities. Pet. App. 13-16. Thus, the court of appeals rejected petitioner's contention that FERC's focus on the collective impact of petitioner's reservoirs conflicted with FERC's consideration of the individual impacts of two reservoirs in *Chinook Pipeline Co.*, 94 F.E.R.C. ¶ 61,017 (2001); *Chippewa & Flambeau Improvement Co.*, 95 F.E.R.C. ¶ 61,327 (2001), review denied, 325 F.3d 353 (D.C. Cir. 2003). The court of appeals properly accepted FERC's explanation that the Commission did not aggregate the impact of one of the two reservoirs in that case because it enhanced downstream generation by less than 0.1%, and reasonably concluded that FERC would neither exercise jurisdiction over nor aggregate the impacts of individual reservoirs falling below a 0.1% threshold. Pet. App. 14-15. The court also concluded that where the aggregate impact of the reservoirs that individually exceed that 0.1% threshold falls below a threshold between 2% and 2.5%, FERC will also decline jurisdiction. *Ibid.* The court of appeals determined that the basis of FERC's decision may reasonably be discerned from FERCs order and its decisions in other cases. *Id.* at 15. That conclusion warrants no further review.

Finally, there is no basis for this Court's review of petitioner's contention that the court of appeals erred in refusing to consider various arguments that petitioner did not raise before FERC. Section 313(b) of the FPA precludes consideration of any objection on judicial review that was not raised before FERC on rehearing, absent good cause. 16 U.S.C. 825*l*(b). The court of appeals here carefully reviewed the record and correctly found that petitioner did not give FERC adequate notice of various arguments allegedly supporting petitioner's challenge to FERC's orders. Pet. App.

10-11, 16, 17-18. Those fact-bound conclusions do not warrant this Court's plenary review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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