No. 10-218

In the Supreme Court of the United States

PPL MONTANA, LLC,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

BRIEF OF *AMICI CURIAE* EDISON ELECTRIC INSTITUTE, NATIONAL HYDROPOWER ASSOCIATION, AND PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON IN SUPPORT OF PETITIONER

MICHAEL A. SWIGER
Counsel of Record
VAN NESS FELDMAN, P.C.
1050 THOMAS JEFFERSON STREET, N.W.
WASHINGTON, D.C. 20007
(202) 298-1800
mas@vnf.com

Counsel for Amici Curiae

(Of Counsel Listing On Inside Cover)

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

EDWARD H. COMER
HENRI D. BARTHOLOMOT
EDISON ELECTRIC INSTITUTE
701 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004
Counsel for Edison Electric Institute

JAMES H. HANCOCK JR.
BALCH & BINGHAM LLP
1710 SIXTH AVENUE NORTH
BIRMINGHAM, AL 35203
Counsel for National Hydropower Association

JEFFREY A. LEAHEY
NATIONAL HYDROPOWER ASSOCIATION
1 MASSACHUSETTS AVENUE, N.W.
SUITE 850
WASHINGTON, D.C. 20001

ANNE SPANGLER
General Counsel
PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY
2320 CALIFORNIA STREET
EVERETT, WA 98201

QUESTION PRESENTED

Does the constitutional test for determining whether a section of a river is navigable for title purposes require a trial court to determine, based on evidence, whether the relevant stretch of the river was navigable at the time the State joined the Union as directed by *United States v. Utah*, 283 U.S. 64 (1931), or may the court simply deem the river as a whole generally navigable based on evidence of present-day recreational use, with the question "very liberally construed" in the State's favor?[*]

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[*] This *amici* brief is limited to the first question presented in the Petition.

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INTERESTS OF HYDROPOWER AND UTILITY AMICI CURIAE

The Edison Electric Institute ("EEI"), National Hydropower Association ("NHA"), and Public Utility District No. 1 of Snohomish County, Washington ("Snohomish") (together "Hydropower and Utility *Amici*") represent electric utilities and hydropower project owners and operators from across the nation, as well as others who rely on such projects.[1] In particular:

EEI is the trade association of U.S. shareholder-owned electric utility companies, international affiliates, and industry associates worldwide. Its U.S. members represent approximately 70 percent of the U.S. electric power industry and generate 60 percent of the electricity produced by U.S. generators. In providing these services, many EEI members rely on hydropower, and many own and operate hydropower projects licensed by the Federal Energy Regulatory Commission ("FERC"). In fact, EEI members comprise the largest group of FERC hydropower project license holders. EEI members also own and operate other electric generation and transmission facilities, located on or near rivers, that could be affected by the outcome of this case.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief, and the parties have consented to its filing. Letters of consent are submitted with this brief. Pursuant to Rule 37.6, EEI, NHA, and Snohomish state that no counsel for either party to this case authored this brief in whole or in part, and no person other than *amici* and their members made monetary contributions to preparation and submission of this brief.

NHA is a non-profit national association dedicated exclusively to advancing the interests of the U.S. hydropower industry, including conventional, pumped storage and new hydrokinetic technologies. NHA seeks to secure hydropower's place as a clean, renewable and reliable energy source that serves national environmental and energy policy objectives. NHA's membership consists of more than 170 organizations including public power utilities, investor owned utilities, independent power producers, project developers, equipment manufacturers, and environmental and engineering consultants and attorneys.

Snohomish is a municipal corporation of the State of Washington, formed by a majority vote of the people in 1936 for the purpose of providing electric and/or water utility service. Snohomish is the second largest consumer-owned electric utility in Washington State and has experienced rapid growth within its service territory in recent years. Snohomish is the licensee of the 112 megawatt (MW) Jackson Hydroelectric Project, and is in the process of developing and assessing several additional small hydropower sites in the next five to ten years. If fully developed, the collective energy output could serve tens of thousands of Snohomish customers. Snohomish is also a member of NHA.

Hydropower projects are an important source of electric power, accounting for seven percent of national electric production and more than 66 percent of the

country's renewable electric energy in 2009.[2] Hydroelectric dams impound water in a reservoir or divert water for release through the project's turbines for the production of electricity. Yet hydropower projects do more than simply generate electricity. The projects help maintain the national electric system's stability, speed recovery when the electric grid is disrupted, and provide valuable base load and peaking power – thereby avoiding the need for additional power plants that rely on coal, natural gas, oil, nuclear, and other fuels. Hydropower projects also provide energy to manufacturing facilities that own and operate such projects, helping to keep our country's manufacturing base competitive in world markets. In addition to electricity production and associated ancillary benefits, the nation's hydropower projects "provide public benefits such as managed water supply, recreation, economic development and flood control while minimizing adverse impacts on environmental resources."[3]

Moreover, the U.S. Department of Energy recognizes continued hydropower development as "clearly part of the solution [to the energy crisis] which represents a major opportunity to create more clean energy jobs," and that "[i]nvesting in our existing hydropower infrastructure will strengthen our

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[2] U.S. Energy Information Administration, Renewable Energy Consumption and Electricity Preliminary Statistics 2009 at 4 & Table 3 (Aug. 2010), available at http://www.eia.gov/fuelrenewable.html.

[3] Federal Energy Regulatory Commission, *Annual Report 2008* at 18, *available at* http://www.ferc.gov/about/strat-docs/annual_rep.asp.

economy, reduce pollution and help us toward energy independence."[4] Recent studies have concluded that by 2025, the nation's hydropower capacity has the potential to nearly double from current levels of approximately 80,000 MW, with a substantial associated increase in jobs.[5] Congress is actively promoting the development of hydropower projects through economic incentives.[6] Such future development of hydropower, which is vital to the interests of this country, depends on the cost of project development remaining competitive with other energy sources, and on investor confidence in predictability of future costs.

Almost all non-federally-owned hydropower projects are subject to the Federal Power Act's ("FPA's") comprehensive regulatory and licensing framework. Congress enacted the FPA (and its predecessor statute, the Federal Water Power Act of

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[4] U.S. Department of Energy, *Obama Administration Announces up to $32 Million Initiative to Expand Hydropower* (June 30, 2009 press release), *available at* http://www.energy. gov/news/7555.htm (statement of Secretary of Energy Steven Chu).

[5] U.S. Department of Energy, *Feasibility Assessment of the Water Energy Resources of the United States for New Low Power and Small Hydro Classes of Hydroelectric Plants* at 21-24, 35, DOE-ID-11263 (2006); Electric Power Research Institute, *Assessment of Waterpower Potential and Development Needs* at vii (2006); Navigant Consulting, *Job Creation Opportunities in Hydropower,* Executive Summary at 17 (2010), *available at* http://www.hydro.org/Jobs%20Study/NHA_JobsStudy_Final%20Report_Final_Sept%2020.pdf.

[6] *See, e.g.,* American Recovery and Reinvestment Tax Act, § 1603, Pub. L. No. 111-5, 123 Stat. 115, 364 (2009).

1920) in order "to secure a comprehensive development of national resources," *First Iowa Hydro-Elec. Coop. v. F.P.C.*, 328 U.S. 152, 180-81 (1946). Under the FPA, FERC has exclusive authority to issue licenses authorizing the construction, operation, and maintenance of new and existing hydroelectric projects.[7] *See* §§ 4(e), 15, 23(b), 16 U.S.C. §§ 797(e), 808, and 817 (2000). In carrying out its statutory responsibilities, FERC is required to consider all the factors affecting the public interest in the comprehensive development of a waterway, including power development, navigation, water supply, recreation, and appropriate conditions to protect the environment. §§ 10(a)(1), 4(e), 16 U.S.C. §§ 803(a)(1), 797(e).

In the early 20th Century, Congress recognized that the federal government lacked the resources to construct hydroelectric dams on all of the nation's rivers. The Federal Water Power Act of 1920 was the result of years of legislative effort to find a licensing regime that would encourage non-federal investment by permitting investors to reap the fruits of their investments subject to federal oversight. To attract the enormous amount of capital required to develop the nation's hydropower potential, Congress included safeguards in the FPA to help ensure positive returns on investments. For example, FPA § 15 requires that licenses be issued on reasonable terms. 16 U.S.C. § 808(a)(1). Under FPA § 6, FERC is authorized to issue licenses with terms of up to 50 years and is

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[7] Federally operated projects, such as those operated by the Tennessee Valley Authority, Army Corps of Engineers, and the Bureau of Reclamation are not licensed by FERC.

prohibited from amending licenses, once they are accepted, without the consent of the licensee. 16 U.S.C. § 799; *Pacific Gas & Elec. Co. v. F.E.R.C.*, 720 F.2d 78, 83-84 (D.C. Cir. 1983). FPA § 28 restricts the authority of Congress to alter the terms of a license, or otherwise impair the rights of the licensee, once a license has been issued. 16 U.S.C. § 822.

As Petitioner explains, this case involves Montana state court litigation resulting from claims made by the State of Montana seeking to require Petitioner to pay a portion of its revenues as "rent" and "back rent" for use of the streambeds under certain of PPL Montana's dams and reservoirs. The case focuses on two hydropower projects – Thompson Falls (P-1869) and Missouri-Madison (P-2188) – with facilities on the Missouri, Madison, and Clark Fork Rivers. The two projects include one storage dam and nine dams with generating facilities that have a combined capacity of approximately 350 MW. Nine of the ten dams were built before 1931. The tenth was built in 1958. The projects were initially licensed in 1949 (P-1869) and 1956 (P-2188), and later issued renewed, long-term licenses by FERC. The total acreage upon which PPL Montana has been ordered to pay rent to the State is approximately 5,600 acres. This acreage includes all areas within the FERC-established project boundaries that formed the streambed prior to construction of the dams.

The State of Montana has laid claim to the ownership of the original beds and banks of the entire Madison, Missouri and Clark Fork Rivers, asserting that it owns those lands in trust for the people of Montana, even though the relevant portions of those rivers have historically been understood to have been

non-navigable for title purposes at the time of Montana's statehood in 1889. The State's claim of ownership was confirmed by a divided decision of the Montana Supreme Court interpreting federal title navigability law and asserting ownership (and the concomitant right to charge rent for past and future occupation) of the riverbeds.

Hydropower and Utility *Amici* agree with PPL Montana that the Montana Supreme Court's decision conflicts with the decisions of this Court and other courts. The Hydropower and Utility *Amici* also fear that if the State court's decision is not corrected, the decision has the potential of being adopted by other States, thereby imposing even more substantial and disruptive burdens on the nation's hydropower and other infrastructure.

There are over 1,000 FERC-licensed projects in 32 States,[8] many of which are located on rivers that might now be deemed navigable at the time of statehood under the Montana Supreme Court approach. Hydropower and Utility *Amici* are concerned that a State requirement that hydropower project owners pay back rents and future rents for occupying beds and banks to which they thought they had acquired title or easements years or even decades earlier, or which they believed were federal lands and thus lawfully occupied pursuant to Section 4(e) of the FPA, 16 U.S.C. § 797(e), throws a dark cloud over licensees' certainty of investment – to say nothing of the unfairness of such

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[8] Federal Energy Regulatory Commission, *Complete list of Issued Licenses* available at http://www.ferc.gov/industries/hydropower/gen-info/licensing/licenses.xls.

licensees being "double-billed" for the right to occupy the streambeds. To encourage investment in and maintenance of these important infrastructure projects, licensees and license applicants must be able to make reasonable and accurate calculations of the economic and financial soundness of hydropower facilities at the time they are built, licensed and relicensed. Hydropower and Utility *Amici* are concerned about the disruption and harm to both the electric utility and hydropower industries and their customers that will likely occur if states can impose multi-million dollar assessments on long-standing hydropower facilities that, for decades, have not been subject to such assessments. We are further concerned that the specter of such assessments will create a disincentive to invest in needed refurbishments of aging hydro infrastructure or in new hydropower facilities.

Furthermore, other riparian land uses, including electric generation and transmission facilities that rely on rivers, are potentially at risk as a result of Montana's new assertion – more than 120 years after statehood – that it owns the riverbeds at issue in this case. The threat of riverbed fees being assessed against owners of other riparian facilities would similarly upset settled land and facility ownership rights, undercut investments already made in reliance on those settled rights, and inhibit future investment.

The tens of millions of dollars in fees that Montana proposes to collect from PPL Montana alone, as well as the flood of other such fees on electric facilities that the State court's decision may unleash in other States, will ultimately be borne by electric utility customers. Such unexpected increased fees are especially

unwelcome now because electric ratepayers already face substantial burdens to pay for increased use of renewable energy, increasingly tight environmental standards, and replacement and upgrades of existing electric generation and delivery infrastructure. Unexpected new fees are also particularly difficult now given the tenuous condition of our economy, with many customers struggling to pay their bills.

Finally, Hydropower and Utility *Amici* believe it is important that the standards for adjudication of the status of rivers as to navigability for title purposes at the time of statehood remain settled, clear, and consistent, so that possible future state claims of land ownership under dams and reservoirs and other riparian facilities will not cloud ownership rights and the prospects for existing or future hydropower and other infrastructure investments.

Hydropower and Utility *Amici*, therefore, request that the Court grant PPL Montana's Petition for Certiorari.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT REVIEW TO REAFFIRM THE PROPER TEST UNDER FEDERAL LAW FOR DETERMINING NAVIGABILITY FOR TITLE.

The Montana Supreme Court's decision on navigability is inconsistent with this Court's precedents and fails to apply the proper test for who holds title to submerged lands. Under the "equal footing" doctrine, title to the beds of rivers vested in a State when it was admitted to the Union if the rivers

were "then navigable." *United States v. Utah*, 283 U.S. 64, 75 (1931); *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 223, 229 (1845); and *Shively v. Bowlby*, 152 U.S. 1, 27-28 (1894). If the rivers were not "then navigable," "title to the river beds remained in the United States." *Utah* at 75. This Court's precedents establish that the proper test for navigability is whether the relevant stretches of the rivers were "navigable in fact" when Montana joined the Union in 1889 – that is, whether the river stretches were used, or susceptible to use, "as highways for commerce, over which trade and travel" could "be conducted in the customary modes of trade and travel on water." *Id*. at 76 (citing *The Daniel Ball v. United States*, 77 U.S. (10 Wall.) 557, 563 (1870)).

The Montana Supreme Court's navigability analysis contravenes this Court's precedents in important ways. First, it failed to consider evidence demonstrating navigability on a section-by-section basis. Instead it concluded that the rivers at issue are generally navigable even though significant stretches where PPL Montana's hydropower projects are located were not navigable when Montana joined the Union. Yet over a century ago in *United States v. Rio Grande Dam & Irrigation Co*., 174 U.S. 690, 698 (1899), this Court indicated that the navigability of a waterway for title purposes must be determined on a section-by-section basis. The Court has since reaffirmed that, when determining navigability for title, a fact-intensive, section-by-section analysis is required. *Utah*, 283 U.S. 64, 77 & n. 9 (1931); *see also Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77, 86 (1922). The Court also has applied a section-by-section approach when determining navigability for purposes of establishing the Federal Power Commission's (FERC's predecessor agency's) regulatory jurisdiction.

United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940). In contrast, the Montana Supreme Court concluded that "so long as *the river* itself was used, or susceptible of being used, as a channel of commerce at the time of statehood," no further inquiry was required. *PPL Montana, LLC v. Montana*, 119 P.3d 421, 446 (Mont. 2009) (emphasis added), Pet. App. 53.[9] As Justice Rice's dissenting opinion (joined by Judge Salvagni) pointed out, the river-as-a-whole approach adopted by the Montana Supreme Court majority cannot be reconciled with this Court's decisions. *Id*. at. 96.

Second, the Montana Supreme Court's reliance on *present-day* navigability conflicts with this Court's decisions and those of other courts. The Court's decisions have applied a rigorous approach to navigability that ties evidence of navigability to the State's precise date of admission to the Union, while noting that some post-admission evidence of actual navigation can be "relevant" to the river's "susceptibility" to use as a highway of commerce at the time of admission. *Utah*, 283 U.S. at 82. As Justice Rice framed it in his dissenting opinion: "Consequently, because Montana entered the Union on November 8, 1889, the courts must apply the navigability for title test at that time, a factual question about which PPL submitted substantial evidence and attacked the State's case for its failure to do so." Pet. App. at 96. Several lower courts have concluded that post-statehood evidence of navigability is generally an unreliable indicator of a waterway's

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[9] Citations for *PPL Montana* hereinafter made to Petitioner's Appendix.

condition at statehood. *See North Dakota v. United States*, 972 F.2d 235, 240 (8th Cir. 1992) (rejecting evidence of modern-day recreational canoe use); and *Arkansas River Rights Comm. v. Echubby Lake Hunting Club*, 126 S.W.3d 738, 744 (Ark. App. 2003)) ("present-day navigability" may be relevant to navigability for Commerce Clause purposes but not for title purposes). This Court has recognized that, for Commerce Clause purposes, non-navigable status may change, in contrast to the determination of navigability to fix ownership of riverbeds, which is determined at the time of admission to statehood. *Appalachian Electric* at 408. Yet the Montana Supreme Court's decision turns this jurisprudence on its head by concluding: (1) that evidence of present-day recreational use "is sufficient for purposes of 'commerce'" to establish navigability for title (Pet. App. at 58); (2) that this Court in *Utah* "embraced the notion that emerging and newly-discovered forms of commerce can be retroactively applied to considerations of navigability" for title (*Id.* at 55); and (3) that the concept of navigability for title is to be "very liberally construed." *Id.* at 54.

As a result of its iconoclastic approach to the question of navigability for title, the Montana Supreme Court determined that the historical evidence amassed by PPL Montana showing non-navigability at time of statehood – including a 1910 federal court decree, and 1891 and 1898 reports from the Army Corps of Engineers to Congress – was simply irrelevant, and granted summary judgment for the State.[10] This

[10] Hydropower and Utility *Amici* are particularly troubled that the state district court reached its conclusion on summary judgment,

radical departure from the traditional, fact-intensive, section-by-section historical inquiry into navigability employed by this Court and other courts is reason enough to grant certiorari in this case.

II. THE SUPREME COURT OF MONTANA'S RETROACTIVE NAVIGABILITY DETERMINATION AND ASSESSMENT OF RENTS THREATENS SETTLED EXPECTATIONS OF HYDROPOWER PROJECT AND OTHER RIPARIAN FACILITY OWNERS.

The Montana Supreme Court's decision undercuts a foundation policy of the FPA "favoring the protection of licensees' expectations." *City of Seattle v. FERC*, 883 F.2d 1084, 1088 (D.C. Cir. 1989). The FPA does contemplate that landowners (including States) will be compensated for use of their lands by licensees – generally through a one-time, up-front fee to pay for fee title or a permanent easement as to non-federal lands. Here, however, more than 120 years after statehood, the State has asserted ownership over lands PPL's predecessor believed it had lawfully acquired from private riparian landowners at the time the projects were built, and additionally over lands PPL believed were owned by the United States. As to the latter, because the United States has not disclaimed its interest, PPL must continue to pay annual charges to FERC under Section 10(e) of the FPA, 16 U.S.C.

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despite voluminous evidence provided by PPL Montana demonstrating that the issue of navigability of the river sections involved in the case were in profound dispute. Such use of summary judgment, upheld by the state supreme court, strikes us as highly inappropriate.

§ 803(e)(1), for occupying lands the U.S. believes are federal lands – as well as rent to the State for the same land – although if the Montana Supreme Court is correct, the U.S. has no right to such payments. And 37.5 percent of the FERC annual charges are even returned to Montana under the FPA's formula! *See* 16 U.S.C. § 810(a).

The rent that Montana seeks to assess is not inconsiderable. Indeed, under the State's valuation methodology, PPL Montana must pay the State 50 percent of the net revenues from hydroelectric generation multiplied by the State's percentage ownership of overall project lands.[11] Pet. App. at 42. The back rent charge for the projects alone was almost $41 million, plus nearly $8 million in interest, and the State will continue to take a substantial portion of the project revenues going forward. *Id.* at 1, 45, 81.

Hydropower and Utility *Amici* are concerned that the Montana Supreme Court's precedent may encourage other States to follow suit in assessing substantial rents and back rents on hydroelectric dam and other riparian facility owners.[12] Not only would

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[11] Hydropower and Utility *Amici* are very troubled by the use of a "50 percent" of revenues test for land rent. Such a radical departure from traditional measures of fair market value of land, based on sales and rent of comparable land, and the nature of the burden imposed by a rental use, elevates land as one factor in the production of hydropower to a disproportionate importance. Charging a percent of a project's net revenue also will impede investment in and retention of hydropower facilities and again will unduly burden electric customers.

[12] Hydropower and Utility *Amici* also are concerned that the State here is seeking rent for use of riverbeds just by "out of state"

this unsettle licensee and facility owner investment expectations and be a burden on electric customers, but it would also be a substantial disincentive to investment in new and existing hydropower projects and other infrastructure, contrary to national policies encouraging hydroelectric development as a clean, reliable, renewable, and emissions-free source of domestic energy and investment to repair and replace the nation's aging infrastructure.

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hydropower project owners, while assuring in-state ranching and farming interests that they will not be similarly burdened. Press Release, Montana Attorney General Steve Bullock, *Bullock Calls Supreme Court's PPL Decision "A Victory for Generations of Montanans"* (Mar. 30, 2010), available at http://www.doj.mt.gov/news/releases2010/20100330.asp. This certainly raises concerns about fairness and equity, if not constitutional concerns about uneven application of state assessments to in-state and out-of-state interests.

CONCLUSION

For the reasons set forth above, Hydropower and Utility *Amici* respectfully request the Court to grant certiorari of the judgment below.

Respectfully submitted,

MICHAEL A. SWIGER
Counsel of Record
VAN NESS FELDMAN, P.C.
1050 THOMAS JEFFERSON STREET, N.W.
WASHINGTON, D.C. 20007
(202) 298-1800
mas@vnf.com
Counsel for Amici Curiae

(Of Counsel Listing On Inside Cover)

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