No. 10-218

In the Supreme Court of the United States

PPL MONTANA, LLC,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Writ of Certiorari to the Supreme Court of Montana

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

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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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INTERESTS OF HYDROPOWER AND UTILITY *AMICI CURIAE*

The Edison Electric Institute ("EEI"), National Hydropower Association ("NHA"), Northwest Hydroelectric Association ("NWHA"), Electric Power Supply Association ("EPSA"), and the 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 and other riparian facilities that may be affected by the Court's decision in this case.[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

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[1] Pursuant to Rule 37.6, EEI, NHA, NWHA, EPSA, 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. The parties have consented to the filing of this brief in letters on file with the clerk's office.

on or near rivers, that could be affected by the outcome of this case.

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 180 organizations including public power utilities, investor-owned utilities, independent power producers, project developers, equipment manufacturers, and environmental and engineering consultants and attorneys.

NWHA is a non-profit trade association that represents and advocates on behalf of the Northwest hydroelectric industry. NWHA has 75 members from all segments of the industry. NWHA is dedicated to the promotion of the Northwest region's waterpower as a clean, efficient energy source while protecting the fisheries and environmental quality that characterize the region.

EPSA is a national trade association representing competitive electric power suppliers, including independent power producers, merchant generators, and power marketers. EPSA's members include companies that are involved in competitive electric markets, as well as various state and regional groups that represent the competitive power industry in their respective regions of the country. EPSA's members have significant financial investments in electric generation and electricity marketing operations in the

United States. EPSA's organizational mission is the promotion of a favorable market environment for the competitive electric industry.

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 owns and operates several hydropower projects in Washington State, including the FERC-licensed 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.

As representatives of developers, owners, and operators of hydropower and other riparian facilities that could be subjected to substantial retroactive, current, and future land rent demands by Montana and other states that might follow Montana's lead, Hydropower and Utility *Amici* are deeply concerned about the ramifications of the Montana Supreme Court's decision. 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 by FERC in 1949 (P-1869) and 1956 (P-2188), and later issued renewed, long-term licenses by FERC. Montana never raised title issues in those licensing proceedings. In 1999, four years before these proceedings commenced, the Montana Power Company, an in-state utility, transferred the dams to PPL Montana, an out-of-state owner that sells power at wholesale. 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.

Only after the sale to the out-of-state owner did the State of Montana lay claim to the ownership of the original beds and banks of the entire Madison, Missouri, and Clark Fork Rivers, retroactively asserting many decades after the dams were constructed 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, which had not been asserted prior to when the dams were built nor during FERC license proceedings, 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, present, 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 *Amici* 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. The decision also has the potential to disturb settled expectations of property ownership for hydropower project and other riparian infrastructure owners across the country.

SUMMARY OF ARGUMENT

The Montana Supreme Court erred in its interpretation of the test for navigability for title for three reasons. First, in clear violation of Supreme Court precedent, the Montana Supreme Court ignored evidence demonstrating non-navigability of the rivers in question on a section-by-section basis. Second, the court erred in considering evidence of present-day navigability when such evidence is irrelevant to the determination of navigability at the time Montana entered the union. Third, the court erred in liberally construing the navigability for title test and applying navigability for federal regulatory and admiralty jurisdiction tests that the law unmistakably shows are fundamentally different from the navigability for title test. Hydropower and Utility *Amici* are deeply concerned that the Montana Supreme Court's precedent, if not corrected, will encourage other states to retroactively claim substantial rents and back rents for submerged lands under hydroelectric dam and other riparian facility owners.

Hydropower licensees must be able to reasonably evaluate the economic viability of their projects before investing in them. The unanticipated charges that could result from widespread application of the Montana Supreme Court's holdings could undermine existing investment in and maintenance of renewable hydroelectric resources and discourage future investment in such resources. The navigability for title test has been misconstrued by the Montana Supreme Court and must now be clarified to prevent Montana and other states from disrupting long-held understandings of property ownership in order to raise additional income for the state.

ARGUMENT

I. THE COURT SHOULD 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 within a State vested in the 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*, 283 U.S. 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 navigability on a section-by-section basis. Instead it concluded that the rivers at issue are generally navigable notwithstanding facts demonstrating that 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. at 77 & n.9; *see also Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 86 (1922). 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.[2] As Justice Rice's dissenting opinion (joined by Judge Salvagni) pointed out, the river-as-a-whole approach adopted by the Montana

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

Supreme Court majority cannot be reconciled with this Court's decisions. Pet. App. 96.

Montana argues that the Montana Supreme Court did not look at the river as a whole, but instead looked at the river segments that interrupted navigation and held these "relatively short" sections should nevertheless be regarded as navigable. Montana Brief in Opposition (Oct. 1, 2010) at 18. Montana also contends that the state court's characterization of these "relatively short" sections does not conflict with *Utah*. As noted above, Justice Rice's dissent disagreed with this conclusion, stating that: "Disturbing to me is that the Court is declaring, as a matter of law, that the reaches claimed by PPL to be non-navigable are simply too 'short' to matter" and "mere 'negligible parts'" of the rivers as a whole. *See* Pet. App. 99. Like Justice Rice, the Hydropower and Utility *Amici* are equally disturbed that the Montana Supreme Court rejected PPL's evidence of non-navigability regarding these river segments, and declined to undertake a fact-intensive analysis as required by *Utah*. *Utah*, 283 U.S. at 87. The precedent on this issue offers no definitive means for determining how long a segment must be in order to warrant a separate analysis of its navigability. Nevertheless, the broader conclusion from *Utah* is that segments of a river that are not deemed to be "short interruptions" or "negligible parts" can be deemed non-navigable upon sufficient evidence. *See id.* at 77. PPL Montana argued that the relevant river segments were long enough not to be deemed "short interruptions" and presented sufficient evidence of non-navigability at least to survive summary judgment on this issue.

Second, the Montana Supreme Court's reliance on *present-day* navigability conflicts with this Court's

decisions and those of other courts. This 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. 96. Several lower courts have concluded that post-statehood evidence of navigability is generally an unreliable indicator of a waterway's 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 is particularly true where, as here, the condition of the rivers is known to have changed substantially, in part due to dam construction, as demonstrated by the affidavit and offer of proof for Dr. Schumm. *See* Pet. App. 102-03. 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. *United States v. Appalachian Electric Power Co.,* 311 U.S. 377, 408 (1940). 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. 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 (Pet. App. 55); and (3) that the concept of navigability for title is to be "very liberally construed." Pet. App. 54.

Montana contends that the Montana Supreme Court "correctly applied the federal navigability for title test to the particular facts" in this case. Montana Brief in Opposition (Oct. 1, 2010) at 17. On the contrary, there is no attempt in the Montana Supreme Court's opinion to reconcile its analysis with the precedents relating to navigability for title purposes. More significantly, however, the Montana Supreme Court's consideration of present-day use of the rivers—if left unchecked by this Court—will create an uncertainty in the law of navigability for property owners and future litigants. To the extent that *Utah* suggests that some evidence of navigation after the date of statehood is relevant for "the issue of the susceptibility of the rivers to use as highways of commerce at the time," *Utah*, 283 U.S. at 82, this case is distinguishable because *Utah* involved "limited historical facts put in evidence by the Government" and lacked a "comprehensive investigation into the history of these regions." *Id*. at 81. Here, PPL Montana submitted "a mountain—over 500 pages—of affidavits and exhibits" demonstrating that these reaches were non-navigable at statehood. *See* Pet. App. 100. Thus, there was ample evidence of non-navigability at the time of statehood in this case,

making evidence of present-day usage unnecessary and irrelevant.

Third, the Montana Supreme Court failed to recognize that the test of navigability for title is different from the test of navigability for federal regulation and admiralty jurisdiction. As Justice Rice noted in his dissent: "While th[e] 'navigability for title' test has similarities to navigability as determined for exercise of the federal government's Commerce Clause power, the two tests are nonetheless different—a factual distinction which the District Court failed to make when relying upon commerce cases . . . ." Pet. App. 94. The two tests differ in a number of ways. For example, navigability for title requires that navigability in fact exist at the time the state is admitted into the Union. In addition, navigability must exist in the river's ordinary condition. *See Utah*, 283 U.S. at 75-76. Navigability for federal jurisdiction, on the other hand, looks more broadly at whether the river could be made navigable after reasonable artificial improvements. *See Appalachian Electric,* 311 U.S. at 408 ("The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic."). Such improvements can occur any time after the state is admitted to the Union, making the river navigable for federal jurisdiction purposes. *Id.* ("Although navigability to fix ownership of the river bed or riparian rights is determined . . . as of the formation of the Union in the original states or the admission to statehood of those formed later, navigability, for the purpose of the regulation of commerce, may later arise. An analogy is found in admiralty jurisdiction, which may be extended over places formerly nonnavigable."). In

addition, the navigability for title test is based on principles grounded in the Property Clause, U.S. Const., art. IV, § 3, cl. 2, not the Commerce Clause which is the basis for regulatory jurisdiction. U.S. Const., art. I, § 8. Thus, waterways that qualify under the Commerce Clause test for navigability may nevertheless fail the test for navigability for title.

The Montana Supreme Court's decision has clouded this distinction between the test for navigability for title and the test for navigability for federal and admiralty jurisdiction. Maintaining the distinction would not disrupt settled precedent on "navigability" in the context of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387 (2006), or in FERC's determination of navigability for federal jurisdiction over hydropower projects, because those tests are different from the test for navigability for title. The concern here is that the Montana Supreme Court's misinterpretation of the distinctive test for navigability for title has far-reaching consequences for property owners in Montana and across the country.

As a result of its iconoclastic approach to the question of navigability for title, the Montana Supreme Court determined that the historical and expert evidence amassed by PPL Montana showing non-navigability at the 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.[3] This radical departure from the traditional,

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

fact-intensive, section-by-section, historical inquiry into navigability employed by this Court and other courts warrants reversal 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.

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.[4] 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

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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.

[4] 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.

plants that rely on coal, natural gas, oil, nuclear, and other fuels.

In many states, utilities are required to meet certain percentages of electricity demand with renewable resources. These can include hydropower. Moreover, hydropower is particularly well suited to integrate other renewable resources such as wind and solar power into the grid.[5] Specifically, through the release of water stored in impoundments, hydropower projects can backstop such intermittent sources of renewable power, providing electricity when those sources are not able to generate it.

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."[6]

In addition, the U.S. Department of Energy recognizes continued hydropower development as "clearly part of the solution [to the energy crisis] and

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[5] U.S. Bureau of Reclamation, *Reclamation – Managing Water in the West – Hydroelectric Power* at 13 (July 2005), *available at* www.usbr.gov/power/edu/pamphlet.pdf.

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

represents a major opportunity to create more clean energy jobs," and that "[i]nvesting in our existing hydropower infrastructure will strengthen our economy, reduce pollution and help us toward energy independence."[7] 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.[8] Congress has recently promoted the development of hydropower projects through economic incentives.[9] 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.

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[7] U.S. Department of Energy, *Obama Administration Announces up to $32 Million Initiative to Expand Hydropower* (June 30, 2009 press release), *available at* http://apps1.eere.energy.gov/news/progress_alerts.cfm/pa_id=195.

[8] 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), *available at* http://www1.eere.energy.gov/windandhydro/pdfs/doewater-11263.pdf; Electric Power Research Institute, *Assessment of Waterpower Potential and Development Needs* at vii (2007), *available at* http://www.aaas.org/spp/cstc/docs/07_06_1ERPI_report.pdf; Navigant Consulting, *Job Creation Opportunities in Hydropower,* Executive Summary at 16 (2009), *available at* http://www.hydro.org/wp-content/uploads/2010/12/NHA_JobsStudy_FinalReport.pdf.

[9] *See, e.g.,* American Recovery and Reinvestment Tax Act, § 1603, Pub. L. No. 111-5, 123 Stat. 115, 364 (2009); Energy Policy Act of 2005 § 242, Pub. L. No. 109-58, 119 Stat. 594, 677.

Almost all non-federally-owned hydropower projects are subject to the Federal Power Act's ("FPA") comprehensive regulatory and licensing framework. Congress enacted the FPA (and its predecessor statute, the Federal Water Power Act of 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.[10] *See* §§ 4(e), 15, 23(b), 16 U.S.C. §§ 797(e), 808, and 817 (2006). 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).

The Federal Water Power Act of 1920 was enacted in the early 20th Century because Congress recognized that the federal government lacked the resources to construct hydroelectric dams on all of the nation's rivers. The statute was the result of years of legislative effort to find a licensing regime that would encourage non-federal investment by permitting investors to realize 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

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[10] 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.

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 prohibited from amending licenses, once they are accepted, without the consent of the licensee. 16 U.S.C. § 799; *Pacific Gas & Elec. Co. v. FERC*, 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.

The Montana Supreme Court's decision undercuts a foundational 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. The underlying assumption of the statute is that the prospective licensee has the opportunity at the outset of construction or licensing—before investment commitments are made—to evaluate and negotiate whatever land rights may be necessary for the operation of the project. Here, however, more than 120 years after statehood, the State has retroactively 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, moreover, because the United States has not disclaimed its interest, PPL has paid and must continue to pay annual charges to FERC under Section

10(e) of the FPA, 16 U.S.C. § 803(e)(1), for occupying lands the United States believes are federal lands—and now is being asked to pay back rent as well as future rent to the State for the same land—although if the Montana Supreme Court is correct, the United States has no right to such payments. And this is on top of 37.5 percent of the FERC annual charges being returned to Montana under the FPA's federal land use fees formula! *See* 16 U.S.C. § 810(a).

The rent that Montana seeks to assess retroactively is considerable. Indeed, under the State's valuation methodology, PPL Montana must pay to 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. 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. Pet. App. 1, 45, 81.

In these times of intense pressures on state government budgets, Hydropower and Utility *Amici* are concerned that the Montana Supreme Court's precedent may encourage other states to follow suit in

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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.

assessing substantial present, future, and back rents on hydroelectric dam and other riparian facility owners.[12] Not only would this unsettle licensee and facility owner investment expectations and be a burden on electric consumers, 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.

If the Court does not reverse the Montana Supreme Court's decision, even states with constitutional and statutory provisions providing for access to navigable waters and easements across navigable waters may assess retroactive rents on hydroelectric dam and other riparian facility owners. In fact, a number of states have statutory provisions allowing rental charges for the use of state-owned beds of navigable waters. *See, e.g.,* 571 Iowa Admin. Code § 18.2 (2008), providing for rental fees for the commercial and industrial use of state-owned riverbeds. And other

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

states may adopt such provisions in response to the Montana Supreme Court's decision, if upheld by this Court. If the test for navigability for title is broadened, those portions of rivers previously understood to be owned by hydroelectric dam and other riparian facility owners may be found to be owned by states that can then charge rental fees to these owners, which would result in increased costs to customers. This would change the financial calculus for hydroelectric dam operators and could cause certain projects to become uneconomic, potentially leading licensees to surrender their operating licenses.

Further, it is not necessary for the state to retain title to the bed and banks of the rivers for the state's environmental interests to be protected. Environmental interests are certainly protected if ownership of riverbeds remains in federal hands, as federal agencies manage federal lands and resources to protect such interests under the auspices of federal environmental statutes such as the CWA and the National Environmental Policy Act. Environmental interests are also protected if ownership of riverbeds remains in the hands of non-federal parties for two significant reasons. First, non-federal entities using the waters of state rivers generally must have or obtain water rights, particularly in western states such as Montana, and the states retain the authority to control and appropriate water and water rights under Section 27 of the FPA. 16 U.S.C. § 821. Second, all non-federal entities using the water of state rivers for purposes that may result in a discharge into navigable waters must obtain a water quality certification under Section 401 of the CWA. 33 U.S.C. § 1341. Under Section 401(d) of the CWA, the state water quality agencies have the authority to attach

mandatory water quality conditions to their 401 certification, which attach to the FERC license. *Id*. § 1341(d). Therefore, Montana's environmental interests in these waters are protected. If the State's environmental interests were of concern, the State could have and should have asserted its title interests long before this litigation.

There are over 1,000 FERC-licensed projects in 32 states,[13] many of which are located on rivers that similarly might be subject to retroactive claims of state ownership under the Montana Supreme Court's approach to determining navigability at the time of statehood. Hydropower and Utility *Amici* are concerned that a state requirement that hydropower project owners pay back, present, 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 licensees being "double-billed" by states and federal land agencies 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 reasonably accurate evaluations of the economic risks associated with investments in hydropower facilities at the time they are built, licensed, and relicensed. Hydropower and Utility

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

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 retroactive 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 occupancy 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 Montana Supreme Court's decision may unleash in other states that are hungry for new sources of revenue, will ultimately be borne by electric consumers. Such unexpected increased expenses are especially unwelcome now because electric ratepayers already face substantial burdens to pay for new electric generation and delivery infrastructure that utilities nationwide will need to construct in coming decades. This new infrastructure is needed to accommodate growth in demand for electricity,

increased use of renewable energy, increasingly rigorous environmental standards, and replacement and upgrades of existing electric generation and delivery infrastructure. Unexpected new expenses are also particularly difficult now given the tenuous condition of our economy, with many customers struggling to pay their bills.

Finally, it is important for the standards for adjudication of the status of rivers as to navigability for title purposes at the time of statehood to remain settled, clear, and consistent. Reversing the Montana Supreme Court's determination will prevent similar future state claims of land ownership under dams and reservoirs and other riparian facilities from undermining long-settled ownership rights and the prospects for existing or future hydropower and other infrastructure investments.

CONCLUSION

For the reasons set forth above, Hydropower and Utility *Amici* respectfully request the Court to reverse the Supreme Court of Montana's decision in *PPL Montana* and remand the case for proceedings consistent with this Court's findings and precedent.

Respectfully submitted,

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