

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Appalachian Rivers Resource Enhancement

Project No. 12570-000

ORDER DENYING PRELIMINARY PERMIT APPLICATION

(Issued October 14, 2005)

1. Appalachian Rivers Resource Enhancement, LLC (ARRE) has filed an application for a preliminary permit to study the proposed Cheoah River Project No. 12570. We are denying the application based on past actions by the applicant, which indicate that he lacks the necessary fitness to be awarded a license.

Background

2. On January 25, 2005, the Commission approved a settlement agreement and issued a new license to Alcoa Power Generating, Inc. (Alcoa) for the Tapoco Project No. 2169.¹ The Tapoco project is located on the Little Tennessee and Cheoah Rivers in North Carolina and Tennessee. The project has four developments, one of which, the Santeetlah development, is relevant to this proceeding. The Santeetlah development includes a 216-foot-high dam, located on the Cheoah River, which impounds a 2,881-acre reservoir (Lake Santeetlah), and several pipelines and tunnels which carry water diverted at the dam to the powerhouse, located about five miles away on the Little Tennessee River. All of the other developments are located on the Little Tennessee River downstream from the Santeetlah powerhouse.

3. On January 24, 2005, one day before the new license was issued, ARRE filed an application for a three-year preliminary permit under section 4(f) of the Federal Power Act (FPA)² to study the proposed Cheoah River Project No. 12570. The proposed

¹ *Alcoa Power Generating, Inc.*, 110 FERC ¶ 61,056 (2005).

² 16 U.S.C. § 797(f) (1994). Section 4(f) authorizes the Commission to issue preliminary permits “for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 9 [of the FPA].”

project would be located on the Cheoah River in North Carolina. As described by ARRE, the proposed project would include one 1,500-kilowatt turbine located somewhat downstream of the left side of the licensed Lake Santeetlah dam. The water would be delivered by means of a new diversion and penstock also located on the left side of the dam. ARRE does not describe any associated transmission facilities. The proposed project would use the flows that Alcoa is required by the new license to release into the Cheoah River from the Lake Santeetlah dam.³

4. A motion to reject or, in the alternative, to intervene and protest, was filed by Alcoa. Alcoa requests that we reject ARRE's application on the ground that the proposed project involves modifications to Santeetlah Dam which are prohibited by FPA section 6⁴ without Alcoa's consent. In the alternative, it requests that the application be denied pursuant to section 6, stating that it does not consent to the proposed modifications because they are inconsistent with instream flow conditions in the license resulting from Commission approval of a settlement agreement between Alcoa and parties to the licensing proceeding.⁵ ARRE filed an untimely answer to Alcoa's motion.⁶

Discussion

5. The purpose of a preliminary permit is to encourage hydroelectric development by affording its holder priority of application (*i.e.*, first-to-file status) with respect to the filing of development applications for the affected site. Our general policy is to issue a preliminary permit unless there is a permanent legal bar to granting a license application.

³ ARRE application at 3-4.

⁴ 16 U.S.C. § 799 (1994).

⁵ Alcoa's motion does not contain sufficient detail for us to determine whether we must reject ARRE's application on the grounds of the proposed project's interference with the Tapoco Project. As discussed below, we decide this case on other grounds.

⁶ 18 C.F.R. § 385.213(d) (2005) provides that an answer to a motion must be made within 15 days after the motion, unless otherwise ordered. Alcoa's motion was filed on April 27, 2005. ARRE's answer was filed 34 days later, on May 31, 2005. ARRE failed to request that the Commission accept its untimely answer or to provide any explanation why it was not timely filed. Its answer will therefore be rejected.

We may, however, make exceptions to established policies if we articulate a rational basis for doing so,⁷ and we recently did so in another proceeding involving an applicant with an unsatisfactory compliance record as a licensee and exemptee.⁸

6. ARRE's president is Mr. Charles Mierek. We have examined the compliance record of other projects under Mr. Mierek's control and direction, and that examination leads us to conclude that we would not issue a license to Mr. Mierek or any entity that is in any way under his control or direction. It is therefore equally inappropriate to issue a preliminary permit to such an entity. The relevant compliance record of projects under Mr. Mierek's control or direction is discussed below.

7. Mr. Mierek is the President of Clifton Power Corporation (Clifton), licensee for the Clifton Mills No. 1 Project No. 4632, located on the Pacolet River in South Carolina. In 1993, the Commission determined that Clifton had violated a compliance order directing it to submit a plan to install, read, and record data from certain flow gauges required under Article 6 of its license, and to implement that plan, as approved, by a certain deadline.⁹ The flow gauges are needed in order to ensure that the project is releasing the minimum flows required by the license.

8. The validity of the compliance order and the Commission's findings of violations of that order were upheld on judicial review, but the court vacated the penalty and remanded the proceeding with instructions to reconsider the amount of the penalty.¹⁰ On remand, the Commission assessed a civil penalty of \$15,000, but stayed its effective date pending any further review Clifton might seek.¹¹ Clifton filed a request for rehearing, which was denied,¹² and a request for judicial review, which was dismissed as incurably

⁷ See *Symbiotics, L.L.C. v. FERC*, 110 Fed. Appx. 76; 2004 U.S. App. LEXIS 19596 (9th Cir. 2004) (affirming denial of preliminary permits where Commission had previously issued a final environmental impact statement or environmental assessment documenting unmitigatable adverse environmental impacts and there was no evidence of changed circumstances).

⁸ *Energie Group, LLC*, 111 FERC ¶ 61,072 (2005).

⁹ *Clifton Power Corp.*, 69 FERC ¶ 61,087.

¹⁰ *Clifton Power Corp. v. FERC*, 88 F.3d 1258, 1269 (D. C. Cir. 1996).

¹¹ *Clifton Power Corp.*, 92 FERC ¶ 61,263 (2000).

¹² *Clifton Power Corp.*, 94 FERC ¶ 61,071 (2001).

premature, because a second request for rehearing was still pending before the Commission.¹³ The court explained that once the Commission acted on Clifton's second rehearing request, Clifton would have 60 days to file a petition for review of the second rehearing order. The Commission acted on the second rehearing request on March 28, 2001,¹⁴ and Clifton did not seek judicial review. The assessment therefore became administratively and judicially final. Accordingly, on February 4, 2003, the Commission issued an order stating that since the civil penalty assessment was now final and non-reviewable, it was lifting the stay of the assessment.¹⁵ The Commission ordered Clifton to pay the civil penalty within 30 days from the issuance date of the order, and noted that failure to make a timely payment would violate a final order of the Commission, and might subject Clifton to additional action under the enforcement and penalty provisions of section 31 of the FPA.¹⁶ It further noted that if the payment was not made on time, interest would begin to accrue under the Commission's regulations. Clifton's request for rehearing of the February 4, 2003 Order was denied,¹⁷ and Clifton did not seek judicial review.

9. On March 16, 2003, the Commission issued a letter to Clifton demanding payment. Clifton received the letter, but did not respond. On December 8, 2003, the Commission referred the assessment to the Department of the Treasury (Treasury). Treasury issued a delinquency notice to Clifton on June 3, 2004. The total debt balance as of that date was \$20,133.01. Treasury's collection agent contacted Mr. Mierek by telephone on June 8, 2004 and again on June 18, 2004. During the latter call, Mr. Mierek informed Treasury's agent that he had no intention of paying the debt. Treasury recently confirmed that the debt has not been collected.

¹³ *Clifton Power Corp. v. FERC*, 294 F.3d 108 (D.C. Cir. 2002).

¹⁴ 94 FERC ¶ 61,346 (2001).

¹⁵ *Clifton Power Corp.*, 102 FERC ¶ 61,121.

¹⁶ 16 U.S.C. § 823(b) (1994).

¹⁷ *Clifton Power Corp.*, 103 FERC ¶ 61,141. This order also rejected or dismissed as premature Clifton's arguments concerning abatement of the penalty pursuant to the Small Business Regulatory Fairness Enforcement Act, Pub. L. 104-121, 110 Stat. 847 (1996), as codified in a note to 5 U.S.C. § 601, the Fair Claims Collections Act, 31 U.S.C. § 3711(a)(2) (1994), alleged disparate treatment of civil penalties assessed against other licensees, and additional penalties and interest. 103 FERC ¶ 61,141 at P 13-19.

10. We continue to regard Mr. Mierek's failure to install the gauges necessary to determine compliance of the project with the minimum flow requirements initially, and in response to a compliance letter, as a serious matter. He has also failed to provide any credible support for his claims that Clifton lacks the resources to pay any civil penalty, and he continues to refuse to pay the civil penalty and accrued interest, or even to engage in good faith settlement discussions with the Commission staff or the Treasury. His conduct in this regard leads us to conclude that he lacks the necessary fitness to receive any additional licenses or exemptions from licensing. Because we would not issue a license to any entity controlled or directed by Mr. Mierek, we will deny his preliminary permit application. Because we are denying ARRE's permit application on fitness grounds, we need not consider the objections to issuance of a permit set forth in Alcoa's motion to reject, or, in the alternative, to intervene and protest.

The Commission orders:

For the reasons set forth in the body of this order, the application for a preliminary permit for the proposed Cheoah River Project No. 12570 filed on January 24, 2005 by Appalachian Rivers Resource Enhancement, LLC is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.