117 FERC ¶ 61,013
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Savannah River Resource Enhancement LLC Project No. 12708-001

ORDER DENYING REHEARING

(Issued October 4, 2006)

1. In this order, we deny the request for rehearing filed by Savannah River Resource Enhancement LLC (Savannah) of an order rejecting its preliminary permit application for the New Savannah Bluff River Project No. 12708, based on our conclusion that the president of Savannah lacks fitness to receive any additional licenses or exemptions.

I. Background

2. On July 5, 2006, Savannah filed an application for a preliminary permit to study the feasibility of constructing and operating Project No. 12708, which would be located at the U.S. Army Corps of Engineer's New Savannah Bluff Lock and Dam on the Savannah River in South Carolina.

3. By letter issued July 7, 2006, the Commission rejected Savannah's permit application because it has concluded that Savannah's president, Mr. Charles Mierek, is not to fit to receive any additional licenses or exemptions from the Commission in light of his record as president of Clifton Power Corporation (Clifton), the licensee for the Clifton Mills No. 1 Project No. 4632.[1] The July 7 letter is consistent with prior orders in which the Commission denied preliminary permit applications filed by entities under the control and direction of Mr. Mierek.[2]

[1] Letter from William Guey-Lee, Chief, Engineering and Jurisdiction Branch, Division of Hydropower Administration and Compliance, to Charles Mierek.

[2] *See Appalachian Rivers Resource Enhancement, L.L.C.*, 114 FERC ¶ 61,145 (2006) (*ARRE*) (denying rehearing of orders denying preliminary permit applications for three projects by an entity under Mr. Mierek's control and direction).

4. Savannah and Mr. Mierek (hereafter, Savannah) timely requested rehearing, and Mr. Mierek timely moved to intervene. We consider their arguments below.

II. Discussion

A. Substantial Evidence

5. Savannah first contends that the Commission's orders are not supported by substantial evidence and violate Administrative Procedure Act (APA) section 557(c)'s requirement that decisions be made on the record.[3] Its first contention in this regard is that there is no evidence of Savannah's lack of fitness.[4] We disagree. Both Clifton and Savannah are under Mr. Mierek's control and direction. Mr. Mierek is president of both entities, and it would be irresponsible of us not to consider his actions in his capacity as president of Clifton when considering the fitness of Savannah as a potential licensee. As detailed in *Appalachian Rivers Resource Enhancement, L.L.C.*[5] and cases discussed therein, the Commission has concluded that Mr. Mierek's record of non-compliance makes him unfit to receive any further preliminary permits or licenses.

6. Savannah also claims that a lack of fitness finding is not warranted because neither Mr. Mierek nor Clifton violated a Commission order.[6] As to Mr. Mierek, it states that the civil penalty for violations of the Clifton Mills No. 1 license was assessed against Clifton. Savannah also asserts that this proceeding is similar to *Armstrong v. CFTC*,[7] in which the court found that an agency improperly imputed the acts of corporations formed by the appellant to the appellant himself. While it is true that Mr. Mierek is the president of Clifton, and thus in some sense may be distinct from the corporate entity, he has had ultimate responsibility for the corporation's actions. There has been no suggestion in any of the *Clifton* proceedings to contradict the fact that Mr. Mierek has been solely responsible for Clifton's failure to comply with its license or pay its civil penalty. Both

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[3] Savannah rehearing request at 4-6. 5 U.S.C. § 557(c) (2000) requires an agency decision to provide a "statement of . . .findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record."

[4] *Id*. at 5.

[5] *ARRE*, 114 FERC ¶ 61,145 P 2-5 and cases cited therein.

[6] Savannah rehearing request at 5-6.

[7] 12 F.3d 401 (3rd Cir. 1993).

Clifton and Savannah are very small businesses. For our purposes here, Mr. Mierek is both Clifton and Savannah.[8]

7. As to Clifton, Savannah asserts that there is no violation of a Commission order assessing a civil penalty until the Commission obtains judgment in a suit against the violator in federal district court and that the Commission has not filed such a suit.[9] This is incorrect, as we recently explained in *Appalachian Rivers Resource Enhancement* (*ARRE*).[10]

B. Consistency with Commission Policies

8. Savannah next asserts that we departed without explanation from a policy of resolving issues based on the legal identity of an applicant. According to Savannah, we have treated partnerships and partners as separate entities for purposes of our application and competition rules.[11] As we explained in *ARRE*,[12] we do not separate the identities of partners and partnerships where matters of fitness to receive a license are concerned. In

[8] *Armstrong* bears very little resemblance to this proceeding. There, liability by the appellant as a controlling entity for the deeds of the corporations he had formed necessarily rested on certain findings of fact under a statutory definition, but the agency's decision made no reference at all to that definition. The agency moreover failed to explain which parts of an administrative law judge's initial decision it was adopting and which portions it was not adopting, so that judicial review was frustrated.

[9] Savannah rehearing request at 5-6.

[10] *See* 114 FERC ¶ 61,145 at P 10 (2006) and *Appalachian Rivers Resource Enhancement, L.L.C.*, 113 FERC ¶ 61,043 (2005) (*Cheoah*), *cited therein*.

[11] Savannah rehearing request at 6-7. *Citing Larry Pane, et al.*, 24 FERC ¶ 61,236 (1983) (individual partners not permitted to take advantage of partnership's permit priority); *Tropicana Limited Partnership*, 65 FERC ¶ 61,094 (1993) (partnership affiliated with corporate preliminary permit applicant bound by deadline for filing development applications in competition with its affiliate's preliminary permit application).

[12] *ARRE*, 114 FERC ¶ 61,145 at P 11 (2006).

fact, we have consistently examined the conduct of the persons controlling and directing licensees and exemptees in this context.[13]

9. Savannah contends that our orders are inconsistent with a long-established policy of not denying a preliminary permit application on fitness grounds.[14] That policy, however, applies only with respect to a permit applicant's financial resources. This is because no permit applicant can be expected to certify its intent to develop the proposed project, since feasibility of the project is the subject of the permit studies and, where the permittee fails to make progress on the studies, the Commission can terminate the permit.[15] There is no such policy with respect to a permit applicant's fitness from a compliance standpoint, as shown by *Energie* and *ARRE*.

10. Savannah claims we departed without explanation from a policy of issuing licenses to applicants with poor compliance records in light of the Commission's means of securing compliance, including civil penalties.[16] It also complains that we have not articulated standards for fitness, and have issued licenses to applicants with worse compliance records than Clifton's. Savannah cites three cases which, it claims, show the existence of such a policy and that Clifton's transgressions are relatively minor.

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[13] *See, e.g., Turbine Industries, Inc.*, 68 FERC ¶ 61,127 (1994) (ordering corporate applicant to show cause why its license application should not be denied on fitness grounds because of the poor compliance record of two other corporate exemptees for other projects under the management of the same individual); *Carl E. Hitchcock, Elaine Hitchcock, and Energie Development Company, Inc. and Carl E. Hitchcock*, 69 FERC ¶ 61,382 (1994) (denying license application based on the compliance record of one of the applicants with respect to other projects under her control and direction); *Energie Group, LLC*, 109 FERC ¶ 62,225 (2004), *reh'g denied*, 111 FERC ¶ 61,072 (2005) (denying a preliminary permit application filed by a corporation on the same grounds), *appeal filed, Energie Group, LLC, et al. v. FERC*, D.C. Cir. No. 05-1206 (June 15, 2005) (*Energie*).

[14] Savannah rehearing request at 8-9, citing *Symbiotics, LLC, et al.*, 100 FERC ¶ 62,038 (2002).

[15] *See Symbiotics, LLC*, 99 FERC ¶ 61,101 at 61,420 and n.13 (2002).

[16] Savannah rehearing request at 8-9.

11. There is no such policy. Each case is decided on the basis of its individual merits. The cases cited by Savannah are all distinguishable. In *City of Augusta, et al.*,[17] the Commission found that a license applicant should not be denied a license because it had been assessed a civil penalty for failing to timely file a fisheries mitigation plan at a separate licensed project and had relocated a short portion of the transmission line for that other project without prior authorization. There, however, the applicant admitted its violation of the fisheries plan requirement and paid the civil penalty,[18] and the Commission found that no significant environmental impacts resulted from relocation of the transmission line segment.[19] Here, the penalty remains unpaid and we continue to regard Clifton's failure to install the gauges necessary to determine compliance with instream flow requirements as a serious matter.

12. In *Village of Gresham*,[20] the Commission issued a new license to an existing licensee that had failed to timely comply with various requirements, including installation of safety devices. In that case there were no competing applications for the license so denial of the application would have required the licensee to file an application to surrender the license; *i.e.*, to shut down an operating project. Moreover, the licensee came into compliance when instructed to do so. In such circumstances, no purpose would have been served by denying the license application.

13. In *Turbine Industries*,[21] the applicant was ordered to show cause why it should not be found unfit in light of compliance problems at two other projects. That order was terminated after the applicant admitted to violating a compliance order regarding one of the other projects, paid a civil penalty, and maintained both existing projects in compliance for a one year period.[22] Here, as discussed below, Clifton continues to be in violation of the order to pay the civil penalty.

14. As the agency charged by Congress with regulating and safeguarding the nation's hydropower resources, we cannot turn a blind eye to any applicant's record in

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[17] 72 FERC ¶ 61,114 (1995).

[18] *See City of Hamilton, Ohio*, 62 FERC ¶ 61,106 (1993).

[19] *See City of Hamilton, Ohio*, 83 FERC ¶ 61,244 (1998).

[20] 46 FERC ¶ 61,067 (1989).

[21] 68 FERC ¶ 61,127 (1993).

[22] *Cook Industries, et al.*, 72 FERC ¶ 61,115 (1995).

considering a new application. Here, the entity seeking a preliminary permit is controlled by an individual who controls another company (Clifton) which engaged in significant violations of its license and our orders, and shows no sign of recognition of the seriousness of its action or the intent to alter its pattern of behavior.[23] It is not possible for us to conclude that any entity under Mr. Mierek's control would be a good steward of the public's resources. We must therefore take Mr. Mierek's past actions into account and see no alternative but to deny the permit application at issue, based on his demonstrated lack of fitness to comply with our regulatory requirements. To do otherwise would be to shirk our responsibilities.

C. Due Process Claims

15. Savannah also raises due process issues. First, it claims[24] that denial of its permit application was a sanction, and so the Commission should have afforded it a hearing before an administrative law judge pursuant to the regulations implementing FPA section 31.[25] Those regulations apply, however, only to proceedings for the assessment of civil penalties.[26] Moreover, denial of a preliminary permit, or any application, is an action on the merits, not a sanction. Here, the Commission did not impose a sanction on Mr. Mierek, but rather found his lack of fitness, based on the record of other proceedings, to be a dispositive factor.

16. Savannah contends in addition that its due process rights were violated by our reliance on extra-record communications from the Treasury Department to ascertain that its collection agent has been unable to collect Clifton's debt and that Mr. Mierek has stated Clifton's intention not to pay the debt.[27] Specifically, it asserts that the

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[23] A detailed summary of Clifton's and the Commission's actions in this regard is set forth in *Cheoah*, 113 FERC ¶ 61,043 at P 7-10.

[24] Savannah rehearing request at 10.

[25] 18 C.F.R. § 385.1500, *et seq*. (2005).

[26] *See* 18 C.F.R. § 385.1501 (2005). We recently rejected essentially the same argument in *Energie,* 111 FERC ¶ 61,072 at P 14 (2005).

[27] *See Cheoah*, 113 FERC ¶ 61,043 at P 8 (2005). Savannah does not dispute the essential fact that it has not paid the civil penalty. In any event, on January 9, 2006, the Commission placed into the record of the *ARRE* proceeding the documents in which the Commission referred Clifton's debt to the Treasury, the notification to Clifton of its

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Commission violated Title 31, section 3720E of the United States Code by referring in one of the other orders denying a permit application (*Cheoah*)[28] on which the July 7, 2006, Order relies, to Mr. Mierek's conversations with the Treasury Department. It claims, without citing any authority, that this section prohibits the Commission from disseminating information regarding the identity of debtors, except with the approval of the Secretary of the Treasury, and only for the purpose of collecting the debt.[29]

17. Section 3720E states, as pertinent here:

> (a) The head of any agency may, with the review of the Secretary of the Treasury, for the purpose of collecting any delinquent nontax debt owed by any person, publish or otherwise publicly disseminate information regarding the identity of the person and the existence of the nontax debt.

18. Section 3720E has nothing to do with this proceeding. It was added to the U.S. Code by the Debt Collection Act of 1982.[30] The purpose of that act is to enhance federal agency efforts to collect debts owed to the United States by, among other things, authorizing a federal agency to disclose individual records to a consumer reporting agency and, when attempting to collect a claim to notify a consumer reporting agency that a person is responsible for the claim.[31] It does not prohibit a federal agency from disclosing the identity of a debtor without prior authorization from the Secretary, but merely states it "may" do so with his review. The Treasury Department has never issued implementing regulations.[32]

19. The Commission's communications with Treasury regarding Clifton's debt, which has been a matter of public record for some time and was referred to the Treasury in December 2003, were not mentioned in *Cheoah* for the purpose of attempting to collect

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delinquent debt by Treasury's collection agent, and telephone logs of the collection agent's communications with Mr. Mierek.

[28] *See* n. 10 above.

[29] Savannah rehearing request at 11.

[30] 31 U.S.C. § 3701-3720E, as amended (2000).

[31] *See* www.osec.gov/ofm/credit/pl97-365.html.

[32] Personal communication by telephone from Mr. Gerald Isenberg, Department of the Treasury, Debt Management Service, December 1, 2005.

Clifton's debt, but to establish in the record that the debt has not been paid and that Clifton refuses to do so. Thus, the *Cheoah* order may have revealed the state of affairs, but only by way of illuminating matters already in the public record.

D. Equal Protection Clause

20. Finally, Savannah contends that the Commission has targeted Mr. Mierek for retaliation because of Clifton's partially successful challenge a decade ago to the original order assessing a civil penalty against it.[33] There, the court upheld the validity of a compliance order issued against Clifton and the finding of violations in that order, but vacated the civil penalty and remanded the proceeding with instructions to reduce the penalty and explain more clearly how the penalty amount was determined. On remand, the Commission reduced the penalty amount.[34]

21. Savannah argues that the alleged retaliation violates the Equal Protection Clause of the 14th Amendment to the United States Constitution.[35] First, the reason for our denial of Clifton's various permit applications is fully set forth in *ARRE*. Second, the Equal Protection Clause by its terms prohibits *states* from denying any person within their jurisdiction the equal protection of the laws. It does not apply to actions of the federal government.[36] The same protection against arbitrary state action is offered under the Constitution by the Due Process Clause of the Fifth Amendment.[37] Savannah's due process claims have been considered and rejected above and in *ARRE*.

22. In sum, Savannah has not provided any facts or arguments that would lead us to reverse the July 7, 2006, Order rejecting its preliminary permit application. We will therefore deny rehearing.

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[33] *See Clifton Power Corp. v. FERC*, 88 F.3d 1258 (D.C. Cir. 1996).

[34] *See Clifton Power Corp*., 92 FERC ¶ 61,263 (2000), *reh'g denied*, 94 FERC ¶ 61,071 (2001), *reh'g and reconsideration denied*, 94 FERC ¶ 61,346 (2001), *appeal dismissed as incurably premature, Clifton Power Corp. v. FERC*, 294 F.3d 108 (D.C. Cir. 2002.

[35] Rehearing request at 11, *citing* U.S. Const., amend. 14, and *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000).

[36] *See Hibben v. Smith*, 191 U.S. 310, 325 (1903).

[37] *Id*.

The Commission orders:

The request for rehearing filed by Savannah River Resource Enhancement LLC and Charles Mierek on August 8, 2006 in this proceeding is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.