

111 FERC ¶ 61,072
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Energie Group LLC

Project No. 12454-002

ORDER DENYING REHEARING

(Issued April 18, 2005)

1. Energie Group LLC (Energie) has filed a request for rehearing of a December 21, 2004 Order¹ issued by the Director of Division of Hydropower Compliance and Administration in the Office of Energy Projects, denying its application for a preliminary permit to study the proposed Williams Energy Project No. 12454. For the reasons discussed below, we deny rehearing. This order is in the public interest because it clarifies that an applicant's compliance history is relevant to the Commission's public interest determination regarding the issuance of preliminary permits.

Background

2. On April 8, 2003, Energie filed an application for a three-year preliminary permit under Section 4(f) of the Federal Power Act (FPA)² to study the proposed Williams Energy Project No. 12454. The project, to be located on the East Fork of the White River, in Lawrence County, Indiana, would comprise: (1) the 280-foot-long, 22-foot-high Williams Dam; (2) the reservoir impounded by the dam, which has a surface area of about 263 acres and storage capacity of about 4,010 acre-feet; (3) an existing powerhouse containing four existing generating units and one proposed generating unit

¹ 109 FERC ¶ 62,225.

² 16 U.S.C. § 797(f). 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]."

having a total installed capacity of 4,250 kilowatts; (4) an existing transmission line; and (5) appurtenant facilities.

3. On December 21, 2004, the Commission issued an order denying the application. The order explained that it would not be in the public interest to issue a permit because of the poor compliance record of one of the principals of Energie, Elaine Hitchcock, with respect to other projects with which she has been associated, and the poor condition of the dam, removal of which is under consideration by the state.³

4. On January 19, 2005, Energie filed a request for rehearing of the December 21, 2004 Order. The rehearing request makes various legal arguments and assertions of fact, which we address below.

Discussion

A. Policy Considerations

5. Energie first states that there is no precedent for denying a preliminary permit on fitness grounds. It contends that fitness to hold a permit should be determined on the basis of a permittee's ability to submit the bi-annual progress reports required by each permit.⁴ In support, Energie cites an order purportedly holding that the financial fitness of a permit applicant is relevant only during the license application phase,⁵ and one

³ 109 FERC at 64,495. In 1992, Energy Alternatives of North America, Inc. (Energy Alternatives), of which Elaine Hitchcock was president, was issued a license for the Williams Dam Project No. 11151, located at the same site as the proposed Williams Energy Project. 60 FERC ¶ 62,077. In 1993, a compliance order was issued in response to the licensee's failure to remedy certain public safety hazards at the project. 62 FERC ¶ 62,079. The project was never constructed and, ultimately, the license was terminated. 69 FERC ¶ 62,194 (1994).

⁴ Rehearing request at 2.

⁵ The order cited by Energie, *Clifton Power Corp.*, 77 FERC ¶ 61,264 (1996) merely states that a license applicant's financial fitness is one of the public interest factors the Commission examines pursuant to the comprehensive development analysis required by FPA section 10(a)(1), 16 U.S.C. § 803(a)(1). However, Energie is correct that the Commission has held that an applicant's financial fitness is not relevant at the permit stage. *See, e.g., Chain Dam Hydroelectric Corp., et al.*, 22 FERC ¶ 61,183 at 61,317 (1983).

stating that the permit may be revoked if the permittee fails to file the required progress reports.⁶

6. The fact that there is no precedent for denying a preliminary permit on fitness grounds is no bar to the Commission doing so in this proceeding. Our general policy is to issue a preliminary permit unless there is a permanent legal bar to granting a license application. We may, however, make exceptions to established policies if we articulate a rational basis for doing so.⁷

7. The issue here is not simply Ms. Hitchcock's financial fitness, but the much broader issue of her overall fitness to construct, operate, and maintain a hydroelectric project. As discussed in detail in the following section, Ms. Hitchcock has an extensive record of violating the FPA, our implementing regulations, the conditions of licenses, exemptions, and permits, and the Commission's compliance orders. On three occasions, this has led to the assessment of civil penalties, which have not been fully paid. As a result, we have already concluded that Ms. Hitchcock is unfit to hold a license.⁸ Based on these facts, it is inappropriate to issue a preliminary permit to her or an entity that is in any way under her control or direction.⁹

⁶ *Symbiotics, et al.*, 100 FERC ¶ 62,038 (2002).

⁷ See *Symbiotics, L.L.C. v. FERC*, 110 Fed. Appx. 76; 2004 U.S. App. LEXIS 19596 (10th Cir. 2004) (*Symbiotics v. FERC*) (affirming denial of preliminary permits where Commission had previously issued final environmental impact statement or environmental assessment documenting unmitigatable adverse environmental impacts and there was no evidence of changed circumstances).

⁸ *Carl E. Hitchcock, Elaine Hitchcock, and Energie Development Company, Inc.*, 69 FERC ¶ 61,382 (1994).

⁹ We note, moreover, that a preliminary permit confers certain rights: (1) only the permittee can file a license application for the project during the permit term; (2) the permittee has the right to amend its license application to make it as well adapted as a later-filed competing license application (right of last amendment); and (3) the permittee's application will be selected over a competitor's if both are equally well adapted. *Kamargo Corporation*, 37 FERC ¶ 61,281 at 61,843 (1986). Issuance of a permit to Energie could therefore have a deterrent effect on other potential developers of the site who do not have Ms. Hitchcock's history of compliance problems.

B. Request for Evidentiary Hearing

8. Energie requests an evidentiary hearing before an administrative law judge, based on its contention that there are sufficient disputes over factual issues, such as the extent of Ms. Hitchcock's involvement in other projects which had compliance problems, to warrant a hearing.

9. An evidentiary hearing is necessary only when disputed issues of material fact cannot be resolved on the basis of written submissions.¹⁰ Not only are Energies' assertions in this proceeding of Ms. Hitchcock's non-involvement in projects with compliance problems collateral attacks on long-final orders, but the existing record, discussed below, amply demonstrates her role in these projects.

10. A \$15,000 penalty was assessed against Ms. Hitchcock in 1995 for unauthorized construction and operation of the Sheboygan Falls Project No. 10058.¹¹ Energie asserts that Ms. Hitchcock had no involvement with that project, and that the unauthorized construction and operation was carried out by her husband, Carl. The Commission determined in the 1995 order that this claim has no merit.¹²

11. The Hitchcocks, as the exemptees for the Eau Galle Project No. 10078, were assessed a civil penalty of \$5,000 in 1997 for violating various conditions of the exemption.¹³ Energie asserts that Ms. Hitchcock was a non-majority shareholder of a corporation that owned that project and that the presiding administrative law judge in the

¹⁰ See *Sierra Association for the Environment v. FERC*, 744 F.2d 661, 663-64 (9th Cir. 1994); *Northern States Power Company*, 78 FERC ¶61,363 at 62,512 (1997); *Public Service Co. of New Hampshire*, 75 FERC ¶61,111 at 61,380 (1996) (denying requests for trial-type hearing when requester unable to show that material facts in dispute could not be resolved on the existing record).

¹¹ *Elaine Hitchcock*, 71 FERC ¶ 61,395.

¹² 71 FERC ¶ 61,395 at 61,550 (1995). See also *Carl E. Hitchcock, Elaine Hitchcock, and Energie Development Co., Inc. and Carl E. Hitchcock*, 69 FERC ¶ 61,382 at 62,444-45(1994), wherein the Commission concluded that Carl and Elaine Hitchcock, jointly or individually, were the principals in all of the companies associated with their various projects.

¹³ *Carl and Elaine Hitchcock*, 80 FERC ¶ 61,355 (1997).

proceeding absolved the Hitchcocks of various alleged violations and found the remaining violations to be minor. The exemption was, however, issued to Carl and Elaine Hitchcock,¹⁴ and they did not contest her ownership and control of the project in the enforcement proceeding. The Commission, moreover, did not entirely share the presiding judge's views concerning the seriousness of the violations.¹⁵

12. Ms. Hitchcock was also a principal in Rough and Ready Hydro Company, the exemptee for the Upper Watertown Dam Project No. 9974. In 1995, Rough and Ready was assessed a civil penalty of \$8,000 for violating the exemption's reservoir level requirements.¹⁶ In 1999, the Commission issued a notice proposing to revoke the exemption in response to repeated violations.¹⁷ Ms. Hitchcock asserts that the violations were the consequence of actions by a downstream hydroelectric project operator and the Commission's orders to cease and desist from violations.¹⁸ None of the many compliance orders associated with this project supports that assertion.¹⁹

13. Finally, the Commission found Elaine Hitchcock to be unfit to hold a license and denied a license application filed by her, Carl Hitchcock, and Energie Development Company, Inc. (of which she was President) for a license for the Oconto Falls Project

¹⁴ See *Carl and Elaine Hitchcock*, 38 FERC ¶ 62,225 (1987), and 80 FERC ¶ 61,355 at 62,215.

¹⁵ See 80 FERC ¶ 61,355 at 62,220 (rejecting judge's characterization of staff gauge violations as minor).

¹⁶ *Rough and Ready Hydro Company*, 70 FERC ¶ 61,028 (1995). Only \$1,400 has been paid.

¹⁷ *Rough and Ready Hydro Company*, 86 FERC ¶ 61,003 (1999). The matter was resolved and the revocation proceeding terminated when Rough and Ready agreed to sell the project to another entity by a specified date. *Rough and Ready Hydro Company*, 94 FERC ¶ 61,312 at 62,146 (2001).

¹⁸ Rehearing request at 3.

¹⁹ See, e.g., compliance orders at 69 FERC ¶ 62,142 (1994), 75 FERC ¶ 62,100 (1996), 80 FERC ¶ 62,020 (1997), and 82 FERC ¶ 62,083 (1998), and Order Modifying and Approving Run-of-River Compliance Plan, 81 FERC ¶ 62,128 (1997).

No. 11484, based on her compliance record at the abovementioned projects.²⁰ Ms. Hitchcock asserts that, although she and Energie Development were named as applicants for Project No. 11484, the actual applicant was Carl Hitchcock.²¹ This assertion has already been rejected.²²

C. FPA Section 31

14. Energie asserts that denial of a preliminary permit is “in the nature of a civil enforcement action.”²³ This is incorrect. The Commission’s enforcement powers with respect to the hydroelectric program are set forth in FPA section 31.²⁴ They pertain only to enforcement of licenses, exemptions, and permits that have already been issued.²⁵ Here, we are simply denying an application for a preliminary permit in the context of an ordinary notice and comment proceeding, as upheld by the Court of Appeals in *Symbiotics v. FERC*, *supra*.

²⁰ *Carl E. Hitchcock, Elaine Hitchcock, and Energie Development Company, Inc. and Carl E. Hitchcock*, 69 FERC ¶ 61,382 at 62,443-44 (1994)

²¹ Rehearing request at 4.

²² Indeed, before denying the license application filed by all three entities for the project on fitness grounds, the Commission granted Carl Hitchcock’s request to reinstate the application, which had previously been rejected, in response to his assertion that all three entities were the applicants. *See* 69 FERC ¶ 61,382 at 62,443-444.

²³ Rehearing request at 3.

²⁴ 16 U.S.C. § 823b.

²⁵ Section 31(a) authorizes the Commission to “monitor and investigate compliance with each license and permit issued under this part and with each exemption granted from any requirement of this Part.” Section 31(b) establishes the circumstances and standards under which the Commission may revoke a license or exemption. Sections 31(c) and (d) concern issuance and assessment of civil penalties.

D. Small Business Regulatory Enforcement Fairness Act

15. Energie states, without providing citations or regulatory text, that the Commission is required by the Small Business Regulatory Enforcement Fairness Act (SBREFA)²⁶ to consult with the Small Business Administration Ombudsman prior to taking actions adverse to small businesses and to avoid actions adverse to them.²⁷ We have reviewed SFREFA and find no such requirements.²⁸ Moreover, nothing in SBREFA precludes us from making an appropriate decision based on the record before us.

E. Bias

16. Energie states that no participant in this proceeding has alleged that Ms. Hitchcock is unfit to be a permittee and that the Commission's conclusion in that regard suggests that it is biased against her.²⁹ The Commission's standard form of public notice in this proceeding did not mention Ms. Hitchcock, let alone solicit comments regarding her fitness.³⁰ In any event, it is entirely the Commission's responsibility to determine the fitness of an applicant and we believe Elaine Hitchcock's poor compliance record clearly supports denial of her permit application.

²⁶ Title II of the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (codified as a note to 5 U.S.C. § 601 (1996)).

²⁷ Rehearing request at 4.

²⁸ SBREFA does require federal regulatory agencies to adopt a policy regarding waiver of civil penalties for small entities under appropriate circumstances, and we have adopted such a policy. *See* 18 C.F.R. § 2.500 (2004).

²⁹ Rehearing request at 4.

³⁰ The Commission's standard form public notice for an application for preliminary permit, issued August 7, 2003 in this proceeding (68 Fed. Reg. 49469-49470, August 18, 2003), stated that the application was accepted for filing, gave notice of the Commission's rules regarding competing preliminary permit and development applications, and requested comments, protests and motions to intervene. Energie named Stacey L. Harriott as the Applicant Contact.

F. Condition of Williams Dam

17. Finally, Energie asserts that there is no issue with respect to the condition of Williams Dam because the Indiana Department of Natural Resources (Indiana DNR) has already repaired it. It adds that any uncertainty with respect to dam removal is not a basis for denial of a preliminary permit, citing the fact that the Commission issues preliminary permits to applicants for projects proposed to be located on river reaches that are under consideration for inclusion in the National Wild and Scenic Rivers System, when such inclusion would prohibit the Commission from issuing a license for the project.³¹

18. Energie has misrepresented the status of the dam. Indiana DNR states that “in addition to the more obvious problems of repair or replacement of deteriorating concrete, there is a continuing problem with leakage of water around the dam through seams in the limestone bedrock.”³² It estimates the investment needed to bring the dam up to a condition which will ensure its structural adequacy for the expected life of the proposed project to be about \$8.5 million.³³

19. Energie’s assertions that Indiana DNR has repaired the dam and suggestion that Indiana DNR may not intend to remove the dam are contradicted by Indiana DNR’s filings. Indiana DNR states that:

the deteriorating condition of the dam, the high cost of reconstruction and negative environmental impacts posed by the dam lead us to conclude that decommissioning would be the best long term approach. In the short term, we are addressing only those immediate repairs necessary to stabilize the structure from a safety standpoint.³⁴

³¹ Rehearing request at 4.

³² Letter to John Estep, Division of Hydropower Administration and Compliance, from Paul Ehret, Deputy Director, Indiana Department of Natural Resources, filed October 5, 2004, at 1.

³³ *Id.*

³⁴ Letter to Peter H. Bruno, Bruno Boiler and Engine Works, from John R. Goss, Director, Indiana DNR, dated October 10, 2003, attached to letter to Stacy Harriott, Energie Group, LLC from Paul Ehret, Deputy Director, Indiana DNR, filed April 29, 2004 (Ehret-Harriot letter).

Indiana DNR has also engaged an engineering consultant to evaluate dam removal options.³⁵ In addition, it is on record as opposing lease of the dam to Energie and has declined to appoint an agency liaison to assist Energie with development of the project.³⁶

20. We conclude that Elaine Hitchcock's poor compliance history, coupled with the questionable status of the dam, render the possibility of her filing for and being granted a license for the proposed project highly unlikely. In consequence, issuance of a preliminary permit to Energie is not in the public interest. We therefore deny rehearing.

The Commission orders:

The request for rehearing filed by Energie Group LLC on January 20, 2005 is denied.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

³⁵ Ehret-Harriot letter at 1.

³⁶ *Id.*