

121 FERC ¶ 61,050
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Mt. Hope Waterpower Project, L.L.P.

Project No. 9401-066

ORDER ON REHEARING

(Issued October 18, 2007)

1. On June 21, 2007, the Commission dismissed Mt. Hope Waterpower Project, LLP's (Mt. Hope) appeal of its Notice of Debt Collection (Collection Notice) and denied its request for a waiver of administrative annual charges assessed for the Mt. Hope Pumped Storage Project No. 9401.¹ On July 23, 2007, Mt. Hope filed a request for rehearing. As discussed below, we deny rehearing, but will waive interest charges if payment is made within 60 days.

Background

2. The history of this matter is set out in more detail in the underlying order. In summary, the Commission, in 1992, issued a license for the construction and operation of the 2,000-megawatt Mount Hope Pumped Storage Project No. 9401.² After issuing several congressionally-authorized extensions, the Commission, on December 15, 2005, terminated the license for failure to commence construction.³ As of that date, Mt. Hope had paid none of the assessed but deferred administrative annual charges.⁴

¹ *Mount Hope Waterpower Project, L.L.P.*, 119 FERC ¶ 61,290 (2007).

² *Halecrest Company*, 60 FERC ¶ 61,121 (1992). In 1994, the project license was transferred to Mt. Hope. *Halecrest Company and Mt. Hope Waterpower Project, LLP*, 68 FERC ¶ 62,008 (1994).

³ *Mt. Hope Waterpower Project, LLP*, 113 FERC ¶ 61,258 (2005).

⁴ The Commission allowed the licensee to enter into a deferred payment agreement with the Commission's Chief Financial Officer. *Halecrest Company*,

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3. On May 2, 2006, the Commission sent Mt. Hope a Collection Notice seeking payment of the deferred annual charge obligations, which total \$5,830,203.54 (principal and interest),⁵ of which Mt. Hope sought waiver and appeal.

4. The Commission's June 21, 2007 order dismissed Mt. Hope's appeal of the Collection Notice, finding that Mt. Hope's argument was a collateral attack on the original annual charge assessments. The order also denied Mt. Hope's request for waiver of the annual charges

5. On rehearing, Mt. Hope argues that the Commission erred in dismissing its appeal and denying its waiver request. Mt. Hope presents no new facts or arguments, but proffers some variations on its previous arguments, as discussed below.

Discussion

A. Appeal of the Collection Notice

6. Mt. Hope argues that the Commission misconstrued its appeal of the Collection Notice as a collateral attack on the annual charge assessments, and erroneously dismissed it. Mt. Hope argues that it was in fact appealing the decision by the Commission to issue

65 FERC ¶ 61,398 (1993). Under this order, payment was deferred until the earlier of (1) fiscal year 1996 (September 30, 1995) or (2) receipt of permanent financing for the project. The payment deadline was subsequently adjusted (the earlier of August 3, 1999, or when Mt. Hope received permanent financing) to reflect further extensions of the commencement of construction deadline. *See* agreement dated November 21, 1996, executed by Christie McGue, the Commission's Executive Director and Chief Financial Officer, and Chris Brenner, President of Mt. Hope.

On April 7, 2000, Commission staff issued an order (unpublished) granting another extension of time to start construction, and noting (at n. 5) that all filing deadlines referenced to these dates would be automatically recalculated. It appears that the Commission staff and the licensee believed that this order also extended the August 3, 1999 payment deadline to August 3, 2002 (the new start of construction deadline), since no correspondence was exchanged during this time and no new annual charge payment agreement was executed.

⁵ The assessment covers the period from license issuance in 1992 until March 14, 1995. The principal amount is \$4,099,295 and the interest is \$1,730,908.54. This order reflects a calculation correction noting a \$789,643.63 decrease in the interest accrued.

the Collection Notice before allowing for resolution of the matter before the Commission.⁶

7. Mt. Hope had an obligation to pay the deferred annual charges no later than August 2002.⁷ In the almost four years from August 2002 until the May 2, 2006 Collection Notice, Mt. Hope had ample opportunity to pay the overdue charges or come to the Commission to attempt to resolve the matter, but it did not do so. Therefore, it cannot now be heard to complain that Commission staff issued the Collection Notice prematurely. Furthermore, neither Mt. Hope's waiver request nor its rehearing request offers any proposed resolution of this matter. We therefore deny rehearing on this issue.

B. Request for Waiver

8. In its underlying request for waiver, Mt. Hope made several arguments as to why the Commission should grant a waiver of Mt. Hope's annual charges. We found Mt. Hope's arguments unconvincing. On rehearing, Mt. Hope again seeks to persuade us to grant it a waiver.

9. In our prior order, we explained that the Omnibus Budget Reconciliation Act of 1986 (OBRA) requires us to recover all costs incurred by the Commission.⁸ Mt. Hope

⁶ Request for rehearing at 17. It states that referring Mt. Hope's debt to Treasury could inhibit waiver, compromise, or other arrangements.

⁷ See n. 4, *supra*.

⁸ Omnibus Budget Reconciliation Act of 1986 (OBRA) 42 U.S.C. § 7178 (2000).

Until October 1986, the Commission's recovery of the cost of administering Part I of the hydroelectric program was governed solely by Federal Power Act (FPA) section 10(e)(1), which directs the Commission to fix reasonable charges for reimbursement of cost of its administration of Part I of the FPA. 16 U.S.C. § 803(e)(1) (2000). The section provides in part "[t]hat the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part...."

Since then, however, section 3401 of OBRA requires the Commission to "collect fees and annual charges in any fiscal year in amounts equal to all of the costs incurred by the Commission in that fiscal year." 42 U.S.C. § 7178(a)(1) (2000). The Commission is further directed to "make such adjustments in the assessments for such fiscal year as may be necessary to eliminate any overrecovery or underrecovery of its total costs."

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points to OBRA's waiver provision⁹ and argues that the Commission improperly denied its waiver request in light of the evidence it presented. It is true that we may grant a waiver, where a showing of good cause has been made.¹⁰ However, contrary to Mt. Hope's claim, it has not demonstrated good cause for a waiver. In our underlying order we looked at Mt. Hope's arguments in support of its waiver request and found none of them persuasive. Moreover we noted that we would have to pass this previously-assessed cost to other licensees to assure there was no underrecovery of our costs, which would work a hardship on those entities.¹¹

10. Mt. Hope argues that we were wrong in stating in our earlier order that waiving these charges would violate OBRA. Mt. Hope argues that waiving the charges would be no different from the Commission (in Order No. 576¹²) deciding not to assess annual charges until commencement of construction.¹³ This argument is essentially a collateral attack on our decision in Order No. 576 not to apply that order retroactively. It is too late for Mt. Hope to raise this argument now.

11. While Mt. Hope argued in its initial waiver request that the Commission should grant it a waiver because the future issuance of a license for the proposed project would be in the public interest, it now argues that a waiver should be issued because in

42 U.S.C. § 7178(e) (2000). OBRA allows the Commission to "waive all or part of any fee or annual charge assessed under this section for good cause shown." 42 U.S.C. § 7178(g) (2000).

⁹ 42 U.S.C. § 7178(g) (2000).

¹⁰ *Id.*

¹¹ 119 FERC ¶ 61,290. As noted in our underlying order, Mt. Hope owes \$4.1 million in principal, which if waived would result in an increase in annual charge assessments to other entities of about seven percent.

¹² In Order No. 576, the Commission established a policy that administrative annual charges would be assessed for unconstructed projects, effective March 15, 1995, beginning with the commencement of construction. *Charges and Fees for Hydroelectric Projects*, 60 Fed. Reg. 15040 (March 22, 1995), FERC Stats. & Regs., Regulations Preambles January 1991- June 1996 ¶ 31,016 (Mar. 15, 1995). Existing annual charge assessments as of that date were not waived. *Id.* at 31,302-03.

¹³ Request for rehearing at 12.

previously issuing a license for the project the Commission had determined that the project was in the public interest.¹⁴ However, the question is not whether we found the project to be in the public interest when we issued the license, but whether granting a waiver of annual charges now would be in the public interest. These are two completely distinct matters. We affirm our earlier finding that, in the absent of any convincing justification by Mt. Hope, turning to other licensees to collect the charges accumulated by Mt. Hope would not be in the public interest.

12. As noted above and in our prior order, OBRA limits what actions we can take with regard to the costs incurred by the Commission without causing an impact to other licenses. However, we do have some flexibility with regard to the interest charged which, if we waive, we do not have to pass on to others. Therefore, under the circumstances of this case, in order to encourage quick resolution of this matter, we will waive the interest due if Mt. Hope pays the principal amount within 60 days of this order. If it does not, we will send the complete amount, principal and interest, to the Treasury Department for collection

The Commission orders:

(A) The request for rehearing filed on July 23, 2007, by Mt. Hope Waterpower Project, LLP, is denied.

(B) If, within 60 days from the date of this order, Mt. Hope pays to the Commission the principal amount of \$4,099,295, its obligation will be considered met in full.

(C) If Mt. Hope does not make payment of \$ 4,099,295, within 60 days from the date of this order, the complete debt of \$ 5,830,203.54 (principal and interest) will be referred to the Treasury Department for collection.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Acting Deputy Secretary.

¹⁴ Request for rehearing at 8.