

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Hydro Development Group, Inc.

Project Nos. 5633-008, 6058-014,
and 6059-015

ORDER DENYING REHEARING

(Issued May 18, 2006)

1. Fred Totten has filed a motion for intervention¹ and request for rehearing of a February 23, 2006 Commission staff order² modifying and approving a recreation plan for the Fowler No. 7 Hydroelectric Project No. 6059 and the Hailesboro No. 4 Hydroelectric Project No. 6058, and addressing recreational access issues at the exempted Hailesboro No. 3 Project No. 5633. The projects, all licensed to the Hydro Development Group, Inc (HDG), are all located on a two-mile reach of the Oswegatchie River, in St. Lawrence County, New York. Because Mr. Totten has not shown any error in staff's decision to authorize the recreational facilities at issue, we deny rehearing.

Background

2. In 1980, the Commission issued HDG an exemption for the proposed 1,000-kilowatt (kW) No. 3 Mill Project, subsequently renamed the Hailesboro No. 3 Project.³

¹ Mr. Totten requests late intervention, but, as explained below, his motion is timely.

² *Hydro Development Group, Inc.*, 114 FERC ¶ 62,178 (2006)

³ 20 FERC ¶ 62,054. The Commission is authorized to exempt from the licensing requirements of Part I of the Federal Power Act (FPA) small hydroelectric projects with an installed capacity of 5 megawatts or less that use for the generation of electricity either an existing dam or a natural water feature without the need for any dam or impoundment. *See* sections 405 and 408 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 2705 and 2708 (2000) as amended by section 246 of the Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 679.

One of the conditions of the exemption, Standard Article 2, required that the exemptee comply with any terms and conditions that federal or state fish and wildlife agencies had determined appropriate. With respect to the Hailesboro No. 3 Project, the Commission received two sets of recommendations. The U.S. Department of the Interior stated that “[i]t is recommended that the applicant give consideration to providing opportunities for public recreational use with the project boundaries. . . . such as canoeing, boating fishing, picnicking, and other activities compatible with the resource . . . in consultation with the State Liaison officer and local community groups” The New York Department of Environmental Conservation stated that it would “require the applicant to prepare, within one year of an exemption at this site, a recreation plan addressing the opportunities for shoreline access and other associated recreational facilities both above and below the Number 3 dam.”⁴ From an examination of the record, it appears that the recommended recreation plan was not developed.

3. Following the issuance of the exemption for the Hailesboro No. 3 Project, the Commission issued HDG minor licenses for the 900-kW Fowler No. 7 Project and the 1,490-kilowatt (kW) Hailesboro No. 4 Project.⁵ Both original licenses expired in late 2002.

4. In 2002, the Commission issued HDG subsequent licenses for the Fowler No. 7 and Hailesboro No. 4 Projects.⁶ In those proceedings, New York Rivers United, American Rivers, and American Whitewater Affiliation asserted that the Commission should reopen the exemption for another exempted project, the Hailesboro No. 6 Project, to impose recreation requirements in order to mitigate for the cumulative impacts of the Fowler No. 7 Project, the Hailesboro No. 4 Project, and the Hailesboro No. 3 Project. The Commission concluded that it lacked authority to reopen a final exemption without the consent of the exemption holder, and thus declined to do so.⁷ With respect to recreation, Article 410 of both licenses required the licensee to develop a recreation

⁴ See letter dated 29, 1982, from Louis M. Concra, Jr., Director, Division of Regulatory Affairs to Kenneth Plumb (Commission Secretary) (filed July 2, 1982).

⁵ See 21 FERC ¶ 62,388 (1982) (Fowler No. 7) and 22 FERC ¶ 62,019 (1983) (Hailesboro No. 4).

⁶ See 101 FERC ¶ 61,097 (Hailesboro No. 4) and 101 FERC ¶ 61,100 (Fowler No. 7).

⁷ 101 FERC ¶ 61,097 at P 27-28; 101 FERC ¶ 61,100 at P 23-25. The Commission affirmed its holding on rehearing, 103 FERC ¶ 61,071 at P 13-15 (2003).

enhancement plan, in consultation with federal and state resource agencies and local groups. The plan was to include a boat put-in and associated parking downstream of Hailesboro No. 3.

5. On July 19, 2004, HDG filed the recreation plan required by Article 410 of the two licenses. HDG stated that the plan was also intended to address unresolved recreational access at the Hailesboro No. 3 Project (presumably to satisfy the recreation plan requirement of the exemption). HDG explained that it would provide the required canoe put-in downstream of the Hailesboro No. 3 Project (as required by Article 410 of the Hailesboro No. 6 license), but had not yet obtained property rights to provide public access to the put-in site, and would update the plan when it had done so. As a separate matter, HDG stated that it owned sufficient property to provide public parking and canoe access to the Hailesboro No. 3 headpond (located at the upstream end of the project), and planned to install a canoe launch, a parking area, a canoe launch access trail, safety fencing, a picnic area, and appropriate signs.

6. In the February 23, 2006 order, Commission staff approved the recreation plan, with modifications not relevant here.

7. On March 22, 2006, Mr. Fred Totten, a landowner in the area of the Hailesboro No. 3 headpond, filed a request for rehearing, expressing concern about the impacts of the proposed facilities on his property.

Discussion

A. Motion to Intervene

8. To give rise an opportunity for public participation with respect to a post-license compliance matter, the proceeding must be one that: (1) entails a material change in the plan of project development or the terms of the license or exemption; (2) would adversely affect the rights of a property holder in a manner not contemplated by the license or exemption; or (3) involves an appeal by an agency or entity specifically given an consultation role by the license or exemption article under which the compliance filing is made.⁸ Article 410 of the licenses for the Hailesboro No. 4 or the Fowler No. 7 Projects does not require the recreation facilities at the Hailesboro No. 3 headpond that were mandated by the February 23, 2006 order. Moreover, while the Hailesboro No. 3

⁸ See *Pacific Gas & Electric Co.* 115 FERC ¶ 61,070 at P 6 (2006), citing *Pacific Gas & Electric Co.*, 40 FERC ¶ 61,035 (1987); *Kings River Conservation District*, 36 FERC ¶ 61,635 (1986).

exemption did, by reference, include the general requirement of a recreation plan, it did not specify what, if any, recreation facilities would be needed. These facilities have now been approved as part of the recreation plan for Hailesboro No. 3, and will be located at it. Because the proposed actions entail a material change in project development for the Hailesboro No. 3 Project, intervention in the proceeding with respect to those facilities is proper.⁹

9. Mr. Totten asks that he be allowed to intervene late in the proceeding because he has not been on the mailing list regarding the projects and only learned of the February 23 order on March 13. Our policy is to consider interventions timely if they are filed within 30 days of an order issued in a proceeding in which public notice was not issued, but in which an entity has a right to participate.¹⁰ In this case, public notice of HDG's filing was not issued. Therefore, Mr. Totten's motion to intervene was timely. Since it was both timely and unopposed, the motion was granted 15 days after it was filed.¹¹

B. The Request for Rehearing

10. Mr. Totten asserts that he owns land under the headpond to the high water mark. He states that he does not support public access to the property, that the headpond provides little recreation for the public and none for whitewater boaters, that implementation of the recreation plan would have a negative impact on the value of his property, and that he is concerned that the proposed parking area cannot be built without

⁹ We would not entertain interventions with respect to facilities, such as the boat put-in below the Hailesboro No. 3 Project, which were required by the long-since final licenses for the Hailesboro No. 4 and Fowler No. 7 Projects. Any objections to those facilities would have had to be made on rehearing of the licensing orders, and would be untimely now. However, Mr. Totten's concerns are limited to the headpond facilities, which were considered for the first time in the February 23, 1996 order.

¹⁰ *See, e.g., Flambeau Hydro, L.L.C.*, 113 FERC ¶ 61,236 at P 9 (2005) (explaining that where there was no public notice of proceeding, motion or notice of invention by consulted agency timely if filed within 30-day deadline for seeking rehearing of order). The same logic applies to a motion to intervene, such as that here, by a party arguably affected by a change in project development.

¹¹ *See* 18 C.F.R. § 385.214(c) (2005).

infringing on his property. He contends that when water in the pond is below the high water line, access to the pond will be across his property, which he does not intend to permit.

11. The Hailesboro No. 3 headpond is located on the Oswegatchie River, a navigable waterway of the United States.¹² While Mr. Totten may own land underneath and surrounding the headpond, the pond itself is not only a project work, but it is part of the waters of the United States, and the project's occupancy of it is subject to those conditions that we conclude are in the public interest. While we do not routinely impose recreation requirements in issuing exemptions, we will do so, at our discretion, where appropriate.¹³ This proceeding, where federal and state resource agencies, local groups, and the exemptee all concur in proposed recreation measures, is such a case.¹⁴ Mr. Totten's personal interests cannot override those of the general public, including the public interest in recreation.¹⁵

12. In any event, Mr. Totten has not shown that the recreation plan will result in any harm to him or his property. He asserts, without providing any supporting evidence, that the proposed parking area cannot be built with infringing on his property and that access to the pond will at some times be across his property. Given that an exemption holder does not have the right of eminent domain that a licensee possesses, HDG can lawfully construct facilities only on property which it holds or acquires by agreement with the property owner. Persons seeking to recreate in the area will have no authority to cross

¹² See 100 FERC ¶ 61,100 at P 1 (2002), *citing* 9 FPC 1323 (1950).

¹³ See *Van Buren Township*, 19 FERC ¶ 61,251 at 61,486 (1982).

¹⁴ While Mr. Totten asserts that there is no recreational value to the headpond, all of these other entities apparently disagree, and we find their mutual conclusion that it is appropriate to prove recreation at this site compelling.

¹⁵ As a general proposition, we do not allow the interests of private landowners to override the public's right to enjoy the recreational resources associated with hydropower projects under our jurisdiction. See *West Penn Power Co.*, 81 FERC ¶ 61,362 at p. 62,736 (1997).

Mr. Totten's property unless he chooses to allow them entry.¹⁶ Mr. Totten also provides no support for the claim that allowing recreation on the headpond will lower his property values.

13. In sum, we see no reason to reverse the February 23, 2006, order and we will deny rehearing.

The Commission orders:

The request for rehearing, filed by Mr. Fred Totten on March 22, 2006, is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁶ It is not clear from Mr Totten's filing why those wishing to use the headpond will not be able to gain access to it through the river or via the canoe access that HDG has stated it will construct on its own property.