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HYDRO

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CLIENT ALERT: HIGHLIGHTING SAFETY CONCERNS, FERC ASSESSES \$600,000 CIVIL PENALTY IN HYDRO ENFORCEMENT CASE

On April 21, the Federal Energy Regulatory Commission (“the Commission” or “FERC”) issued an order finding “that Ampersand Cranberry Lake Hydro, LLC [“Ampersand”] . . . , licensee for the Cranberry Lake Project No. 9685 (‘Project’), violated Article 5 of the project’s license by failing to retain the possession of all project property covered by the license,” and assessing a \$600,000 civil penalty.¹ The Commission states that “the record suggests that Ampersand Cranberry Lake deliberately attempted to shirk its obligations under the Project license [to undertake dam safety remediation work that proved to be more expensive than the licensee had expected] by voluntarily entering into an agreement to terminate its access to the Project property.”² As Chairman Glick stated in FERC’s press release on the order:³

The Commission takes violations of the terms and conditions of these licenses very seriously because, in many instances, they are critically linked to public safety. Dam safety remains a top priority of the Commission and FERC will use its authority to ensure that licensees do what they need to do to protect the public against dam failures.

Background

The Cranberry Lake Project is a 595 kW project in upstate New York, originally constructed in 1917, and first licensed in 1987.⁴ FERC approved the transfer of the license from the previous licensee to Ampersand in 2015.⁵

Like its predecessor, Ampersand operated the project under a lease agreement with the dam owner, Oswegatchie River-Cranberry Reservoir Regulating District Corporation (“OR-CRRDC”). FERC states that “[a] part of its 2014 application for approval of transfer of license, Ampersand . . . committed to complete certain

¹ *Ampersand Cranberry Lake Hydro, LLC*, 179 FERC ¶ 61,037, P 1 (2022) (“Enforcement Order”).

² *Id.* P 54.

³ News Release, FERC, FERC Assesses Civil Penalty for Hydro License Violation (Apr. 21, 2022), <https://www.ferc.gov/news-events/news/ferc-assesses-civil-penalty-hydro-license-violation>; see also Enforcement Order PP 10, 67.

⁴ *Id.* PP 2-4.

⁵ *Id.* P 4

dam safety works, including the rehabilitation of the project's fuse plug spillway . . . in the dam's embankment."⁶ The fuse plug is an element of the project's earthen embankment "designed to sacrificially fail to prevent overtopping of the reservoir's main dam and save more critical project works from failing."⁷ Following FERC's approval of the license transfer, an updated cost estimate suggested to Ampersand that rehabilitation would cost more than \$350,000, which was more expensive than it had originally anticipated.⁸ Ampersand then began to attempt to renegotiate its lease agreement with OR-CRRDC, threatening more than once to surrender its license in order to avoid paying for the necessary repairs.⁹ These attempts were fruitless, and in 2019, OR-CRRDC sued Ampersand, seeking "damages of \$16,471.68 or, as an alternative, an order evicting Ampersand Cranberry Lake from the lease property."¹⁰

FERC staff informed Ampersand that "[i]n the event that the project lease with the dam owner is terminated, [Ampersand] would be in violation of Article 5 and subject to appropriate Commission compliance actions," and that "it is imperative that [Ampersand] continue to work with the current dam owner to retain the necessary property rights under Article 5 throughout [its] license term, including the rights necessary to replace the fuse plug spillway and complete other required repairs to the project."¹¹ In response to Ampersand's statements that it would have to transfer the license to OR-CRRDC or surrender the license if it were to lose access to the dam, FERC staff also noted that "any application to transfer or surrender your project license would have to be approved by the Commission. Further, all dam safety repairs including the necessary modifications to the fuse plug spillway must be completed prior to your submittal of a transfer or surrender application."¹²

Termination of lease agreement and FERC enforcement proceeding

On July 6, 2021, Ampersand and OR-CRRDC signed a settlement that terminated the lease.¹³ In response, FERC issued an Order to Show Cause and Notice of Proposed Penalty to Ampersand.¹⁴ Ampersand argued that "the appropriate remedy in this case is immediate termination of the license and transition of the [OR-CRRDC] Dam to state jurisdiction,' not a civil penalty,"¹⁵ because it had no choice but to enter into the settlement agreement.¹⁶ FERC was unconvinced, explaining that had Ampersand truly been compelled to sign the settlement, it could seek to have the settlement voided on the grounds of duress.¹⁷ On the contrary, FERC found that Ampersand "chose to terminate the lease and relinquish possession of the Project property in

⁶ *Id.* P 11.

⁷ *Id.* P 12.

⁸ *Id.* P 14.

⁹ *Id.* PP 15-18.

¹⁰ *Id.* P 20.

¹¹ *Id.* P 25 (quoting Letter from Kimberly Nguyen, Environmental and Project Review Branch Chief for the Division of Hydropower Administration and Compliance, to Sayad Moudachirou at 2, No. P-9685-033 (July 23, 2020) ("Nguyen Letter")); *see also* P 27.

¹² *Id.* P 27 (quoting Nguyen Letter at 3-4); *see also id.* P 29.

¹³ *Id.*

¹⁴ *Ampersand Cranberry Lake Hydro, LLC*, 177 FERC ¶ 61,028 (2021) ("Order to Show Cause").

¹⁵ Enforcement Order P 37 (quoting Answer of Ampersand Cranberry Lake Hydro, LLC to Order to Show Cause and Notice of Proposed Penalty at 7-8, No. P-9685-034 (Nov. 22, 2021), eLibrary No. 20211122-5166 ("Ampersand Answer")).

¹⁶ *Id.* (citing Ampersand Answer).

¹⁷ *Id.* P 40.

exchange for OR-CRRDC's agreement to relinquish its claims to, among other things, outstanding rental and water tax payments," noting in addition that Ampersand's "prior correspondence with OR-CRRDC makes clear that it had a significant incentive to agree to terminate the Lease Agreement" because "doing so allowed it to avoid spending \$350,000 to repair the fuse plug (an amount that dwarfed the less than \$16,500 sought in the lawsuit)."¹⁸ FERC found relevant Ampersand's previous assertions to OR-CRRDC "that it intended to surrender its Project license and shift the cost of repairing the fuse plug onto OR-CRRDC."¹⁹ In essence, while Ampersand may have felt that settling was the only *viable* option, its relinquishment of project property rights was not "involuntary" because it had other choices open to it.

Conclusion

There are two key takeaways from this decision. First, FERC is willing to use its civil penalty authority to ensure that licensees take the actions necessary to protect the public against dam failures.

Second, licensees cannot evade their obligations simply by relinquishing project property rights. Doing so does not relieve a licensee of its responsibilities under the project license, but does make it more difficult to comply, and may well result in FERC enforcement action.

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¹⁸ *Id.* P 39.

¹⁹ *Id.*