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.

Mt. Hope Waterpower Project LLP Project No. 12641-001

ORDER GRANTING IN PART AND
DENYING IN PART REQUEST FOR REHEARING

(Issued September 8, 2006)

1. This order grants in part and denies in part the request for rehearing filed by Mt. Hope Waterpower Project LLP (Mt. Hope) of the June 15, 2006, order [1] (June 15 Order) dismissing Mt. Hope's application for a preliminary permit to study the feasibility of the proposed 2000-megawatt Mount Hope Pumped Storage Project No. 12461. We are fixing an end date to the "cooling-off" period established in the June 15 Order with respect to preliminary permit applications by Mt. Hope for the project, and otherwise denying rehearing.

I. Background

2. The background to this order was set forth in the June 15 Order and need not be repeated here. In brief, the Commission issued a license for the project to Mt. Hope's predecessor in 1992[2] (1992 license). The licensee was granted the maximum allowable time to commence construction, but failed to do so. In 1996 and 1999, Congress passed legislation authorizing the Commission to extend the deadline for commencement of construction, which the Commission did. Neither of the extended deadlines was met.

[1] 115 FERC ¶ 61,315.

[2] The license was transferred to Mt. Hope in 1994. *Halecrest Co., et al.*, 68 FERC ¶ 62,008.

On December 15, 2005, the Commission issued an order terminating the 1992 license.[3] Mt. Hope did not seek rehearing.

3. On January 17, 2006, Mt. Hope filed an application for a preliminary permit to study the feasibility of the Mount Hope project. In the June 15 Order, the Commission dismissed the permit application. Mt. Hope timely filed a request for rehearing, which we consider below.

II. Discussion

4. The purpose of a preliminary permit is to encourage hydroelectric development by affording its holder priority of application (*i.e.*, guaranteed first-to-file status) with respect to the filing of development applications for the affected site. 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,[4] and we have recently done so with regard to issuance of preliminary permits in other proceedings.[5]

5. In the June 15 Order, we explained that, although there has been as yet no competition to develop the Mount Hope site, it is not in the public interest to immediately reserve the site for the same entity which, along with its predecessor, was unable to commence construction on a project after having exclusive development rights for approximately 20 years, for 13 years of which it held a license.[6]

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[3] *Mt. Hope Waterpower Project LLP*, 113 FERC ¶ 61,258.

[4] *See Symbiotics, L.L.C. v. FERC*, 110 Fed. Appx.76; 2004 U.S. App. LEXIS 19596 (10th.Cir. 2004) (*Symbiotics*).

[5] *See Energie Group, LLC*, 111 FERC ¶ 61,072 (2005), *appeal filed*, *Energie Group, LLC, et al. v. FERC*, D.C. Cir. No. 05-1206 (June 15, 2005) and *Appalachian River Resources, Inc.*, 114 FERC ¶ 61,145 (2006) (permit applicants had unsatisfactory compliance records at other projects); *Symbiotics* (Commission had previously issued a final environmental document for another project at the site concluding that it would have unmitigable adverse environmental impacts and there was no evidence of changed circumstances); *Electric Plant Board of the City of Augusta, Ky*, 115 FERC ¶ 61,198 (2006) (*Augusta*) (permit applicant's license for the project had been terminated for failure to commence construction after holding the license for more than a decade).

[6] June 15 Order, 115 FERC ¶ 61,315 at P 9-10.

A. Issuance of Preliminary Permits to Former Licensees

6. Mt. Hope first argues that in the June 15 Order and in *Electric Plant Board of the City of Augusta, Kentucky* (*Augusta*),[7] issued May 18, 2006, we adopted a new policy prohibiting former licensees from further pursuing a previously licensed project when the prior license was terminated for failure to commence construction.

7. We have adopted no such policy. In the June 15 Order and in *Augusta*, we dismissed permit applications by former licensees who failed to commence construction after holding their licenses for over a decade. We explained the reasons for departing from our general policy. The great majority of licenses terminated for failure to commence construction are terminated following the maximum statutory period of four years to commence construction, in the absence of Congressional authorization to the Commission to issue any further extensions of time. We have not established a blanket policy of denying the permit or license application, or notice of intent to file an application, of any former licensee in such a situation, or indeed of any other former licensee. Such a dismissal is unusual and each application will be considered in light of the relevant facts.

B. Site-Banking

8. Mt. Hope charges that we improperly applied our policy against "site-banking" to this proceeding.[8] Site-banking occurs when an entity that is unable to develop a proposed project ties up the project site, and thus prevents others from developing it. This is inconsistent with the time limits for development of licensed projects of Federal Power Act section 13,[9] which reflect a Congressional intent that water power resources be used in the best possible manner and at the earliest possible time.[10]

9. Mt. Hope asserts that the policy against site-banking cannot be applied here, because it has previously been applied only to situations where a licensee was seeking a

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[7] 115 FERC ¶ 61,198.

[8] Rehearing request at 8-11.

[9] 16 U.S.C. § 806 (2000).

[10] *See* June 15 Order, 115 FERC ¶ 61,315 at P 9, *citing Augusta*, 115 FERC ¶ 61,198 at P 10, citing *Idaho Power Company*, 14 FPC 55, 68 (1955), *aff'd*, *Idaho Power Co. v. FPC*, 237 F.2d 777 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 924 (1956).

stay of license, while Mt. Hope seeks a preliminary permit to study an unlicensed project.[11] It adds that the Commission has never before, with the exception of *Augusta*, dismissed a preliminary permit application by a prior licensee. Mt. Hope is correct that the policy against site-banking was not applied in the preliminary permit context until *Augusta*. The essence of the policy, however, is that an entity which is unwilling or unable to develop a site should not be permitted to maintain the exclusive right to develop it. Whether that occurs in the context of a stay of license, a preliminary permit, or some other context, is immaterial.

10. Mt. Hope also urges that a preliminary permit holder cannot "bank" a site because it has no right to develop the site.[12] On the contrary, a preliminary permit holder can indeed prevent development of a site by others. A preliminary permit confers several 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.[13] These rights effectively hamper or preclude efforts by any other entity to develop a site during the term of the permit and for the duration of any license application that may be filed during its term.

11. Mt. Hope further asserts that the standard conditions in preliminary permits requiring a permittee to demonstrate its progress prevent site-banking.[14] The standard conditions are not, however, designed to require progress in actual development of the site, but only in the evaluation of the feasibility of development and, at the permit holder's option, development of a license application.[15] The permittee is under no

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[11] Rehearing request at 8-9.

[12] Rehearing request at 11.

[13] *Kamargo Corporation*, 37 FERC ¶ 61,281 at 61,843 (1986).

[14] Rehearing request at 9, *citing City of Richmond, VA*, 53 FERC ¶ 61,342 (1990).

[15] A preliminary permit requires only that the permittee provide the Commission with a progress report every six months describing the actions it has taken under the Commission's prefiling consultation requirements. The permittee is not required to have completed any particular consultation requirements at any time during the term of the permit, and it is common for the Commission to issue successive permits for the same site to the same permittee if its progress reports demonstrate reasonable diligence. *See, e.g., Rock Creek Cattle Co., Ltd*., 116 FERC ¶ 62,015 (2006).

obligation to develop the site, or even to file a license application during the term of the permit. In fact, the vast majority of preliminary permits do not result in a license application.

12. Mt. Hope further argues that if the policy against site-banking is relevant here, the June 15 Order is inconsistent with that policy because it implicitly treats the extensions of time granted to Mt. Hope to commence construction under the 1992 license as site-banking, while Commission precedent holds that they are not.[16] There is no disagreement that the extensions of time granted to Mt. Hope under the 1992 license were not site-banking. The June 15 Order, however, is forward-looking; it addresses Mt. Hope's application to reserve the site for itself for an additional period of at least three years. In light of Mt. Hope's lengthy, unsuccessful efforts to develop the same project for which it has applied for a permit, we conclude that the public interest would not thereby be served by issuance of a permit, thus delaying or possibly precluding another entity from developing the site.

13. Finally, Mt. Hope points out that no competing permit or license applications were filed following the December 15, 2005, termination of the 1992 license, and states that the Commission "cannot simply wait it out for the right applicant to come along."[17] It is hardly surprising that no competing permit applications have been filed at this point. The December 15 order was not administratively final until the close of business on January 16, 2006, when Mt. Hope failed to file a request for rehearing by the statutory deadline. Its permit application was filed within a few minutes of the Commission opening for business the next morning. As a first-to-file permit applicant, all else being equal, Mt. Hope would receive preferential treatment as to any competing, non-municipal permit applicant.[18] Although Mt. Hope would not receive such treatment as against a competing municipal permit applicant, we think the public interest is best served if other potential municipal and non-municipal permit or license applicants are given additional time to assess whether to file either kind of application. In this regard, we note that development of a large pumped storage project is a very significant undertaking requiring substantial expenditures of time and money by any entity serious about preparing a license application.

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[16] Rehearing request at 10, *citing Fieldcrest Cannon, Inc.*, 55 FERC ¶ 61,096 at 61,295 (1991).

[17] Rehearing request at 11.

[18] *See* 18 C.F.R. § 4.37(b)(2) (2006).

C. Fitness

14. Mt. Hope contends that the June 15 Order impliedly rejects its filing on the ground that Mt. Hope lacks fitness to develop a project at the Mount Hope site, but the record of its conduct under the 1992 license does not support such a finding.[19] It adds that the Commission has previously stated that financial fitness is irrelevant at the preliminary permit stage,[20] which is consistent with our broadly-applicable policy limiting the scope of our inquiry into the applicant's background at the permit stage, in light of the potential burdens to the Commission and applicants of such an inquiry. Finally, Mt. Hope states in this regard that examination of a permit applicant's background at the permit stage has generally been to determine if a permit applicant exhibited sufficient diligence during the term of a prior permit for a project at the same site during which it did not apply for a license to warrant issuance of a subsequent permit. Mt. Hope asserts that such cases are not relevant here and, if they are, Mt. Hope diligently pursued construction under the 1992 license.[21]

15. In fact, the June 15 Order makes no determination, express or implied, concerning Mt. Hope's fitness or diligence. It merely finds that the public interest in timely development of the Mount Hope site pursuant to the FPA and in a competitive environment will best be served if we do not reserve the site for an additional, indeterminate period for development by an applicant that has been unable, for whatever reason, to construct a licensed project at the site for well over a decade.

D. Cooling Off Period

16. The June 15 Order does not permanently preclude issuance of a permit or license to Mt. Hope for the project site. Rather, it finds that the public interest is best served by a "cooling-off" period before we would consider again reserving the site to Mt. Hope.[22] Mt. Hope asserts that we have inadequately explained the rationale for our decision. We disagree. The order plainly states our concern that issuance of a permit to Mt. Hope, in

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[19] Rehearing request at 11-13.

[20] *Id*. at 13-14, *citing Baltic Associates*, 35 FERC ¶ 61,358 (1986).

[21] *Id*. at 14-17.

[22] June 15 Order, 115 FERC ¶ 61,315 at P 10.

light of its inability for many years to develop the licensed project, would dampen competition in to develop the site and could needlessly expend staff resources.[23]

17. Mt. Hope argues that any such intent is misguided because termination of the 1992 license, along with public notice of Mt. Hope's permit application soliciting competing permit applications,[24] is sufficient to allow other entities to compete for the site. As discussed above, however, we think the public interest is best served by keeping the site open for applications by other entities for an additional period of time.

18. Mt. Hope also objects to the open-ended nature of the cooling-off period, which it states effectively extends indefinitely the solicitation of competing applications by other entities. It asserts that this constitutes an improper circumvention of the rules pertaining to preliminary permits, upon which Mt. Hope is entitled to rely.[25] We disagree. We followed our regulations to the letter in issuing public notice of Mt. Hope's application.[26] That notice was issued before we determined that the circumstances of the case require us to depart from our customary practice with regard to the issuance of permits, which is a separate matter. Moreover, even if dismissal of Mt. Hope's permit application could be construed as an extension of the solicitation period, we believe we have adequately explained our reasoning.

19. Mt. Hope also argues that the June 15 Order is arbitrary because it does not address the effect on Mt. Hope that the award of a preliminary permit or license to another entity might have on its investment to date; *i.e.*, it might lose its investment in the project.[27] Mt. Hope appears to confuse its own interests with those of the public. Whatever Mt. Hope's investment may be, it does not create an entitlement for it to tie up the project site indefinitely. The Commission gave Mt. Hope every opportunity to develop its project by granting it every available extension of time to commence

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[23] *Id*. at P 9-10.

[24] A public notice of Mt. Hope's application soliciting competing permit or license applications was issued on March 7, 2006. 71 F.R. 13122 (March 14, 2006).

[25] Rehearing request at 20.

[26] 18 C.F.R. § 2.1(a)(1)(iii) (2006).

[27] Mt. Hope states that it has invested $30 million in the project, and acquired substantial in interests in land needed for the project. Rehearing request at 21. We have no information on which to assess the validity of this statement.

construction. We are not required to support the efforts of a former licensee to protect its investment by maintaining control of a site once its license expires.

20. Finally in this regard, Mt. Hope states that the cooling-off period is unreasonable because there is no support for the proposition that the passage of time alone will engender competition for the site,[28] its open-ended nature prevents Mt. Hope from addressing the reasonableness of the requirement, and it assures other entities that there is no deadline to compete against Mt. Hope.[29] In any event, it submits, sufficient time for competition has passed since termination of the 1992 license because any serious competitor for the site would already have filed an application for a permit or license, or notice of intent to file such an application.[30]

21. Although we do not necessarily agree with these arguments, we conclude upon further consideration, and in light of the fact that we impute no lack of fitness to Mt. Hope, that it is appropriate to establish an end date for the cooling-off period. At this point, potentially interested applicants have had several months to review the considerable record associated with the 1992 license and to consider whether to make the substantial investment associated with preparing a license application.[31] We also consider, as discussed previously, that the filing of Mt. Hope's permit application has had a deterrent effect on other potential developers of the site. We will therefore provide for the cooling-off period to end six months from the issuance date of this order. However, we reach no conclusion now as what we might conclude regarding the merits of any future application by Mt. Hope.

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[28] Rehearing request at 19. Mt. Hope asserts (at 22) that other entities had six months between termination of the 1992 license and our dismissal of its permit application to file competing applications. We would, however, have dismissed any competing permit application filed before the statutory period for Mt. Hope to seek rehearing. Moreover, public notice of Mt. Hope's permit application was not issued until March 7, 2006, and allowed potential competitors only 60 days to file a competing permit application or notice of intent to file such an application.

[29] Rehearing request at 20.

[30] *Id*. at 22.

[31] Potential applicants should understand that the record supporting the 1992 license cannot, in all likelihood, simply be reproduced in support of a current day application. The environmental record, and perhaps other aspects of a new application, are stale at this point.

22. In conclusion, Mt. Hope offers no facts or arguments that persuade us to reverse the May 18, 2006, order in this proceeding except to the extent set forth in the preceding paragraph.

The Commission orders:

(A) The request for rehearing for rehearing filed in this proceeding by Mt. Hope Waterpower Project LLP on July 17, 2006, is denied except as discussed in the body of this order and in Ordering Paragraph (B) below.

(B) The Commission will accept for filing an application from Mt. Hope Waterpower Project LLP for a preliminary permit no earlier than six months from the date of issuance of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.