

4. On November 3, 2005, Commission staff cited *Cheoah* in an order denying ARRE's application for a preliminary permit to study development of the proposed Enhanced Dillsboro Project No. 12563, to be located at the Dillsboro Dam on the Tuckasegee River (*Dillsboro*).³ Dillsboro Dam is part of the existing Dillsboro Project No. 2602, which is licensed to Duke Power (Duke). In the context of a multi-project relicense proceeding, Duke agreed to surrender its license for the Project No. 2602 and to remove Dillsboro Dam and decommission the powerhouse.⁴

5. Also on November 3, 2005, Commission staff cited *Cheoah* in an order denying ARRE's application for a preliminary permit to study development of the proposed W. Kerr Scott Project No. 12587, to be located at the W. Kerr Scott Dam on the Yadkin River in North Carolina (*Scott Dam*).⁵ Scott Dam is a federal dam operated by the U.S. Army Corps of Engineers primarily for flood control purposes.

6. ARRE filed timely requests for rehearing of all three orders.⁶ Clifton Power Corporation (Clifton) timely filed motions to intervene and requests for rehearing in all three proceedings. Mr. Mierek timely filed a motion to intervene and request for rehearing in *Scott Dam*.⁷ Jackson County, North Carolina (Jackson County) filed a motion to intervene in *Dillsboro* and *Cheoah*, and a timely request for rehearing in

³ *Appalachian Rivers Resource Enhancement, LLC*, 113 FERC ¶ 62,100 (*Dillsboro*).

⁴ Duke's surrender application was filed May 24, 2004. It is being considered in the context of a multi-project environmental review which is pending.

⁵ *Appalachian Rivers Resource Enhancement, LLC*, 113 FERC ¶ 62,098 (*Scott Dam*).

⁶ ARRE's requests for rehearing are identical in substance, but not entirely consistent in pagination. For convenience, the page references herein are to ARRE's request filed in *Cheoah* and *Dillsboro*.

⁷ Clifton's and Mr. Mierek's requests for rehearing consist of a one page summary of the arguments advanced by ARRE. For convenience, we will refer only to ARRE in discussing these arguments.

Dillsboro.⁸ Duke filed a motion for leave to answer and an answer to the ARRE's rehearing request in *Dillsboro*, in which it renews its previously advanced argument that ARRE's application should be rejected because it violates Commission policy.

Discussion

A. Procedural Matter

7. Duke supports the result and rationale of *Dillsboro*. It states, however, that the permit application in that proceeding should have been rejected because it conflicts with a Commission policy not to entertain competing applications where an existing licensee first files a relicense application then, as a result of settlement discussions, files an application to surrender its license and remove or decommission the project.⁹ Because we are affirming the underlying order, Duke's motion to reject is moot.

B. Substantial Evidence

8. ARRE first contends that the Commission's orders are not supported by substantial evidence and violate Administrative Procedure Act (APA) section 557(c)'s

⁸ In Jackson County's November 14, 2005, motion to intervene, the county states, correctly, that it had previously intervened in *Dillsboro*, in January 2005. Thus, the motion was unnecessary in that proceeding, as to which the county was already a party. In the motion, Jackson County states that the *Dillsboro* order was not served on it or its counsel. Even if this is correct, it is irrelevant, since the county clearly had actual notice of the order, as evidenced by its filing a timely request for rehearing. As to the *Cheoah* proceeding, the motion to intervene was timely and unopposed, and thus the county became a party 15 days after its motion was filed. See 18 C.F.R. § 385.214(c) (2005).

On December 5, 2005, Jackson County filed a single request for rehearing with respect to both the *Cheoah* and *Dillsboro* orders. Jackson County's rehearing request, to the extent it pertains to *Cheoah*, was rejected as untimely by notice issued December 16, 2005 (the request for rehearing was filed more than 50 days after the order was issued, while Section 313(a) of the Federal Power Act, 16 U.S.C. § 825l(a) (2000), requires requests for rehearing to be filed within 30 days of the date of the relevant order). Jackson County did not seek rehearing of that rejection, which is now final. We deal herein with Jackson's County timely request for rehearing as to the *Dillsboro* order.

⁹ Duke's arguments in this regard are set forth in its motion to intervene, in which it cited *Arizona Public Service Co.*, 97 FERC ¶ 61,315 (2001), and *PacifiCorp*, 97 FERC ¶ 61,348 (2001).

requirement that decisions be made on the record.¹⁰ Its first contention in this regard is that we improperly imputed the acts of Clifton to ARRE because ARRE did not exist when Clifton and Mr. Mierek took the actions leading to our conclusion that Mr. Mierek lacks the fitness to receive any further licenses or exemptions.¹¹ We disagree. Regardless of when ARRE was formed, both Clifton and ARRE are under Mr. Mierek's control and direction. Mr. Mierek is president of both entities, and it would be irresponsible of us not to consider his actions in his capacity as president of Clifton when considering the fitness of ARRE as a potential licensee.

9. ARRE also claims that a lack of fitness finding is not warranted because neither Mr. Mierek nor Clifton violated a Commission order. As to Mr. Mierek, it states that the civil penalty for violations of the Clifton Mills No. 1 license was assessed against Clifton. ARRE also asserts that this proceeding is similar to *Armstrong v. CFTC*,¹² in which the court found that an agency improperly imputed the acts of corporations formed by the appellant to the appellant himself. While it is true that Mr. Mierek is the president of Clifton, and thus in some sense may be distinct from the corporate entity, he has had ultimate responsibility for the corporation's actions. There has been no suggestion in any of *Clifton* proceedings to contradict the fact that Mr. Mierek has been solely responsible for Clifton's failure to comply with its license and not to pay its civil penalty. Both Clifton and ARRE are very small businesses. For our purposes here, Mr. Mierek is both Clifton and ARRE.¹³

10. As to Clifton, ARRE asserts that there is no violation of a Commission order assessing a civil penalty until the Commission obtains judgment in a suit against the violator in federal district court and that the Commission has not filed such a suit.¹⁴ This

¹⁰ ARRE rehearing request at 7-9. 5 U.S.C. § 557(c) (2000) requires an agency decision to provide a "statement of . . . findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record."

¹¹ *Id.* at 8.

¹² 12 F.3d 401 (3rd Cir. 1993).

¹³ *Armstrong* bears very little resemblance to this proceeding. There, liability by the appellant as a controlling entity for the deeds of the corporations he had formed necessarily rested on certain findings of fact under a statutory definition, but the agency's decision made no reference at all to that definition. The agency moreover failed to explain which parts of an administrative law judge's initial decision it was adopting and which portions it was not adopting, so that judicial review was frustrated.

¹⁴ ARRE rehearing request at 9.

is incorrect. A licensee or exemptee's obligation to pay a civil penalty attaches when the penalty becomes administratively and judicially final. As discussed in *Cheoah*, Clifton's civil penalty became administratively and judicially final, and Clifton was ordered to pay the penalty. Its request for rehearing was denied and it did not seek judicial review. The matter is now final and has been referred to the Treasury Department for collection.¹⁵ ARRE confuses the obligation to pay the penalty with the means provided by FPA section 31¹⁶ for the Commission to collect the debt when the licensee is delinquent.¹⁷ As the company's president, Mr. Mierek is responsible both for the underlying license violation and the failure to pay the civil penalty.

C. Consistency with Commission Policies

11. ARRE next asserts that we departed without explanation from a policy of resolving issues based on the legal identity of an applicant. According to ARRE, we have treated partnerships and partners as separate entities for purposes of our application and competition rules.¹⁸ ARRE misreads our precedent. We do not separate the identities of partners and partnerships where matters of fitness to receive a license are

¹⁵ See *Cheoah*, 113 FERC ¶ 61,043 at P 9.

¹⁶ 16 U.S.C. § 823b (2000).

¹⁷ The Commission collects debts under the Standards for the Administrative Collection of Claims (Standards), 31 C.F.R. § 901 *et seq.* (2004). Under section 901.1(e), the Commission must transfer to the Secretary of the Treasury any debt that has been delinquent for a period of 180 days or more so that the Secretary may take appropriate action to collect this debt or terminate collection action. See 31 C.F.R. § 285.12 (2004). Section 285.12(c) requires the mandatory transfer of debts to Treasury's Financial Management Service for any debt more than 180 days delinquent for debt collection services. A debt is legally enforceable if there has been a final agency determination that the debt, in the amount stated, is due and there are no legal bars to collection action. 31 C.F.R. § 285.12(c)(3)(i) (2004). In the *Clifton* case, there has been final agency action and the debt is legally enforceable as is.

¹⁸ ARRE rehearing request at 9-14. Citing *Larry Pane*, 24 FERC ¶ 61,236 (1983) (individual partnership not permitted to take advantage of partnership's permit priority); *Tropicana Limited Partnership*, 65 FERC ¶ 61,094 (1993) (partnership affiliated with corporate preliminary permit applicant bound by deadline for filing development applications in competition with its affiliate's preliminary permit application).

concerned. In fact, we have consistently examined the conduct of the persons controlling and directing licensees and exemptees in this context.¹⁹

12. ARRE contends that our orders are inconsistent with a long-established policy of not denying a preliminary permit application on fitness grounds.²⁰ That policy, however, applies only with respect to a permit applicant's financial resources. This is because no permit applicant can be expected to certify its intent to develop the proposed project, since feasibility of the project is the subject of the permit studies and, where the permittee fails to make progress on the studies, the Commission can terminate the permit.²¹ There is no such policy with respect to a permit applicant's fitness from a compliance standpoint, as shown by *Energie*.

13. ARRE claims we departed without explanation from a policy of issuing licenses to applicants with poor compliance records in light of the Commission's means of securing compliance, including civil penalties.²² It also complains that we have not articulated standards for fitness, and have issued licenses to applicants with worse compliance records than Clifton's. ARRE cites three cases which, it claims, show the existence of such a policy and that Clifton's transgressions are relatively minor.

¹⁹ See, e.g., *Turbine Industries, Inc.*, 68 FERC ¶ 61,127 (1994) (ordering corporate applicant to show cause why its license application should not be denied on fitness grounds because of the poor compliance record of two other corporate exemptees for other projects under the management of the same individual); *Carl E. Hitchcock, Elaine Hitchcock, and Energie Development Company, Inc. and Carl E. Hitchcock*, 69 FERC ¶ 61,382 (1994) (denying license application based on the compliance record of one of the applicants with respect to other projects under her control and direction); *Energie Group, LLC*, 109 FERC ¶ 62,225 (2004), *reh'g denied*, 111 FERC ¶ 61,072 (2005), *appeal filed*, *Energie Group, LLC, et al. v. FERC*, D.C. Cir. No. 05-1206 (June 15, 2005) (denying a preliminary permit application filed by a corporation on the same grounds).

²⁰ ARRE rehearing request at 11-12, citing *Symbiotics LLC, et al.*, 110 FERC ¶ 62,038 (2002).

²¹ See *Symbiotics, LLC*, 99 FERC ¶ 61,101 at 61,420 and n.13 (2002).

²² ARRE rehearing request at 13-14.

14. There is no such policy. Each case is decided on the basis on its individual merits. The cases cited by ARRE are all distinguishable. In *City of Augusta, et al.*,²³ the Commission found that a license applicant should not be denied a license because it had been assessed a civil penalty for failing to timely file a fisheries mitigation plan at a separate licensed project and had relocated a short portion of the transmission line of that other project without prior authorization. There, however, the applicant admitted its violation of the fisheries plan requirement and paid the civil penalty,²⁴ and the Commission found that no significant environmental impacts resulted from relocation of the transmission line segment.²⁵ Here, the penalty remains unpaid and we continue to regard Clifton's failure to install the gauges necessary to determine compliance with instream flow requirements as a serious matter.

15. In *Village of Gresham*,²⁶ the Commission issued a new license to an existing licensee that had failed to timely comply with various requirements, including installation of safety devices. In that case there were no competing applications for the license so denial of the application would have required the licensee to file an application to surrender the license; *i.e.*, shut down an operating project. Moreover, unlike Clifton, the licensee in *Gresham* came into compliance when instructed to do so. In such circumstances, no purpose would have been served by denying the license application.

16. In *Cook Industries*,²⁷ the applicant was ordered to show cause why it should not be found unfit in light of compliance problems at two other projects. That order was terminated after the applicant admitted to violating a compliance order regarding one of the other projects and paying a civil penalty, and had maintained both existing projects in compliance for a one year period. Here, as discussed below, Clifton continues to be in violation of the order to pay the civil penalty.

17. As the agency charged by Congress with regulating and safeguarding the nation's hydropower resources, we cannot turn a blind eye to any applicant's record in considering a new application. Here, the entity seeking a preliminary permit is controlled by an individual who controls another company (Clifton) which engaged in significant violations of its license and our orders, and shows no sign of recognition of the

²³ 72 FERC ¶ 61,114 (1995).

²⁴ See *City of Hamilton, Ohio*, 62 FERC ¶ 61,106 (1993).

²⁵ See *City of Hamilton, Ohio*, 83 FERC ¶ 61,244 (1998).

²⁶ 46 FERC ¶ 61,067 (1989).

²⁷ 68 FERC ¶ 61,127 (1993).

seriousness of its action or any intent to alter its pattern of behavior.²⁸ It is not possible for us to conclude that any entity under Mr. Mierek's control would be a good steward of the public's resources. We must therefore take Mr. Mierek's past actions into account and see no alternative but to deny the permit application at issue, based on his demonstrated lack of fitness to comply with our regulatory requirements. To do otherwise would be to shirk our responsibilities.

D. Due Process Claims

18. ARRE also raises due process issues. First, it claims that denial of its permit application was a sanction, and so the Commission should have afforded it a hearing before an administrative law judge pursuant to the regulations implementing FPA section 31.²⁹ Those regulations apply, however, only to proceedings for the assessment of civil penalties.³⁰ Moreover, denial of a preliminary permit, or any application, is not a sanction. Here, the Commission did not impose a sanction on Mr. Mierek, but rather found his lack of fitness, based on the record of other proceedings, to be a dispositive factor.

19. ARRE also contends that its due process rights were violated by our reliance on extra-record communications from the Treasury Department to ascertain that its collection agent has been unable to collect Clifton's debt and Mr. Mierek has stated Clifton's intention not to pay the debt.³¹ ARRE states that it is entitled to the name of any Treasury employees contacted, a transcript of the communications, and the right to cross-examin[e the Treasury employee or employees.

20. An evidentiary hearing is necessary only when disputed issues of material fact cannot be resolved on the basis of written submissions.³² ARRE does not dispute the

²⁸ A detailed summary of Clifton's and the Commission's actions in this regard is set forth in *Cheoah*, 113 FERC ¶ 61,043 at P 7-10.

²⁹ 18 C.F.R. § 385.1500, *et seq.* (2005).

³⁰ *See* 18 C.F.R. § 385.1501 (2005). We recently rejected essentially the same argument in *Energie*. *See* 111 FERC ¶ 61,072 at P 14.

³¹ *Cheoah*, 113 FERC ¶ 61,043 at P 8.

³² *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) and *Public Service Co. of New Hampshire*, 75 FERC ¶ 61,111 at 61,380 (1996).

essential fact that it has not paid the civil penalty.³³ In any event, we have placed into the record of this proceeding the documents in which the Commission referred Clifton's debt to Treasury, the notification to Clifton of its delinquent debt by Treasury's collection agent, and telephone logs of the collection agent's communications with Mr. Mierek.³⁴

21. Jackson County asserts that the *Dillsboro* order should have been preceded by public notice of the application, receipt of public comments, and issuance of an order for ARRE to show cause why its permit application should not be denied on fitness grounds.³⁵ There was clearly no need to do so, as the fitness determination had already been made in *Cheoah* and the relevant considerations are identical in both proceedings. Moreover, Jackson County alleges no facts that call into question the Commission's determination of Mr. Mierek's lack of fitness.

E. Privacy Issues

22. Finally, ARRE asserts that the Commission violated Title 31, section 3720E of the United States Code. This section states, as pertinent here:

(a) The head of any agency may, with the review of the Secretary of the Treasury, for the purpose of collecting any delinquent nontax debt owed by any person, publish or otherwise publicly disseminate information regarding the identity of the person and the existence of the nontax debt.

ARRE states without citing any authority that the section "prohibits a federal agency from disseminating information regarding the identity of debtors, except with the approval of the Secretary of the Treasury and only for the purpose of collecting the debt."³⁶

23. Section 3720E has nothing to do with this proceeding. It was added to the U.S. Code by the Debt Collection Act of 1982.³⁷ The purpose of that act is to enhance

³³ ARRE asserts that Clifton cannot pay its penalty, and that the Commission improperly rejected its evidence in this regard. Rehearing request at 18. That matter is however administratively and judicially final. *Cheoah*, 113 FERC ¶ 61,043 at P 8.

³⁴ These materials were placed in the record on January 9, 2006.

³⁵ Jackson County rehearing request at 2-3.

³⁶ ARRE rehearing request at 19.

³⁷ 31 U.S.C. § 3701-3720E, as amended (2000).

federal agency efforts to collect debts owed to the United States by, among other things, authorizing a federal agency to disclose individual records to a consumer reporting agency and, when attempting to collect a claim to notify a consumer reporting agency that a person is responsible for the claim.³⁸ It does not prohibit a federal agency from disclosing the identity of a debtor without prior authorization from the Secretary, but merely states it “may” do so with his review. The Treasury Department has never issued implementing regulations.³⁹

24. The Commission’s communications with Treasury regarding Clifton’s debt, which has been a matter of public record for some time and was referred to the Treasury in December 2003, were not mentioned in *Cheoah* for the purpose of attempting to collect Clifton’s debt, but to establish in the record of this proceeding that the debt has not been paid and Clifton’s refusal to do so. Thus, the *Cheoah* order may have revealed the state of affairs, but only by way of illuminating matters already in the public record.

25. In sum, ARRE has not provided any facts or arguments that would lead us to reverse our prior orders in these proceedings. We will therefore deny rehearing.

The Commission orders:

(A) The requests for rehearing filed by Appalachian Rivers Resource Enhancement LLC and by Clifton Power Corporation on October 14, 2005 and November 16, 2005 in Project Nos. P-12563-001, P-12570-001, and P-12587-001; by Charles Mierek on November 16, 2005 in P-12587-001; and by Jackson County on December 5, 2005 in P-12563-001; are denied.

(B) The answer of Duke Power to requests for rehearing and motion for leave to file answer filed on November 22, 2005, is dismissed as moot.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

³⁸ See www.osec.gov/ofm/credit/pl97-365.html.

³⁹ Personal communication by telephone from Mr. Gerald Isenberg, Department of the Treasury, Debt Management Service, December 1, 2005.