

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

19 FERC 761,229

Before Commissioners: C. M. Butler III, Chairman;
Georgiana Sheldon, J. David Hughes
and A. G. Sousa.

Hydro Development Group, Inc.) Project No. 2695-001

ORDER GRANTING EXEMPTION FROM LICENSING OF A SMALL
HYDROELECTRIC PROJECT OF 5 MEGAWATTS OR LESS

(Issued June 4, 1982)

The Hydro Development Group, Inc. (HDG) has filed 1/ an application for exemption from Part I of the Federal Power Act (FPA) for the proposed Dexter Project No. 2695-001. The application was filed pursuant to the Commission's regulations, 18 C.F.R. §§4.101-4.108 (1981), implementing Section 408(b) of the Energy Security Act (ESA) of 1980. 2/ The project is to be located on the Black River in Jefferson County, New York.

Notice of the application was published in accordance with Section 408 of the ESA and the Commission's regulations. Comments were requested from interested Federal and state agencies, including the U.S. Fish and Wildlife Service and the state fish and wildlife agency. All comments, protests, and petitions to intervene that were filed have been considered. No agency has any objection relevant to the issuance of this exemption.

On September 2, 1981, the Brownville Power Company 3/ (Brownville) filed a petition to intervene. In its petition, Brownville alleged that operation of the Dexter Project with 30-inch flashboards would potentially interfere with the operation of its proposed Brownville Project, to be located 2.5 miles upstream. HDG responded on September 16, 1981 (supplemented September 29, 1981), denied the allegation, and claimed that for many years both projects had operated with no interference. HDG also points out that neither Brownville nor its predecessors made any objection to Dexter's long use of the flashboards. Subsequently, both parties filed supplemental pleadings to further explain and support their positions.

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1/ HDG filed its application for exemption for Project No. 2695-001 on May 11, 1981.

2/ Pub. Law No. 96-294, 94 Stat. 611. Section 408 of the ESA amends inter alia, Sections 405 and 408 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. §§2705 and 2708).

3/ The Brownville Power Company (Brownville) had filed an application for preliminary permit for Project No. 4939-000 on June 22, 1981, and revised it on July 23, 1981.

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The center of the controversy is the historical tailwater elevation of the Brownville Project versus the historical headwater elevation of the Dexter Project. Both parties agree that the Dexter and Brownville Projects operated for years without interference. Brownville, however, maintains that the Brownville Project historically operated under normal conditions at a tailwater elevation of 260.5 msl, while HDG asserts that the Dexter Project historically operated at a headwater elevation of 262 msl with flashboards in place. The parties dispute each others' elevation figures, with Brownville claiming in particular, and Dexter disputing, that the Dexter Project was historically operated without flashboards. 4/

4/ HDG's initial response included affidavits that reveal that on 3 recent occasions "white water" condition existed at the base of Brownville Dam and persisted for about 250 feet downstream. At these times Dexter's flashboards were in place. Thus, HDG concludes that no possible interference could occur at Brownville Dam because there was no pondage or backwater built up there. HDG also provided the results of an engineering survey at the two sites showing elevations of 262 msl at the top of the flashboards at Dexter and water surface elevations of 266 and 267 msl at 2 locations in the tailrace at Brownville. In addition, HDG provided eleven affidavits from persons concerning the long established use of flashboards at the Dexter Project including two photographs of the site published in the local newspaper in 1949 and 1963 clearly showing flashboards in place.

At the request of the Secretary of the Commission, Brownville filed a response to HDG's submissions. Brownville states that its records show that the generation facilities utilized a 21 foot head between elevations 281.5 feet and 260.5 feet. Brownville provided an affidavit from a long time employee stating that from 1956 to 1971 the project operated at maximum capacity and at no time did excess water elevation in the tailrace interfere with maximum operations. Brownville also provided an engineering report concluding that (1) prior to 1957 there were 21 feet of head "extending from a probable headwater elevation of 281.5 + to a tailwater elevation 260.5 + under normal flow conditions"; and (2) after 1957 there is sufficient data to suggest that no permanent change in tailwater conditions occurred up to 1966. (No data is available for the post-1966 period.)

HDG responded that this report is suspect because it is based on a variety of assumptions and derived elevations. HDG asserts that Brownville commissioned its own engineering surveys that were taken on October 27, 1981 and January 12, 1982. These surveys were never submitted to the Commission by Brownville but the results (which assertedly are known to HDG and reported in affidavits) confirm HDG's own survey, namely that the tailrace at Brownville Dam is significantly higher than that claimed by Brownville.

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Under Section 4.104(e)(1) of the Commission's regulations, 18 C.F.R. 4.104(e)(1), an exemption application is favored over a mutually exclusive preliminary permit application. Therefore, if there was a mutually exclusive permit application here, the exemption application would be favored.

Turning to the matter of requisite ownership of property rights, Brownville alleges that Dexter "has not shown that it owns all the property rights necessary to develop the project as proposed." Brownville does not state, however, which property rights are allegedly absent, nor does it in any way substantiate its claim. Our inspection of the application reveals that Dexter does possess the necessary property rights to qualify for an exemption for the Dexter Project.

As demonstrated by the discussion herein, there is no significant dispute over requisite property interests in this case and no colorable showing has been made by Brownville that the exemption may not be granted under our regulations. HDG has rebutted each of Brownville's allegations. 5/ It would be in the public interest to grant the exemption under the circumstances of this case.

The documents filed by HDG and Brownville show that the two projects have operated without interference for many years. It is entirely appropriate, therefore, that an exemption for the Dexter Project and a preliminary permit for the Brownville Project both be granted. 6/ Moreover, as we have already found in other circumstances, granting an exemption does not preclude the issuance of a permit for another project that is in whole or in part inconsistent with the development authorized under an exemption. The Metropolitan District of Hartford, Connecticut, Project No. 4297-001, 16 FERC 161,254 (1981); Wells River Hydro Associates, Project No. 4770-000, 18 FERC 161,157 (1982). Thus, even if there were some conflict between the two projects, the Commission could later take action in the public interest.

Standard Article 2 included in this exemption requires compliance with any conditions that Federal or state fish and wildlife agencies have determined appropriate to prevent loss of, or damage to, fish and wildlife resources. The terms and conditions referred to in Article 2 are contained in any letters of comment by these agencies which have been forwarded to HDG in conjunction with this exemption.

5/ See, Fluid Energy Systems, Inc., Kern County Water Agency, V. W. & L. W. Page; Project Nos. 3592, 4125, 4805-001, 19 FERC 161,040 (1982).

6/ By virtue of our conclusion in this order, it follows that the Director, Office of Electric Power Regulation, has sufficient delegated authority to act on the application for a preliminary permit by Brownville Power Company for Project No. 4939-000.

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Should the Applicant contest any terms or conditions that were proposed by Federal or state agencies in their letters of comment as being outside the scope of Article 2, the Commission shall determine whether the disputed terms or conditions are outside the scope of Article 2.

The Commission orders

(A) The Dexter Project No. 2695-001 as described and designated in Hydro Development Group's application filed on May 11, 1981, is exempted from all of the requirements of Part I of the Federal Power Act, including licensing, subject to the standard articles in §4.106 of the Commission's regulations attached hereto as Form E-2, 18 C.F.R. §4.106 (1981).

(B) This order is final unless an application for rehearing is filed within 30 days from the date of its issuance, as provided in Section 313(a) of the Act. The filing of an application for rehearing does not operate as a stay of the effective date of this order, except as specifically ordered by the Commission. Failure to file an application for rehearing shall constitute acceptance of this order.

By the Commission..

(S E A L)



Kenneth F. Plumb,
Secretary.

§ 4.106 Standard terms and conditions of exemption from licensing.

Any exemption from licensing granted under this subpart for a small hydroelectric power project is subject to the following standard terms and conditions:

(a) Article 1. The Commission reserves the right to conduct investigations under sections 4(g), 306, 307, and 311 of the Federal Power Act with respect to any acts, complaints, facts, conditions, practices, or other matters related to the construction, operation, or maintenance of the exempt project. If any term or condition of the exemption is violated, the Commission may revoke the exemption, issue a suitable order under section 4(g) of the Federal Power Act, or take appropriate action for enforcement, forfeiture, or penalties under Part III of the Federal Power Act.

(b) Article 2. The construction, operation, and maintenance of the exempt project must comply with any terms and conditions that any Federal or state fish and wildlife agencies have determined are appropriate to prevent loss of, or damage to, fish or wildlife resources or otherwise to carry out the purpose of the Fish and Wildlife Coordination Act, as specified in Exhibit E of the application for exemption from licensing or in the comments submitted in response to the notice of the exemption application.

(c) Article 3. The Commission may accept a license application by any qualified license applicant and revoke this exemption if actual construction or development of any proposed generating facilities has not begun within 18 months, or been completed within 24 months, from the date on which this exemption was granted. If an exemption is revoked, the Commission will not accept a subsequent application for exemption within two years of the revocation.

(d) Article 4. This exemption is subject to the navigation servitude of the United States if the project is located on navigable waters of the United States.

(e) Article 5. This exemption does not confer any right to use or occupy any Federal lands that may be necessary for the development or operation of the project. Any right to use or occupy any Federal lands for those purposes must be obtained from the administering Federal land agencies. The Commission may accept a license application by any qualified license applicant and revoke this exemption, if any necessary right to use or occupy Federal lands for those purposes has not been obtained within one year from the date on which this exemption was granted.

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