

177 FERC ¶ 61,028
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
James P. Danly, Allison Clements,
and Mark C. Christie.

Ampersand Cranberry Lake Hydro, LLC

Project No. 9685-034

ORDER TO SHOW CAUSE AND NOTICE OF PROPOSED PENALTY

(Issued October 21, 2021)

1. Pursuant to Rule 209(a)(2) of the Commission's Rules of Practice and Procedure,¹ the Commission directs Ampersand Cranberry Lake Hydro, LLC (Ampersand Cranberry Lake or Respondent), licensee for the Cranberry Lake Project No. 9685, to show cause why it should not be found to have violated Article 5 of the project license by failing to retain the possession of all project property covered by the license. The Commission further directs Respondent to show cause why it should not be assessed a civil penalty of \$600,000 for violation of Article 5 of the project's license.
2. Pursuant to Rule 213(a) of the Commission's Rules of Practice and Procedure,² the Commission directs Respondent to file an answer with the Commission within 30 days of the date of this order. Office of Enforcement staff (Enforcement staff) may reply to Respondent's answer within 30 days of the filing of the answer. The Commission will consider these pleadings as part of its review of this proceeding.

I. BACKGROUND

A. The Cranberry Lake Project

3. The Cranberry Lake Project is located on the Oswegatchie River in St. Lawrence County, New York. The license covers project property including: (1) the licensee's rights to certain lands described in the license; (2) project works, including (i) a dam that is approximately 195 feet long and 19 feet high; (ii) an earthen embankment having a

¹ 18 C.F.R. § 385.209(a)(2) (2020).

² *Id.* § 385.213(a).

fuse plug spillway; (iii) a 57,400 acre-foot reservoir; (iv) a power channel; (v) a powerhouse with a 595-kilowatt (kW) generator; (vi) a tailrace; and (3) additional facilities, including “[a]ll of the structures, fixtures, equipment or facilities used to operate or maintain the project and located within the project area.”³

4. The dam has a high hazard potential rating, which means that a failure of the project works would result in a probable loss of human life.⁴

5. The dam is owned by the Oswegatchie River-Cranberry Reservoir Regulating District Corporation (OR-CRRDC), a state municipal corporation. Previously, Ampersand Cranberry Lake maintained the dam and operated and maintained the hydroelectric project pursuant to a lease agreement with OR-CRRDC.

6. The project’s license was originally issued to Trafalgar Power, Inc. on April 27, 1987.⁵ After the project fell into disrepair,⁶ the license was transferred to Ampersand Cranberry Lake on March 12, 2015.⁷ In connection with that transfer application, Ampersand Cranberry Lake submitted a letter stating that it was part of a diversified business group with approximately \$28 million in assets and annual revenues in excess of \$10 million.⁸ Ampersand Cranberry Lake gave assurances that, if granted the transferred

³ See *Trafalgar Power, Inc.*, 39 FERC ¶ 62,088, at 63,244 (1987).

⁴ The hazard potential of a dam is based on the potential for loss of human life or economic, environmental, and/or lifeline losses in the area downstream of the dam in the event of failure of the dam or mis-operation of the dam or appurtenances. Hazard potential does not refer to the condition or hydraulic capacity of the dam or appurtenances themselves, but rather the incremental impacts should failure occur. Also, the hazard potential assigned to a dam is based on consideration of the effects of a failure during both normal and variable flood flow conditions.

⁵ See *Trafalgar Power, Inc.*, 39 FERC ¶ 62,088.

⁶ See, e.g., Joint Application for Approval of Transfer of License, at 1 (Dec. 5, 2014) (“The Cranberry Lake Project consists of a single unit which is currently not operating due to the failure of the high speed shaft couplings in addition to potential damage to the gearbox, seals, and generator bearings.”).

⁷ See *Trafalgar Power, Inc.*, 150 FERC ¶ 62,146 (2015).

⁸ Letter from Lutz Loegeters in response to Commission staff’s December 23, 2014 request for Additional Information Request on Application for Approval of Transfer of License, Docket No. P-9685-030 (Jan. 13, 2014).

license, it “will be positioned to access funding necessary to operate and maintain the Project safely and in accordance with its respective license.”⁹

B. Dam Safety Concerns and Property Dispute

7. For context relating to the instant violation, as part of its application to receive the transferred license, Ampersand Cranberry Lake committed to complete certain dam safety work involving the project’s fuse plug spillway (fuse plug) in the dam’s embankment and to raise the earthen embankment crest.¹⁰ The Cranberry Lake Dam has a fuse plug that is designed to fail during very high flows so as to increase the project’s discharge capacity. This designed failure would provide a controlled release in an effort to avoid a full breach and subsequent uncontrolled release. Before it acquired the license, Ampersand Cranberry Lake committed to complete this work by the second calendar quarter of 2017,¹¹ but it has failed to do so. Instead, Ampersand Cranberry Lake has submitted a lengthy series of extension requests covering nearly the entire time that it has held the license for the project.¹²

8. On January 28, 2019, OR-CRRDC filed a complaint in New York state court alleging that Ampersand Cranberry Lake had failed to pay minimum rent (for two years), water tax, and interest as required by the lease agreement.¹³ It sought damages of at least \$16,471.68 or, as an alternative, an order evicting Ampersand Cranberry Lake from the leased property.

⁹ *Id.* at 1-2.

¹⁰ *See, e.g.*, Letter from John Spain, Regional Engineer, to Sayad Moudachirou, Asset Manager, Docket No. P-9685-000 (Jun. 5, 2018); Letter from John Spain to Ian Chow, Asset Manager, Docket No. P-9685-000 (Feb. 27, 2017); Letter from John Spain, to Ian Chow, Docket No. P-9685-000 (Apr. 27, 2016); Letter from Gerald L. Cross Regional Engineer, to Ian Chow, Docket No. P-9685-000 (Sept. 29, 2015).

¹¹ Joint Application for Approval of Transfer of License, at 2 & 8 (Dec. 5, 2014).

¹² *See, e.g.*, Letter from Sayad Moudachirou to John Spain, Docket No. P-9685-000 (Jan. 16, 2020); Letter from Gerit F. Hul to Kimberly D. Bose, Docket No. P-9685-029 (May 22, 2015); Memorandum from Ian Chow, Docket No. P-9685-000 (Mar. 29, 2016).

¹³ *Oswegatchie River-Cranberry Reservoir Regulating District Corporation v. Ampersand Cranberry Lake Hydro, LLC*, No. EFCV-2019-0154668, Compl. at ¶¶ 14-23 (N.Y. Sup. Ct. Jan. 28, 2019).

9. On January 16, 2020, Ampersand Cranberry Lake disclosed that OR-CRRDC had filed a complaint seeking termination of the project's lease and an order directing Ampersand Cranberry Lake to vacate the project premises.¹⁴ Ampersand Cranberry Lake asserted to Commission staff that if the license were to be terminated, OR-CRRDC would be responsible for the fuse plug modification. Ampersand Cranberry Lake asked for a 60-day extension of existing deadlines (which included deadlines to prepare design and construction documentation for fuse plug replacement) to provide time for it to try to resolve its legal dispute with OR-CRRDC.

10. The Regional Engineer granted an extension in a letter dated March 31, 2020, citing the COVID-19 pandemic and giving Ampersand Cranberry Lake until May 15, 2020, to submit required design and construction documentation related to the fuse plug work.¹⁵ He indicated that no further extensions would be granted and added: "As the licensee, you are responsible for addressing all project safety related matters at the project . . . The responsibility of addressing the dam safety issue related to the fuse plug is the responsibility of Ampersand."¹⁶

11. Ampersand Cranberry Lake provided some design and construction documentation on May 19, 2020, and reported that OR-CRRDC had rejected its settlement offer and was pursuing termination of the lease.¹⁷

12. On July 23, 2020, Kimberly Nguyen, Environmental and Project Review Branch Chief for the Division of Hydropower Administration and Compliance (DHAC), notified Ampersand Cranberry Lake that Commission staff had rejected its submitted documentation as being inadequate, and it was required to submit revised documentation within 30 days.¹⁸ With respect to the property rights issue, Ms. Nguyen wrote:

In the event that the project lease with the dam owner is terminated, you would be in violation of Article 5 and subject to appropriate Commission

¹⁴ See Letter from Sayad Moudachirou to John Spain, Docket No. P-9685-000 (Jan. 16, 2020).

¹⁵ See Letter from John Spain to Sayad Moudachirou, Docket No. P-9685-000 (Mar. 31, 2020).

¹⁶ *Id.*

¹⁷ See Ampersand Untitled Filing, Docket No. P-9685-000 (May 19, 2020).

¹⁸ See Letter from Kimberly Nguyen, to Sayad Moudachirou, Docket No. P-9685-033 (July 23, 2020).

compliance actions. Given this information, it is imperative that you continue to work with the current dam owner to retain the necessary property rights under Article 5 throughout your license term, including the rights necessary to replace the fuse plug spillway and complete other required repairs to the project.¹⁹

In order to ensure that you are taking appropriate actions to comply with Article 5 to safely operate and maintain the project, please file within 30 days from the date of this letter, a detailed progress report of your compliance with this article. This report must include: (1) a description of the current effective status of your lease with the dam owner; (2) a description of all specific steps/actions you have taken, since your January 16, 2020 filing, to retain the necessary property rights; and (3) your plan and schedule to implement the future steps/actions necessary to retain the necessary rights under the lease, including any actions that may be necessary should the lease be terminated.²⁰

13. Ampersand Cranberry Lake responded on August 27, 2020, writing that the COVID-19 pandemic had slowed its consultant's progress on the design and construction documents and that it did not anticipate being able to provide final versions of those documents before December 15, 2020.²¹ It also reported that it continued to be unable to make any progress in its negotiations with OR-CRRDC and provided a summary of all steps that it had taken since January 15, 2020 to resolve the matter – which were limited to sending two settlement letters, one of which remained outstanding.²² It closed the report by writing:

[Ampersand Cranberry Lake] is hopeful that our latest proposal will entice the Regulating District to start a conversation. In case of lease termination however, [Ampersand Cranberry Lake] will be compelled to abide by the terms of the lease and transfer all relevant existing equipment and machinery to the Regulating District at no cost. In that case, [Ampersand

¹⁹ *Id.* at 2.

²⁰ *Id.* at 4.

²¹ Letter from Sayad Moudachirou to Kimberly Nguyen, Docket No. P-9685-033 (Aug. 27, 2020).

²² *See id.* at 2.

Cranberry Lake] will also be forced to either surrender the license or transfer it to the Regulating District.²³

14. On October 19, 2020, noting “the extensive delays surrounding the fuse plug spillway,” Ms. Nguyen ordered Ampersand Cranberry Lake to submit construction documents in December 2020; start construction by June 30, 2021; and complete construction by December 31, 2021.²⁴ She added:

Based on our review of your August 28 filing and our expectation that you will meet the above D2SI-NYRO schedule for completing the necessary dam safety repairs, we find you in compliance with Article 5 at this time.

However, in the event that the project lease with the dam owner is terminated and/or if you are unable to complete the above dam safety repairs due to the on-going dispute (i.e., unable to access the leased property to complete the required work), you would be in violation of Article 5 and subject to appropriate Commission compliance actions. Given this information, it is imperative that you continue to work with the current dam owner and/or take any other lawful actions necessary to retain the necessary property rights under Article 5 throughout your license term, including the rights necessary to replace the fuse plug spillway and complete other D2SI-NYRO required repairs to the project.

You stated that negotiations over your lease will begin soon. Alternatively, you suggest that it may be necessary for you to transfer the license to the dam owner or surrender the license in the future. Be aware 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.²⁵

²³ *Id.*

²⁴ *See* Letter from Kimberly Nguyen to Sayad Moudachirou, Docket No. P-9685-033 (Oct. 19, 2020).

²⁵ *Id.* at 3-4 (footnotes omitted).

She directed Ampersand Cranberry Lake to file a status report on the lease issue by December 1, 2020, discussing the steps that it has taken to retain the necessary property rights and its plans and schedule for future steps to retain those rights.²⁶

15. Ampersand Cranberry Lake submitted the required design documents in December 2020.²⁷ That submission also purported to provide the status report on the lease issue, which did not identify any specific steps that it had taken to retain necessary property rights nor plans for future steps:

As of December 1, 2020, Ampersand Cranberry Lake Hydro still has control over the lease and is continuing to operate the Cranberry lake hydro according to its license. However, recent discussions with counsel of the Regulating District, confirmed the likelihood that the ongoing lawsuit will be resolved with a termination of the lease and the obligation of Ampersand Cranberry Lake to vacate the property, and turn over the equipment and machine to the Regulating District per the termination conditions. This is still a fluid situation with further updates expected by the end of this week of November 30, 2020.

16. On January 28, 2021, Robert Fletcher, Chief of the DHAC Land Resources Branch, responded to that update, referencing a January 21, 2021 telephone conversation in which Ampersand Cranberry Lake “confirmed that the current status of this matter has not changed.”²⁸ He continued:

Based on our review of your December 2, 2020 filing, we find that you remain in compliance with Article 5 at this time. Please note that should the project lease be terminated and/or if you are unable to complete the fuse plug spillway modifications due to the on-going lease dispute, you would be in violation of Article 5 and subject to appropriate compliance actions. In order for us to monitor the situation, please keep us informed of any changes regarding your lease with the dam owner.

He repeated Commission staff’s earlier reminder that “any application to transfer or surrender your project license would have to be approved by the Commission.

²⁶ *See id.* at 4.

²⁷ *See, e.g.*, Letter from Sayad Moudachirou, Asset Manager, to Kimberly Nguyen, Docket No. P-9685-033 (Dec. 1, 2020).

²⁸ *See* Letter from Robert Fletcher, Branch Chief, to Sayad Moudachirou, Docket No. P-9685-033 (Jan. 28, 2021).

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.”²⁹

17. Ampersand Cranberry Lake submitted pre-construction documents for the fuse plug and embankment work on April 7, 2021.³⁰ The next week, on April 16, 2021, Ampersand Cranberry Lake requested that all preconstruction work be delayed by 90 days because OR-CRRDC had proposed to immediately terminate the lease and Ampersand Cranberry Lake needed “sufficient time to work with [OR-CRRDC] toward a definite and acceptable outcome with respect to the outstanding issues between the parties.”³¹ Commission staff did not respond to that request.

18. On July 6, 2021, Ampersand Cranberry Lake and OR-CRRDC executed a Settlement and Release agreement resolving the New York State litigation.³² Pursuant to that settlement agreement, OR-CRRDC relinquished claims to, among other things, outstanding rental and water tax payments in exchange for Ampersand Cranberry Lake’s agreement to terminate the lease and to convey by quitclaim sale to OR-CRRDC “all equipment, furniture, fixtures, and assets currently used by Lessee to operate the Project.”³³

19. On July 21, 2021, OR-CRRDC filed a notice with the New York State court that it was discontinuing the litigation with Ampersand Cranberry Lake.³⁴ It did so before any orders were issued in that litigation.

20. On July 29, 2021, Ampersand Cranberry Lake called Commission Regional Office staff and reported that OR-CRRDC had terminated the lease and that OR-CRRDC had

²⁹ *Id.* n.5.

³⁰ *See* Ampersand Cranberry Lake Untitled Filing, Docket No. P-9685-033 (Apr. 7, 2021).

³¹ Letter from Sayad Moudachirou, to Kimberly Nguyen, Docket No. P-9685-033 (Apr. 16, 2021).

³² *See* Settlement and Release Agreement, Docket No. P-9685-000 (filed Sept. 15, 2021).

³³ *Id.*

³⁴ *Oswegatchie River-Cranberry Reservoir Regulating District Corporation v. Ampersand Cranberry Lake Hydro, LLC*, No. EFCV-2019-0154668, Notice of Discontinuance (July 21, 2021).

revoked Ampersand Cranberry Lake's access to the Project Site as of July 25, 2021, with both Ampersand and OR-CRRDC signing that termination.³⁵ At OR-CRRDC's request, Ampersand Cranberry Lake surrendered the keys and access equipment for the dam and powerhouse and no longer has physical access to either one.³⁶ Ampersand Cranberry Lake was told that OR-CRRDC was working with National Grid to de-energize the powerhouse.³⁷ At the time of that telephone call, Commission staff was reviewing Ampersand Cranberry Lake's pre-construction documents.

21. Ampersand Cranberry Lake has not performed any work on the outstanding fuse plug and embankment work since it lost possession of the project works.

II. VIOLATIONS AND REMEDIES

22. Article 5 of the Project license states, in pertinent part:

The Licensee or its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use
.....

23. On July 29, 2021, Ampersand Cranberry Lake notified Commission staff that it had completely lost possession of the project works as of July 25, 2021. It previously had represented that loss of such possession would prevent it from complying with the Commission's dam safety orders. Failure to retain possession of all project property covered by the license as issued or as later amended would be a violation of license Article 5.

III. Potential Remedies

A. Civil Penalty

24. Section 31(c) of the FPA, 16 U.S.C. § 823b(c) (2018), states that "[a]ny licensee, permittee, or exemptee who violates or fails or refuses to comply with any rule or regulation under this subchapter, any term, or condition of a license, permit, or exemption under this subchapter . . . shall be subject to a civil penalty in an amount not to exceed

³⁵ Memorandum by Patrick M. Kelly, Civil Engineer, Docket No. 9685-000 (Aug. 17, 2021).

³⁶ *See id.*

³⁷ *See id.*

\$10,000 for each day that such violation or failure or refusal continues.” Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015,³⁸ that maximum penalty has been increased to \$23,607 per-day for each violation.³⁹

25. A total of 88 days have elapsed since Ampersand Cranberry Lake lost possession of Project property (as defined by the license). At \$23,607 per-day, the maximum civil penalty for this violation as of today is \$2,077,416, but that maximum penalty will increase with each passing day.

26. Taking into consideration the nature and seriousness of the violations and the efforts of Ampersand Cranberry Lake to remedy the violations in a timely manner, as required by section 31(c) of the FPA, and the factors set out in 18 C.F.R. § 385.1505 (2021),⁴⁰ the Commission proposes imposition of a civil penalty equal to \$600,000.

27. Maintaining possession of all necessary property rights for a hydroelectric project is a duty of the utmost importance for a licensee, for such possession is not only essential for the proper operation of the project, but also for protection of the project’s neighbors from harm. Ampersand Cranberry Lake claims that its inability to access the project property will prevent it from complying with Commission staff’s dam safety orders —

³⁸ Sec. 701, Public Law 114-74, 129 Stat. 584, 599.

³⁹ 18 C.F.R. § 385.1602 (2020).

⁴⁰ Section 385.1505 reads as follows:

a) In determining the amount of a proposed penalty, the Commission will consider the nature and seriousness of the violation, and the efforts of the licensee, exemptee, permittee or one who should possess appropriate authority but does not, to remedy the violation in a timely manner.

(b) In making its determination under paragraph (a), the Commission will consider the following factors: (1) Whether the person had actual knowledge of the violation; (2) Whether the person had constructive knowledge of the violation deemed to be possessed by a reasonable individual acting under similar circumstances; (3) Whether the person has a history of previous violations; (4) Whether the violation caused loss of life or injury to persons; (5) Whether economic benefits were derived because of the violation; (6) Whether the violation caused damage to property or the environment; (7) Whether the violation endangered persons, property or the environment; (8) Whether there were timely remedial efforts; (9) Whether there were untimely remedial efforts; (10) Whether there were no remedial efforts; and (11) Whether there are any other pertinent considerations.

after delaying for many years the work required by those orders, work that it committed to complete when it applied for transfer of the license. A failure of the high hazard dam at this project would result in a probable loss of human life. Accordingly, this potential violation of Article 5 is very serious. Ampersand Cranberry Lake voluntarily agreed to terminate its lease and sell Project equipment to OR-CRRDC in a settlement of OR-CRRDC claims for economic damages against it. Based on the reports that it submitted, it appears that Ampersand Cranberry Lake made few efforts to take remedial action regarding its loss of property rights, notwithstanding repeated letters from Commission staff directing it to ensure that it did not lose possession of the project. In fact, seeing the potential loss of possession, Ampersand Cranberry Lake sought to absolve itself of its dam safety obligations (and the economic cost of complying with such obligations), claiming that OR-CRRDC would be responsible for completing the work on the fuse plug and embankment that it had committed to do. The Commission has considered the foregoing factors in proposing the civil penalty.

28. To the degree that Ampersand Cranberry Lake is able to negotiate access to the project sufficient to complete the fuse plug and embankment work, the Commission may allow Ampersand Cranberry Lake to offset the costs of such work against any civil penalty that it assesses.

29. In support of its license transfer application, Ampersand Cranberry Lake represented that as part of a “diversified business group,” it “will be positioned to access funding necessary to operate and maintain the Project safely and in accordance with its respective license.” Given this representation and other factors, the Commission will consider naming Ampersand Cranberry Lake’s corporate parent(s) as alter-ego defendant(s) in any federal court enforcement action if Ampersand Cranberry Lake fails to make timely payment of any civil penalty that is assessed.

IV. Conclusion

30. The Commission directs Respondent to respond to this order as set forth above.⁴¹ This order also is the notice of proposed penalty required pursuant to section 31 of the FPA.⁴² In its answer(s) to this order, Respondent has the option to choose between either

⁴¹ Under 18 C.F.R. § 385.213(c), Respondent must file an answer that provides a clear and concise statement regarding any disputed factual issues and any law upon which it relies. Respondent must also, to the extent practicable, admit or deny, specifically and in detail, each material allegation and set forth every defense relied upon. Failure to answer an order to show cause will be treated as a general denial and may be a basis for summary disposition under Rule 217. 18 C.F.R. § 385.213(e)(2) (2020).

⁴² 16 U.S.C. § 823b(d).

(a) an administrative hearing before an Administrative Law Judge at the Commission prior to the assessment of a penalty under section 31(d)(2)(A), or (b) a prompt penalty assessment by the Commission under section 31(d)(3)(A). If Respondent elects an administrative hearing before an ALJ, the Commission will issue a hearing order unless it is determined that the matter can be resolved in a summary disposition. If Respondent elects a prompt penalty assessment, and if, after a review of the full record to be developed in this proceeding, the Commission finds a violation, the Commission will issue an order assessing a penalty. If such penalty is not paid within 60 days of assessment, the Commission will commence an action in a United States district court for an order affirming the penalty.⁴³

The Commission orders:

(A) Within 30 days of the date of this order, Respondent must file an answer in accordance with Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213, showing cause why it should not be found to have violated Article 5 of the Project license.

(B) Within 30 days of the date of this order, Respondent must file an answer in accordance with Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213, showing cause why violation of Article 5 of the Project license should not warrant an order requiring Ampersand Cranberry Lake to be assessed a civil penalty totaling \$600,000, or a modification of that amount consistent with section 31(d)(4) of the FPA.

(C) In any answer, Respondent should address any matter, legal, factual or procedural, that it would urge in the Commission's consideration of this matter. To the extent that Respondent cites any material not already published in the above-cited dockets, Respondent is directed to file non-publicly one copy of such material on CD-ROM or DVD in the captioned docket and to serve a copy of same on Enforcement staff.

(D) Pursuant to section 31(d)(1) of the FPA, within 30 days of the date of this order, Respondent may also make an election to have the procedures set forth in section 31(d)(3) of the FPA apply to this proceeding. Under that provision, if the Commission finds a violation, the Commission will issue a penalty assessment and, if not paid within 60 days of the order assessing penalties, the Commission will institute an action in the appropriate

⁴³ FPA section 31(d)(3)(B), 16 U.S.C. § 823b(d)(3)(B).

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United States district court. Should Respondent fail to make a timely election under section 31(d)(1), the procedures of section 31(d)(2) will apply.

By the Commission. Commissioner Danly is concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Ampersand Cranberry Lake Hydro, LLC

Project No. 9685-034

(Issued October 21, 2021)

DANLY, Commissioner, *concurring*:

1. I concur with today's order directing Ampersand Cranberry Lake Hydro, LLC (Ampersand) to show cause why it should not be assessed a civil penalty of \$600,000 for violating Standard Article 5 of Ampersand's license.¹ I write separately to underscore two points.
2. *First*, the Commission cannot allow licensees to thwart their license obligations by forfeiting the property rights necessary to comply with those obligations.
3. *Second*, this proceeding highlights how critical it is for the Commission to ensure that licensees have the financial wherewithal (and incentive) to physically maintain their facilities.² The Commission inquired into Ampersand's ability to meet the financial obligations of the project.³ Ampersand assured the Commission that it "will be positioned to access funding necessary to operate and maintain the Project safely and in accordance with its respective license," noting its access to lines of credit, debt, and equity infusions from its parent company.⁴ The Commission reviewed Ampersand's assurances and found them satisfactory.⁵ And despite these steps, Ampersand has not yet

¹ *Ampersand Cranberry Lake Hydro, LLC*, 177 FERC ¶ 61,028 (2021).

² *See Financial Assurance Measures for Hydroelectric Projects*, 174 FERC ¶ 61,039 (2021) (Notice of Inquiry); *see also Boyce Hydro Power, LLC*, 175 FERC ¶ 61,049 (2021) (Danly, Comm'r, concurring at P 3).

³ *See* Commission Staff December 23, 2014 Additional Information Request Letter, Docket No. P-9685-030, at 1-2 (Accession No. 20141223-3051).

⁴ *See* Ampersand January 13, 2015 Additional Information Request Letter Response, Docket No. P-9685-030, at 1-2 (Accession No. 20150113-5123).

⁵ *See Trafalgar Power, Inc.*, 150 FERC ¶ 62,146, at P 4 (2015).

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completed work on the fuse plug spillway which it had said would be complete by the second quarter of 2017.⁶

4. How to go about resolving the issue of licensee solvency requires a great deal of thought. My hope is that, when we move forward from the Notice of Inquiry, we will convene one or more technical conferences to offer more structured fora in which to explore these questions. It is my further hope that everyone with an interest participate in the Commission's generic proceedings on financial assurance, to help us improve the record we have already begun compiling in the Notice of Inquiry and offer the best analysis they can regarding the extent of the Commission's powers and the most reasonable means by which to employ them.

For these reasons, I respectfully concur.

James P. Danly
Commissioner

⁶ See Trafalgar Power Inc. and Ampersand December 5, 2014 Joint Application for Approval of Transfer of License, Docket No. P-9685-031, at Ex. A Proposed Preliminary Schedule (Accession No. 20141205-5327).

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