

129 FERC ¶ 61,027
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

AmerenUE

Project No. 459-282

ORDER DENYING REQUEST FOR REHEARING
AND MOTION TO INTERVENE

(Issued October 15, 2009)

1. On June 8, 2009, the Commission's Secretary issued a notice dismissing a motion to intervene and request for rehearing filed by Duncan's Point Home Owners and Lot Owners Association (Duncan's Point Owners) in the post-licensing proceeding for the Pebble Creek and Duncan's Point Public Access Plan for the Osage Hydroelectric Project No. 459. On July 8, 2009, Duncan's Point Owners filed a timely request for rehearing of the dismissal and a renewed motion to intervene. For the reasons discussed below, we deny Duncan's Point Owners' pleadings.

Background

2. The licensed 176.2-megawatt Osage Project is located on the Lake of the Ozarks (Lake) in Missouri.¹ Pursuant to Article 41 of the project license, the licensee, AmerenUE, authorized a developer to build a seawall on project land and run a buried effluent discharge pipe from a wastewater treatment facility within a private development of lake-front homes known as the Pebble Creek Development, across project lands and into the Lake, near Duncan's Point resort, which occupies a peninsula bordered by the Lake and Lick Creek Cove.² The Pebble Creek Development and Duncan's Point are located outside the project boundary.

¹ The project was originally licensed in 1926. The Commission issued new licenses for the project in 1981 and 2007. *Union Electric Co.*, 15 FERC ¶ 62,038 (1981); *Union Electric Co. d/b/a AmerenUE*, 118 FERC ¶ 62,247 (2007).

² Article 41, the Commission's standard land use article, delegates authority to the licensee to grant permission for certain use and occupancy of project property, including

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3. On September 7, 2004, Commission staff issued a letter order finding that the licensee had not fully complied with Article 41 with respect to granting a permit for the seawall and that the seawall impeded public access along the shoreline at Duncan's Point, in violation of Article 18 of the license.³ Staff required the licensee to file a compliance plan and quarterly compliance reports to ensure that its procedures for issuing permits fully complied with Article 41. As mitigation for impacts to public access, staff required the licensee to file a plan for public access, including construction of a paved walkway at the seawall location to provide contiguous access to the shoreline, designation of a general public access area at the crossroads of the Pebble Creek Development and Duncan's Point (located between lots 14 and 15 of the Pebble Creek Development), and development and maintenance of a two-acre public park toward the back of Lick Creek Cove, with a parking area, trail to the Lake, and shoreline access area, to be named in honor of Daniel R. Duncan, founder of Duncan's Point.⁴ The licensee filed the plan on November 15, 2004, and Commission staff approved it on February 23, 2005.

4. On March 4, 2005, Duncan's Point Owners filed a formal complaint against the licensee regarding the seawall and discharge pipe. The Commission denied the complaint, finding that it duplicated matters already examined and resolved informally by Commission staff.⁵ The complainants sought rehearing, which the Commission denied.⁶ They then filed a petition for judicial review of the denial, together with the Commission's denial of their requests for rehearing of staff's related letter orders of

permits for the construction of retaining walls for erosion control and easements for effluent lines. *See Union Electric Co.*, 15 FERC ¶ 62,038 at p. 63,048.

³ Article 18 is a standard license article that directs the licensee to allow reasonable public access to project lands and waters for recreational purposes. *See Form L-3, Terms and Conditions of License for Constructed Major Project Affecting Lands of the United States*, published at 54 FPC 1817 (revised Oct. 1975), and incorporated by reference in the 1981 Osage Project license, *Union Electric Co.*, 15 FERC ¶ 62,038 at p. 63,046 (Ordering Paragraph D).

⁴ *See* letter from John Estep, FERC, to David Fitzgerald, AmerenUE (dated Sept. 7, 2004).

⁵ *Duncan's Point Lot Owners Ass'n v. Union Electric Co.*, 111 FERC ¶ 61,190 (2005).

⁶ *Duncan's Point Lot Owners Ass'n v. Union Electric Co.*, 112 FERC ¶ 61,289 (2005).

September 1, 2005, and March 28, 2006.⁷ On April 15, 2008, the court denied the petitions for review, finding that the Commission had acted reasonably throughout the controversy.⁸ This ended the proceeding on the complaint and related letter orders.

5. On April 20, 2007, the Commission issued an order granting the licensee's application for a non-project use of project lands, which allowed the construction on project lands of part of a deck associated with an adjacent residence.⁹ As mitigation for the encroachment, the Commission required the licensee to improve the public access area at the crossroads of Duncan's Point and Pebble Creek by installing a floating courtesy dock and an all-weather gravel walkway.¹⁰ The licensee filed a report on June 18, 2007, documenting that it had implemented the required improvements. Commission staff accepted the licensee's documentation on July 17, 2007.

6. Commission staff continued to monitor the licensee's compliance regarding project boundary and public access issues. On July 22, 2008, staff conducted a site visit to the area of the Pebble Creek Development. During the site visit, staff determined that the project boundary in the vicinity of Pebble Creek was not well-marked and that private patio furniture obstructed a portion of the seawall walkway. As a result, staff issued a letter order on December 8, 2008, requiring that the licensee develop a plan to permanently mark the project boundary along the Pebble Creek Development and to ensure contiguous access along the entirety of the shoreline at Pebble Creek by linking the seawall walkway, public access area at the crossroads of Duncan's Point and Pebble Creek, and the Daniel R. Duncan Park and Access area, and provide for the extension of the seawall walkway to the Daniel R. Duncan Park and Access area.

7. On February 5, 2009, AmerenUE filed a public access plan for the Pebble Creek and Duncan's Point areas. On March 6, 2009, Duncan's Point Owners filed a motion to

⁷ See *Union Electric Co.*, 112 FERC ¶ 61,289 (2005); *Union Elec. Co.*, 114 FERC ¶ 61,038 (2006).

⁸ *Duncan's Point Lot Owners Ass'n. v. FERC*, 522 F.3d 371, 378 (D.C. Cir. 2008).

⁹ *Union Electric Co.*, 119 FERC ¶ 61,073 (2007).

¹⁰ Commission staff issued public notice of the application, and Duncan's Point Owners intervened in opposition to it. Although they filed a timely request for rehearing of the April 20, 2007 order, the Commission's Secretary rejected it by notice issued on May 25, 2007, because it failed to raise any specific allegations of error. Duncan's Point Owners sought rehearing of the rejection, and the Commission denied rehearing on July 6, 2007. *Union Electric Co.*, 120 FERC ¶ 61,015 (2007).

intervene and comments on the plan. On April 8, 2009, Commission staff issued an order responding to the comments and modifying and approving the plan.¹¹ Staff modified the plan to require the licensee to file a report documenting implementation of its plan, add measures to address any damaged project boundary markers or encroachments discovered during the licensee's monthly inspections, and clarify that construction of a paved walkway along the undeveloped portions of the shoreline was not necessary.

8. On May 8, 2009, Duncan's Point Owners filed a request for rehearing of the April 8, 2009 Order. On June 8, 2009, the Commission's Secretary dismissed Duncan's Point Owner's March 6, 2009 motion to intervene and dismissed their May 8, 2009 request for rehearing for lack of party status, citing the Commission's practice of not entertaining motions to intervene and requests for rehearing in post-licensing proceedings except under limited circumstances that did not exist in this proceeding.

9. On July 8, 2009, Duncan's Point Owners filed their request for rehearing and motion to intervene, arguing that the Commission should entertain their motion because their recreational rights are adversely affected and they should be given a consultation role in this post-licensing proceeding. Duncan's Point Owners reiterate their ongoing concern that the licensee is not complying with the requirements of its 2004 mitigation plan or subsequent orders of the Commission, citing in particular the December 8, 2008 letter order's requirement that the licensee's public access plan "provide for the extension of the seawall walkway to the Daniel R. Duncan Access area."

Discussion

A. Duncan's Point Owners' Motion to Intervene and Consultation Role

10. Duncan's Point Owners seek intervention for the purpose of requesting rehearing of Commission staff's April 8, 2009 Order, which modified and approved the licensee's public access plan and determined that the plan, as modified, met the requirements of the December 8, 2008 letter order.

11. Although the Commission allows extensive public participation in licensing proceedings, after a license has been issued, opportunities for public participation in compliance matters are limited. The June 8 notice articulated the Commission's long-standing practice of limiting public participation in post-licensing proceedings to those

¹¹ *AmerenUE*, 127 FERC ¶ 62,024 (2009)(April 8, 2009 Order). As required by the April 8, 2009 Order, *AmerenUE* filed a report documenting its implementation of the plan on June 29, 2009. Commission staff accepted the licensee's documentation by letter order on September 18, 2009.

involving certain types of filings. Specifically, to give rise to an opportunity to intervene, the licensee's filing or the Commission's order must involve a material change in the plan of project development or in the terms and conditions of the license, an adverse effect on the rights of a property holder in a manner not contemplated by the license, or an appeal by an agency or entity specifically given a consultation role with respect to the filing at issue.¹² This approach allows the Commission to act on numerous hydroelectric compliance matters in a manner that is both administratively efficient and consistent with the requirements of the Federal Power Act and due process.¹³

12. In this case, the licensee is simply engaged in complying with the terms of the April 8, 2009 Order. The compliance plan entails no material change in project operations and no property rights have been affected. For filings that simply involve compliance matters that neither materially change license requirements or adversely affect property rights in a manner not contemplated by the license, there is no opportunity to intervene and seek rehearing with respect to the filing.

13. The Commission recognizes that entities that are given a consultation role in a particular license article or compliance matter should be allowed to intervene and seek rehearing of matters on which they were required to be consulted.¹⁴ Duncan's Point Owners are not named as an entity to be consulted concerning compliance with the public access plan. However, they contend that they should be given a consultation role, because they were parties and stakeholders during the relicensing proceeding.

¹² See *Puget Sound Energy, Inc.*, 112 FERC ¶ 61,116, at P 6 (2005); *City of Tacoma, Washington*, 109 FERC ¶ 61,318, at P 6 (2004); *City of Tacoma, Washington*, 89 FERC ¶ 61,058, at p. 61,193 (1999); *Pacific Gas and Electric Company*, 40 FERC ¶ 61,035, at p. 61,099 (1987); and *Kings River Conservation District*, 36 FERC ¶ 61,365, at p. 61,883 (1986). As discussed in greater detail in the *Kings River* case, if a filing would involve a material change to the project or its operation, section 6 of the Federal Power Act, 16 U.S.C. § 799 (2006), would require that the Commission provide notice and an opportunity to participate in much the same manner as it does for licensing proceedings. Similarly, if the rights of third-party property holders could be adversely affected by post-licensing actions of the Commission, due process considerations would require that the Commission provide notice and an opportunity to be heard.

¹³ See *City of Tacoma, Washington*, 109 FERC ¶ 61,318, at n. 5 (2004); and *Kings River Conservation District*, 36 FERC ¶ 61,365, at p. 61,181-83 (1986).

¹⁴ See, e.g., *Pacific Gas and Electric Company*, 40 FERC ¶ 61,035 (1987).

14. We have previously made clear that intervention in a licensing proceeding does not carry over to post-licensing proceedings.¹⁵ Indeed, each post-licensing proceeding is a separate matter,¹⁶ so that successful intervention in one post-licensing case does not carry over to other post-licensing proceedings.¹⁷ Thus, the fact that Duncan's Point Owners were parties to the relicensing proceeding is not dispositive here. Moreover, to the extent that Duncan's Point Owners object to the fact that the license did not require consultation with them as to public access issues, they should have raised that issue on rehearing of the license order.¹⁸ Such an assertion is now time barred.

15. While consultation status affords entities an opportunity to intervene in post-licensing proceedings, consultation status is not afforded all entities. Consultation status in post-licensing proceedings is generally given to resource agencies and entities that have a specific interest or expertise that is not otherwise represented in the proceeding. Duncan's Point Owners' participation in the relicensing proceeding as stakeholders does not provide support for their participation in post-licensing proceedings as a consulted entity. Although Duncan's Point Owners include lot owners, homeowners, and residents of Duncan's Point resort, which is adjacent to the areas that are included in the licensee's public access plan, both Duncan's Point resort and the Pebble Creek Development are located outside of the project boundary. The plan, which improves public access to the shoreline along the Pebble Creek Development, does not adversely affect Duncan's Point Owners' property rights. To the extent Duncan's Point Owners seek consultation status because of their concern about the licensee's compliance with the plan and related Commission orders, their interest in compliance is not a sufficient interest or a justification for granting consultation status. It is the Commission's responsibility to monitor and enforce the licensee's compliance with matters within the Commission's jurisdiction.¹⁹

¹⁵ See, e.g., *Merimil Limited Partnership*, 115 FERC ¶ 61,087 (2006).

¹⁶ See, e.g., *City of Tacoma, Washington*, 89 FERC ¶ 61,058 (1999).

¹⁷ See, e.g., *Indiana-Michigan Power Company*, 87 FERC ¶ 61,278 (1999).

¹⁸ Duncan's Point Owners filed a timely request for rehearing of the license order on April 30, 2007, but did not raise the consultation issue. On May 25, 2007, the Commission's Secretary dismissed the filing as deficient for failure to include a statement of issues. Duncan's Point Owners sought rehearing of the rejection, and the Commission denied rehearing on July 6, 2007. *Union Electric Co.*, 120 FERC ¶ 61,016 (2007).

¹⁹ Although Duncan's Point Owners were parties to the 2005 complaint proceeding and the 2007 proceeding authorizing the non-project use of project lands

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16. Since none of the bases for public participation in this post-licensing proceeding exist, we conclude that the Secretary properly dismissed Duncan's Point Owners' motion to intervene and request for rehearing. For purposes of clarification, however, we discuss below their contention that the December 8, 2008 letter order required the licensee to construct an extended walkway and that the licensee's public access plan is inconsistent with the order's requirement.

B. The Walkway Requirement

17. Staff's December 8, 2008 letter order required, among other things, that the licensee's public access plan provide for the extension of the seawall walkway to the Daniel R. Duncan Park and Access area. Duncan's Point Owners contend that this is essentially a requirement to construct an extended paved walkway. In support of their interpretation, Duncan's Point Owners argue that staff's requirement that the licensee ensure contiguous public access by linking the seawall walkway, the public access area at the crossroads of Duncan's Point and Pebble Creek,²⁰ and the Daniel R. Duncan Park and Access area²¹ indicates that the licensee was to connect these areas by constructing a paved walkway. We disagree.

18. Although staff's December 8, 2008 letter order states that the plan "must provide for the extension of the seawall walkway to the Daniel R. Duncan [Park and] Access area," staff clarified this requirement in its April 8, 2009 Order after reviewing the

discussed above, both of these proceedings are completed, and they provide no basis for seeking intervention and rehearing in any subsequent post-licensing matters. The compliance proceeding instituted by Commission staff's December 8, 2008 letter order is a separate matter, and is unrelated to these earlier proceedings.

²⁰ Duncan's Point Owners contend that there is no such crossroad. As shown in the photographs included in the licensee's compliance filing of June 18, 2007, the walkway and removable courtesy dock are in fact located at the crossroads of Duncan Drive and Pebble Creek Drive.

²¹ Duncan's Point Owners contend that the Commission has failed to enforce its order to put in a Daniel R. Duncan Park, while now referring to the area as an access area instead of a park. At various points, Commission staff has referred to this area as either a park or an access area. The licensee's February 5, 2005 public access plan refers to it as the Daniel R. Duncan Park and Public Access area. The Commission addressed and resolved the issue of the adequacy of the park as part of the 2005 complaint proceeding, which is now completed. *See Union Electric Co.*, 114 FERC ¶ 61,038, at P 17-20 (2006), *aff'd*, *Duncan's Point Lot Owners Assn. v. FERC*, 522 F.3d 371, 378 (D.C. Cir. 2008).

licensee's plan and considering Duncan's Point Owners' comments. Staff found that sufficient project lands exist along both the developed and undeveloped portions of Pebble Creek to provide safe public access, and that delineation of the project boundary along the entirety of the shoreline would clearly indicate project lands open to public access. Staff further found that, since marking of the project boundary would delineate the public access corridor along Pebble Creek, the marking would link the seawall walkway to the public access area between Pebble Creek lots 14 and 15 and to the Daniel R. Duncan Park and Access area. Staff expressly rejected the option of constructing a paved walkway through the undeveloped, vegetated sections of Pebble Creek because it would alter the natural appearance of the shoreline and require the removal of vegetation, which could result in increased runoff and erosion and adversely affect water quality and wildlife habitat. Instead, staff found that, once the project boundary markers are installed, project lands will be readily identifiable along all of Pebble Creek and that this will provide a linkage between all of the public access points, consistent with the December 8, 2008 letter order. Thus, the April 8, 2009 Order makes it clear that Commission staff did not intend to require the construction of a paved walkway from the seawall walkway to the park, and Duncan's Point Owners overlook this clarification.

19. We agree that construction of a paved walkway along the undeveloped portions of the Lake shoreline is not necessary, and is indeed undesirable. It is sufficient to require, as staff did in the April 8, 2009 Order, that the project boundary be clearly marked, and that the licensee include provisions in its plan to identify and correct any damaged project boundary markers or encroachments onto project lands. This will ensure unobstructed public access to the shoreline near Pebble Creek.

The Commission orders:

The request for rehearing and motion to intervene, filed by Duncan's Point Home Owners and Lot Owners Association on July 8, 2009, are denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.