

134 FERC ¶ 61,114
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Appalachian Power Company

Project No. 2210-206

ORDER DENYING REHEARING

(Issued February 17, 2011)

1. On November 12, 2010, the Commission's Secretary issued a notice¹ rejecting as untimely Jody and Polly Lyons' request for rehearing of an August 16, 2010 Commission staff letter finding that Appalachian Power Company's (licensee) actions complied with the terms of its license for the Smith Mountain Pumped Storage Project No. 2210. The project is located on the headwaters of the Roanoke River in Bedford, Campbell, Franklin, and Pittsylvania Counties, Virginia. On December 13, 2010, the Lyons filed a timely request for rehearing of the November 12 notice. For the reasons discussed below, we deny rehearing.

Background

2. Pursuant to Article 415 of the license, the licensee has the authority to grant permission for certain types of use and occupancy of project lands and waters without prior Commission approval (e.g., piers, landings, and boat docks) and to ensure that, among other things, any facilities it permits are in compliance with the project's license, including its Shoreline Management Plan (SMP).²

¹ *Appalachian Power Co.*, 133 FERC ¶ 61,135 (2010).

² The Commission approved Appalachian Power's SMP in 2005, *Appalachian Power Co.*, 112 FERC ¶ 61,026 (2005), and approved amendments to it in 2006 and 2007. See *Appalachian Power Co.*, 115 FERC ¶ 62,071 (2006), and 118 FERC ¶ 62,149 (2007). Article 413 of the relicense order, issued in 2009, requires Appalachian Power to continue to implement the SMP. *Appalachian Power Co.*, 129 FERC ¶ 62,201, at 64,600 (2009).

3. The Lyons own a single slip dock on Smith Mountain Lake. In 2008, the licensee determined that the dock was not built to the exact specifications of its permit, and that the Lyons had made unauthorized improvements and changes to the dock. Accordingly, the licensee imposed various measures to enforce the terms and conditions of the permit, and to bring the unauthorized additions into compliance with the SMP. The Lyons appealed the matter to Appalachian Power, which it denied.³

4. On May 24, 2010, the Lyons requested that Commission staff review the licensee's actions. The Lyons asserted that: 1) the licensee's actions were inconsistent with the SMP; 2) the licensee failed to follow its inspection plan for ensuring that permitted uses comply with their permits;⁴ and 3) the imposed measures to bring the dock into compliance would harm project waters by increasing sediment deposition. The licensee filed a response on June 28, 2010, and the Lyons filed an answer to the licensee's response on July 6, 2010.

5. On August 16, 2010, staff issued a letter finding that the licensee's actions were consistent with its license, the SMP, and its compliance inspection plan. On October 14, 2010, counsel for the Lyons filed on their behalf a letter, which stated only that it served "as formal notice of the Lyons Notice of Appeal claim against the . . . Commission regarding your decision of August 16, 2010 under the shoreline management plan."

6. On November 12, 2010, the Commission's Secretary issued a notice rejecting the pleading as a late-filed request for rehearing.⁵ The notice explained that, pursuant to section 313(a) of the Federal Power Act (FPA),⁶ an aggrieved party must file a request for rehearing within 30 days after the issuance of a Commission decision, in this case no later than September 15, 2010. Because the 30-day rehearing deadline is statutorily based, it cannot be extended, and the request for rehearing must be rejected as untimely. The notice further explained that: (1) even if the rehearing request had been timely, it would have been rejected because it failed to set forth specifically the ground or grounds

³ See April 20, 2010 letter from Appalachian Power to Mr. Arthur V. Shaheen, Attachment D to the Lyons' filing of May 24, 2010.

⁴ On March 20, 2008, the licensee filed a compliance inspection plan, which Commission staff approved by letter of April 9, 2008.

⁵ *Appalachian Power Co.*, 133 FERC ¶ 61,135. The notice explained that, under Rule 1902 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.1902(a) (2010), an appeal of staff action will be treated as a request for rehearing subject to the provisions of Rule 713, 18 C.F.R. § 385.713 (2010).

⁶ 16 U.S.C. § 825l (2006).

upon which it was based, as required by FPA section 313(a); and (2) the pleading was deficient because it failed to include a Statement of Issues as required by Rule 713 of the Commission's Rules of Practice and Procedure.⁷

7. On December 13, 2010, counsel for the Lyons filed on their behalf a timely request for rehearing of the November 12, 2010 rejection notice.⁸

Discussion

8. On rehearing, the Lyons argue that the August 16, 2010 staff letter does not constitute final agency action subject to rehearing because the letter: (1) is listed in the Commission's e-library system as "general correspondence," rather than as a "final agency action;" and (2) does not include a statement that it is "final agency action" and that the Lyons are entitled to seek rehearing within 30 days. Thus, according to the Lyons, there was no way to know that they had 30 days from the date of the letter to file a request for rehearing. The Lyons argue in the alternative that, even if the August 16, 2010 letter is properly deemed a final decision, the Commission "violated the Code of Federal Regulations and its own regulations" by failing to include a statement to that effect, along with notice that requests for rehearing must be filed within 30 days, pursuant to section 385.713 of our regulations. The Lyons submit that, since this "necessary notice provision language" was not included in staff's letter, their due process rights have been violated as they had no notice of their right to a rehearing, and are precluded from exercising their right to appeal the decision to an appellate court.⁹

9. The Lyons are incorrect. To determine whether a staff action is subject to rehearing, we look to our regulations, not to how a document may be described in our e-library system.¹⁰ Neither the FPA nor our regulations requires that a staff action

⁷ 18 C.F.R. § 385.713(c)(2) (2010).

⁸ On December 14, 2010, counsel filed an identical rehearing request, and included several attachments that were not part of the December 13, 2010 filing. Because the December 14, 2010 pleading was filed after the 30-day rehearing deadline (December 13, 2010), it must be rejected as untimely. We note in any event that the attachments to the December 14, 2010 filing were previously placed in the record of this proceeding by the Lyons.

⁹ Section 313(a) of the FPA provides that seeking rehearing is a prerequisite to judicial review.

¹⁰ It is not unusual for e-library to classify as "general correspondence" staff letters that issue final agency action subject to rehearing. *See, e.g.*, December 17, 2010 letter

(continued...)

subject to rehearing contain a statement to that effect. To the contrary, Rule 713 (Request for rehearing) of our Rules of Practice and Procedure,¹¹ which sets out the 30-day rehearing deadline and other filing requirements, provides: “This section applies to any request for rehearing of a final Commission decision or other final order, *if rehearing is provided for by statute, rule, or order.*”¹² (Emphasis added.) Rule 1902 (Appeals from action of staff) offers additional guidance:¹³

Any staff action (other than a decision or ruling of presiding officer . . . made in a proceeding set for hearing under Subpart E . . .) taken pursuant to authority delegated to the staff by the Commission is a final agency action that is subject to a request for rehearing under Rule 713 (request for rehearing). [Emphasis added.][¹⁴]

10. Entities practicing before the Commission are charged with knowledge of the Commission’s rules.¹⁵ Moreover, where, as here, entities are represented by counsel, we expect counsel to be familiar with relevant provisions of the FPA and our regulations, and to inform their clients of procedural requirements, such as deadlines for seeking rehearing of a staff determination that is not to their liking. We note that in the instant

from Director, Division of Hydropower Administration and Compliance, to Xcel Energy (Project No. 1982); September 23, 2010 letter from Chief Financial Officer to Portland Hydro Project Manager (Project No. 2821); and October 6, 2008 letter from Director, Division of Financial Services, to Holcomb Rock Company (Project No. 2901).

¹¹ The Commission’s Rules of Practice and Procedure are set forth in Part 385 of our regulations, and can be referenced either as the full section number or as the shorter Rule number contained in the section’s title. *See* 18 C.F.R. § 385.103 (2010).

¹² 18 C.F.R. § 385.713(a)(1) (2010).

¹³ 18 C.F.R. § 385.1902(a) (2010).

¹⁴ In support of their argument, the Lyons point to section 385.713(a)(2)(v) of our regulations, 18 C.F.R. § 385.713(a)(2)(v) (2010), as requiring the Commission to specifically designate those actions that it considers final decisions for purposes of rehearing. The Lyons misread our regulations. That section applies by its terms only to Commission proceedings set for trial-type hearing under Subpart E of Part 385 (18 C.F.R. §§ 385.501-385.510 (2010)) (i.e., hearings before presiding officers with witnesses, testimony, exhibits, evidence, etc.). Moreover, as discussed above, staff actions have been, by regulation, designated as final agency actions.

¹⁵ *See, e.g., Northeast Hydrodevelopment, LLC*, 131 FERC ¶ 61,151, at P 7 (2010).

rehearing request, counsel did not challenge the other procedural deficiencies set forth in the November 12, 2010 notice rejecting the untimely rehearing request, including failure to set forth specifically the ground or grounds upon which the rehearing request was based, and failure to include a Statement of Issues. For the above reasons, we deny rehearing and affirm the Secretary's rejection of the Lyons' late-filed request for rehearing.¹⁶

The Commission orders:

(A) The request for rehearing filed by Jody and Polly Lyons on December 13, 2010, is denied.

(B) The request for rehearing filed by Jody and Polly Lyons on December 14, 2010, is rejected as late-filed.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁶ On rehearing, the Lyons asks that, because staff's August 16, 2010 letter was not a final agency action subject to rehearing, the Commission now "transform" the letter into a final order, with notice to the Lyons of their right to request reconsideration of the matter within 30 days of the "transformation" date. The Lyons presented this same argument in an October 25, 2010 filing. Because we deny rehearing and find that the August 16 staff letter was indeed final staff action, this request is moot.