

140 FERC ¶ 61,210  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
Cheryl A. LaFleur, and Tony T. Clark.

Union Electric Company

Project No. 459-317

ORDER DENYING REHEARING

(Issued September 20, 2012)

1. Mr. Pat Kelleher has filed a timely request for rehearing of the June 5, 2012 Commission staff order<sup>1</sup> approving a change in the project boundary for the Osage Project No. 459. As discussed below, we deny rehearing.

**Background**

2. The Osage Project is located on the Osage River in Benton, Camden, Miller, and Morgan Counties, Missouri, and immediately downstream of the U.S. Army Corps of Engineers' Harry S. Truman Dam. Following a determination by Union Electric Company (Ameren), the licensee for the project, that a large number of privately-owned structures were located within the project boundary and that some of the structures did not conform to the shoreline management plan developed by Ameren, the Commission directed Ameren to file, by June 1, 2012, an application, prepared in consultation with stakeholders, to revise the project boundary to remove any lands not needed for project purposes.<sup>2</sup>

3. Ameren filed the required application on January 31, 2012. The application proposed to generally set the project boundary at the elevation of 662 feet Union Electric Datum in most locations, lowering the boundary below that level where necessary to exclude from the boundary existing residential and commercial structures, and leaving the boundary at higher levels where necessary to encompass areas that are needed for

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<sup>1</sup> *Union Electric Company*, 139 FERC ¶ 62,177 (2012).

<sup>2</sup> *Union Electric Company*, 137 FERC ¶ 61,114 at 61,600 (Ordering Paragraph (B)).

project purposes, including public recreation and access sites, state parks, wetlands, and historic properties.<sup>3</sup>

4. On June 5, 2012, Commission staff issued an order approving Ameren's proposal, with slight modifications.<sup>4</sup> After examining the resources potentially affected by Ameren's proposal, staff concluded that approving the revised boundary would not be a federal action significantly affecting the quality of the human environment.<sup>5</sup>

5. None of the stakeholders that had previously been involved in the proceeding, including homeowners, businesses, federal and state agencies, counties, municipalities, or other entities sought rehearing. However, Mr. Kelleher, who had previously intervened in the proceeding, did.

## **Discussion**

### **A. Standing**

6. As an initial matter, we conclude that Mr. Kelleher has not been aggrieved by the June 5, 2012 order and so lacks standing to seek rehearing of it.

7. Mr. Kelleher does not demonstrate that he has any interest in the Osage Project, whether as an affected landowner, a local resident, or in any other way. Indeed, he does not suggest that he has been in any way harmed by the June 5, 2012 order, although he appears to assert generally that the order may permit the construction of additional structures, to the detriment of public access and recreation.<sup>6</sup>

8. As we have previously explained, general concerns of the type raised by Mr. Kelleher do not amount to the particularized showing of an interest that would support intervention in a post-license or compliance proceeding.<sup>7</sup> Likewise, such vague assertions do not demonstrate that a party has been aggrieved by an order, a prerequisite

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<sup>3</sup> 139 FERC ¶ 61,177 at P 25.

<sup>4</sup> The order required Ameren to ensure that the revised boundary incorporated all of the historic Duncan Point Subdivision and to examine whether lands within two state parks needed to be within the boundary. 139 FERC ¶ 62,177 at PP 55-57.

<sup>5</sup> See 139 FERC ¶ 62,177 at PP 49-52; 60-70.

<sup>6</sup> See request for rehearing at 3-4; 6.

<sup>7</sup> *Appalachian Power Company*, 137 FERC ¶ 61,208, at P 15 (2011).

to seeking rehearing.<sup>8</sup> As the Supreme Court has held with regard to establishing Article III standing, an entity must show, *inter alia*, an injury that is concrete, particularized, actual or imminent, and fairly traceable to the defendant's challenged action.<sup>9</sup> Mr. Kelleher has not made such a showing.<sup>10</sup>

## B. Merits

9. Given our conclusion that Mr. Kelleher lacks standing to seek rehearing, we need not address the merits of his arguments, but will do so for clarity.

10. Mr. Kelleher asserts that entities that own lands in fee along the project shoreline can build new structures within the project boundary at the 660-foot elevation, including fences (which he apparently is concerned will block access.)<sup>11</sup> This is theoretically true. As we previously explained in this proceeding, the fact that lands are located within a project boundary does not give the licensee title to them.<sup>12</sup> Thus, an entity with unencumbered fee title to lands within the project boundary is free to use them as that entity sees fit.

11. As a practical matter, however, the scenarios Mr. Kelleher raises are not realistic, and, even if they were, would not be likely to impact public use of the project lands and waters. First, given that the Osage Project impoundment can reach the 662-foot elevation during flood events, it seems unlikely that anyone would be interested in constructing a new building subject to flooding. It is also our understanding that many, if not all, of the deeds governing shoreline property contain restrictions preventing the deed-holders from taking action that interferes with Ameren's operation of the project, such that Ameren could prevent future construction that would unduly affect public access or recreation. Finally, in the June 5, 2012, order, Commission staff responded to comments from Mr. Kelleher regarding the impact on public recreation and access of the proposed change

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<sup>8</sup> See 16 U.S.C. § 825l (2006) (any person *aggrieved* by an order issued by the Commission . . . may apply for a rehearing . . . ." (emphasis added).

<sup>9</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). See also *City of Tacoma, Washington*, 135 FERC ¶ 61,155, at PP 17-24 (2001).

<sup>10</sup> We have recently explained in two instances that Mr. Kelliher's unspecific interests in public access and recreation do not provide sufficient grounds for intervention in Commission proceedings. *PPL Holtwood, LLC*, 140 FERC ¶ 61,038 (2012); *Alabama Power Company*, 140 FERC ¶ 61,037 (2012).

<sup>11</sup> Request for rehearing at 3.

<sup>12</sup> 137 FERC ¶ 61,114 at P 25.

in the project boundary, explaining that almost all of the land being removed from the boundary was already not available to the public,<sup>13</sup> that private property owners cannot restrict public access to shoreline areas owned or controlled by Ameren, and that shoreline camping is only permitted in designated areas.<sup>14</sup> The approved changes to the boundary did not delete any public recreation sites or access areas, and thus will have no impact on those resources.

The Commission orders:

The request for rehearing filed on July 5, 2012 by Mr. Pat Kelleher is denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>13</sup> Ameren's interest in most of these lands was limited to flowage easements. 139 FERC ¶ 62,177 at P 51.

<sup>14</sup> 139 FERC ¶ 62,177 at P 52.