

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeem G. Kelly.

Duke Energy Corporation

Project Nos. 2686-039  
2698-037  
2602-009

ORDER DENYING REHEARING

(Issued June 27, 2005)

1. The Friends of Lake Glenville Association, Inc. (Association) has requested rehearing of a March 28, 2005 notice dismissing as interlocutory the Association's February 25, 2005 request for rehearing of Commission staff's January 28, 2005 letter. The letter stated that staff would not issue a Scoping Document No. 2 as part of the National Environmental Policy Act (NEPA) process. For the reasons discussed below, we deny the Association's rehearing request. This order is in the public interest because it clarifies the Commission's procedural rules.

**Background**

2. In January 2004, Duke Energy Corporation (Duke Energy) filed a Settlement Agreement and new license applications for the West Fork Hydroelectric Project No. 2686 and the East Fork Hydroelectric Project No. 2698. The projects are located on the Tuckasegee River, in Jackson County, North Carolina.<sup>1</sup>

3. Duke Energy and sixteen other stakeholders signed the Settlement Agreement, which resolves the signatories' issues related to Duke Energy's January 2004 license applications.<sup>2</sup> The Association, a group comprising landowners surrounding Lake

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<sup>1</sup> On June 1, 2004, Duke Energy filed a surrender application for the Dillsboro Project No. 2602, also located on the Tuckasegee River, in Jackson County, North Carolina.

<sup>2</sup> Signatories include various state and federal resource agencies, the Bear Creek Lake and Cedar Cliff Lake Residents, American Whitewater Affiliation, North Carolina Wildlife Federation, and the Eastern Band of Cherokee Indians.

Glenville, the West Fork Project's primary reservoir, participated in the process leading to the Settlement Agreement, but did not sign it.

4. On October 29, 2004, staff initiated the environmental review process for the proposed relicensings by issuing Scoping Document 1 to solicit written comments on the scope of issues to be considered in staff's Environmental Assessment (EA). Staff indicated in Scoping Document 1 that it would evaluate, among other issues, the relicense applications for the East Fork and West Fork Projects, and the proposals for the new licenses set forth in the Settlement Agreement.

5. After conducting public scoping meetings in December 2004, staff issued a letter on January 28, 2005, stating that, because no "new, substantive comments were received during the comment period or scoping meetings," it would not issue a Scoping Document 2.

6. On February 24, 2005, the Association filed a request for rehearing of the January 28 letter. On March 28, 2005, the Commission Secretary issued a notice dismissing as interlocutory the Association's rehearing request, stating that the January 28 letter does not impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process, and therefore rehearing does not lie.<sup>3</sup> The notice further stated that it was not alleged, nor did it appear, that the Association would suffer irreparable injury if the Commission did not entertain the rehearing request. Therefore, the rehearing request was dismissed.<sup>4</sup>

7. On April 27, 2005, the Association timely filed a request for rehearing of the March 28, 2005 notice.<sup>5</sup>

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<sup>3</sup> 110 FERC ¶ 61,376.

<sup>4</sup> *Id.*

<sup>5</sup> On May 13, 2005, Duke Power, a division of Duke Energy Corporation, filed an answer to the Association's rehearing request. On May 31, 2005, the Association filed a response to Duke Power's answer. The Commission's regulations at 18 C.F.R. § 385.213(a)(2) (2005) do not permit answers to requests for rehearing, or answers to answers, nor do the arguments raised assist the Commission in addressing the issues in this order. Therefore, we reject Duke Power's answer, and the Association's response.

## **DISCUSSION**

8. The purpose of a Scoping Document is to identify staff's preliminary list of issues to be addressed in its NEPA analysis, including other alternatives to the proposed action, the level of analysis required, qualifying Federal, state, and tribal comprehensive waterway plans to be considered, and a plan and schedule for processing the license application.<sup>6</sup> Following the deadline for filing comments on Scoping Document 1, Commission staff shall, "if necessary, issue Scoping Document 2."<sup>7</sup>

9. In its January 10, 2005 comments on Scoping Document 1, the Association expressed concerns over certain provisions in the proposed Settlement Agreement, and offered alternative measures to be considered in the EA: (1) rather than rely on law enforcement, require Duke Energy to lease its buffer strip around Lake Glenville and other reservoirs to adjacent property owners to minimize buffer zone nuisances; (2) maintain Lake Glenville at guaranteed levels rather than targeted levels; (3) improve public recreation facilities by redirecting proposed funding; and (4) revise proposed vegetation management guidelines of the shoreline management plan to address removing debris or fallen trees in the lake and/or the buffer zone, and viewshed restrictions.<sup>8</sup>

10. The Association argues on rehearing that staff's decision not to issue Scoping Document 2 to include its proposed "alternatives" in effect excludes those alternatives from environmental review.<sup>9</sup> The Association cites several Commission orders to support its assertion that the exclusion of alternatives is "an adverse final order for which appeal to or rehearing by the Commission is entirely appropriate."<sup>10</sup>

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<sup>6</sup> 18 C.F.R. § 5.8(c) (2004).

<sup>7</sup> 18 C.F.R. § 5.10.

<sup>8</sup> A viewshed is defined as all of the surface areas of the landscape that are visible from an observer's viewpoint, or all of the surface areas from which a particular portion or feature of the landscape can be seen. A viewshed can be restricted by intervening landforms and the screening effects of vegetation and structures.

<sup>9</sup> *See* Rehearing request at 9.

<sup>10</sup> *Id.*

11. The Association's proposed alternative measures have not been excluded from environmental review. It has filed comments concerning its proposals at least four times prior to the issuance of Scoping Document 1,<sup>11</sup> and those comments are reflected in Scoping Document 1, which provides in relevant part that the EA will address:

(1) the need for a shoreline management plan, and the potential effects of the proposed action and alternatives on access to project waters; (2) effects of the elevation of the water level of project reservoirs on recreational use of them; (3) potential effects of expanding and increasing recreation facilities; and (4) effects of vegetation management practices, and need for potential changes to these practices, and need for protection of the reservoir by maintaining a natural vegetated buffer with limited clearing.

12. That Scoping Document 1 does not include the details of the Association's proposals, or characterize them as separate "alternatives," does not mean they will not be fully considered in the EA. To the contrary, the EA will analyze all reasonable alternatives. Nothing in staff's January 28, 2005 letter, or anywhere in the record for that matter, suggests otherwise.<sup>12</sup> Accordingly, for the reasons stated in the March 28, 2005 notice, staff's January 28 letter is interlocutory, and we will deny the Association's request for rehearing on the matter.

13. Finally, the Association argues that the January 28 letter and March 28 notice erroneously failed to address its concerns that the proposed Settlement Agreement was reached through procedures that it alleges contravene the Commission's regulations.<sup>13</sup>

14. The Association filed comments on the proposed Settlement Agreement on July 6, 2004 and August 3, 2004. These comments will be carefully considered, as will all of the Association's comments in this proceeding, when the Commission takes action on the proposed relicensing. Should the Association feel that the Commission failed to properly address its concerns, then it may seek rehearing of the Commission's order.

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<sup>11</sup> Comments were filed on August 3, 2004, July 6, 2004, June 24, 2004, and March 26, 2004. The Association also participated in the December 2004 site visits and scoping meetings at which it expressed its concerns.

<sup>12</sup> Because Scoping Document 1 incorporates the Association's proposals, staff appropriately did not deem it necessary to issue a second Scoping Document.

<sup>13</sup> *See* Rehearing request at 12-21.

The Commission orders:

The Friends of Lake Glenville Association's April 27, 2005 request for rehearing of the March 28, 2005 notice in this proceeding is denied.

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.