

129 FERC ¶ 61,195  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Energy Carolinas, LLC

Project No. 2602-029

ORDER AMENDING LICENSE

(Issued December 2, 2009)

1. Duke Energy Carolinas, LLC (Duke), licensee for the Dillsboro Project No. 2602, filed on May 29, 2009, and supplemented on August 10 and 20, 2009, an application to amend the project's boundary to include lands that it states are required for activities in conjunction with license surrender and the accompanying dam and powerhouse removal, which the Commission approved in prior orders. As discussed below, we grant the amendment application.

**Background**

2. The Dillsboro Project is located on the Tuckaseegee River in the Town of Dillsboro in Jackson County, North Carolina, and comprises, among other project works, a 12-foot-high, 310-foot-long concrete masonry dam and a 77-foot-wide by 43-foot-deep by 43-foot-high powerhouse that is integral to the dam. On July 22, 2003, Duke filed an application to relicense the project, followed, on June 1, 2004, by an application to surrender its license and to remove the project works. The project license expired on July 31, 2005, and, on September 6, 2005, the Commission issued a notice that Duke is authorized to continue to operate the project consistent with the terms of the license, until the Commission acts on Duke's pending relicense application, accepts Duke's surrender application, or takes other appropriate action.<sup>1</sup>

3. Duke's 2004 surrender application proposed to surrender the project license and to remove project facilities, including the dam and the powerhouse. The surrender

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<sup>1</sup> The authorization was issued pursuant to section 9(c) of the Administrative Procedure Act, 5 U.S.C. § 558(c) (2006).

application was supported by a large group of stakeholders, including federal and state resource agencies, Indian tribes, local governments, non-governmental organizations, and homeowners groups.<sup>2</sup> A small group, including Jackson County and some local entities, opposed Duke's proposal.<sup>3</sup> In July 2007, the Commission issued an order approving Duke's surrender application and dismissing its relicense application.<sup>4</sup> The surrender order stated that "[t]he surrender shall become effective upon issuance of a Commission notice that all of the surrender conditions specified below . . . have been satisfied."<sup>5</sup>

4. The surrender order required Duke to file a number of plans prior to and during demolition activities. One such plan, required by Ordering Paragraph (H) of the order, was a Sediment Management Plan to set forth, for Commission approval and following consultation with federal and state resource agencies, actions to minimize the erosion and transport of sediments during reservoir draining, dam demolition, and sediment removal, as well as sediment stabilization at the completion of demolition. Duke filed the required plan, which incorporated agency comments, on May 22, 2008, and it was approved on July 15, 2008.<sup>6</sup>

5. On May 29, 2009, Duke filed an application seeking authorization to amend the Dillsboro Project boundary to add several parcels of land already owned by the company. Duke explained that it will need to use the lands to efficiently carry out sand-mining operations required by the Sediment Management Plan. Duke stated the proposed amendment would add to the project approximately 11 acres of land upstream of the project dam.

6. In response to a request from Commission staff for further information, Duke explained that it will not only use the lands proposed to be added to the project for

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<sup>2</sup> See *Duke Energy Carolinas, LLC*, 120 FERC ¶ 61,054, at P 8, n.7 (2007), for a list of the entities supporting the settlements that included, *inter alia*, the agreement to surrender the Dillsboro project license and remove the project works.

<sup>3</sup> See *Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,069, at P 9 (2008) for a list of these entities (styled "community parties").

<sup>4</sup> See *Duke Energy Carolinas, LLC*, *supra* n.2 and n.3, *appeal pending*, *Jackson County, North Carolina, et al. v. FERC* (D.C. Cir. No. 08-1224, oral argument October 9, 2009).

<sup>5</sup> See *Duke Energy Carolinas, LLC*, 120 FERC ¶ 61,054 at 61,269, Ordering Paragraph (B).

<sup>6</sup> See *Duke Energy Carolinas, LLC*, 124 FERC ¶ 62,038 (2008).

sediment removal, but also as mooring, staging and access areas, to stockpile riprap, to construct a workpad, to hold sediment ponds and to stockpile sand, rock, and organic sediment, and as laydown areas for demolished material.<sup>7</sup> Duke also explained that, while it will donate the lands to the Town of Dillsboro or to Jackson County once demolition is complete, the county has informed Duke that it plans to condemn the lands, along with other project lands, for a proposed park. Duke appended to its response a June 17, 2009 letter from counsel for Jackson County, stating that the county intended to file a condemnation action to condemn project lands, including the dam, powerhouse, and other property, on or about July 20, 2009. Duke explained that it viewed the lands as essential for project demolition and so would oppose condemnation.<sup>8</sup>

7. On August 20, 2009, Duke filed with the Commission a copy of the county's complaint, which sought to condemn project lands and enjoin Duke from demolishing the dam and powerhouse.<sup>9</sup>

8. On September 9, 2009, the Commission issued public notice of the proposed amendment. In response, Jackson County and the U.S. Department of the Interior (Interior) filed comments,<sup>10</sup> and Jackson County filed a motion to intervene, comments, and protest.

9. Jackson County asserted that, before filing the amendment application, Duke had been aware of the county's plans to acquire project lands for the proposed park.<sup>11</sup> The county also stated that the Commission has been aware throughout the proceedings that there is no need for further Commission oversight with regard to the lands.<sup>12</sup> The county

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<sup>7</sup> See letter to Kimberly Bose (Commission Secretary) from Jeffrey G. Lineberger (Duke's Director of Hydro Strategy & Licensing at p.2 (filed August 10, 2009).

<sup>8</sup> See *id.* at p.1 and Attachment B.

<sup>9</sup> The condemnation case is captioned *County of Jackson v. Duke Energy Carolinas, LLC and the Bank of New York Mellon Trust Company, N.A.*, Civil Action No. 09-CVS-590 (General Court of Justice, Superior Court Division).

<sup>10</sup> Interior stated that it supports the proposed expansion of the project boundary and believes the additional lands are necessary for the operation and maintenance of the project.

<sup>11</sup> Jackson County motion at 2-3.

<sup>12</sup> *Id.* at 3-4. The county also alleges, at some length, *id.* at 5-7, that there is excess turbidity below the dredging sites. This is not relevant to Duke's amendment application.

contended that the Commission “should be made aware that the condemnation suit filed by the County does not intend to interfere with the current removal of sediments.” The county argued that “the original license has expired and is [of] no effect. Thus, to the extent that there is still a project boundary it falls under the Commission’s decommissioning jurisdiction. As such, lands should not be moved in and out of the formerly designated project boundary if alternative means are available to effectuate the Commission’s jurisdiction . . . .”<sup>13</sup> Finally, the county states that, should the Commission elect to process Duke’s application, Duke should be required to comply with the Commission’s formal amendment requirements.<sup>14</sup>

10. On October 26, 2009, Duke filed an answer to Jackson County’s motion. Duke asserted that the county’s arguments were irrelevant to the amendment proceeding. Duke also disagreed with the county’s assertion that the project is no longer licensed and that Duke is not a Commission licensee with respect to the project. The company denied the county’s statement that its condemnation proceeding will not interfere with dam removal. Duke also contended that the Commission should deny the county’s motion to intervene.

## **Discussion**

### **A. Procedural Matters**

11. Duke contends that we should deny the county’s motion to intervene (part of the county’s October 9, 2009 pleading), since in its view the county has failed to articulate any interest that would be affected by the company’s application.<sup>15</sup>

12. Given that the lands at issue already belong to Duke, that Duke will donate them to the Town of Dillsboro or to Jackson County after surrender is effective, and that the county has not suggested that adding the new lands to the project boundary will have any adverse environmental impacts, we are inclined to agree with the company that the county has no interest in this proceeding and cannot be aggrieved by our action on Duke’s application. However, as Duke also notes, the county filed a motion to intervene on June 1, 2009. Because that motion was unopposed, and our regulations provide that if no answer in opposition to a motion to intervene is filed within 15 days after the motion

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<sup>13</sup> Jackson County motion at 7.

<sup>14</sup> *Id.* The county suggests that Duke should have engaged in additional agency consultation. *Id.* at 4.

<sup>15</sup> *See* Duke answer at 7.

is filed, the movant becomes a party,<sup>16</sup> Jackson County is already a party to this proceeding.<sup>17</sup>

**B. Regulatory Status of the Dillsboro Project**

13. Jackson County suggests that the Commission's jurisdiction over the Dillsboro Project is somehow diminished or altered as a result of the surrender order. The county states that Duke is "the former licensee for the Dillsboro Project, which had previously been licensed, and is now subject to the Commission's jurisdiction over decommissioning activities . . . ."<sup>18</sup> The county also asserts that there is no need for Commission oversight regarding the project boundary "after a license has expired in 2005, and the July of 2007 acceptance of surrender application with the dismissal of a relicensing application,"<sup>19</sup> and that "the original license has expired and is [of] no effect" such that issues regarding the project boundary fall "under the Commission's decommissioning jurisdiction."<sup>20</sup>

14. To the extent that the county contends that the project license has expired, that Duke is no longer a Commission licensee, and that the Commission's jurisdiction over the project rests on a "decommissioning jurisdiction" that somehow differs from the Commission's general jurisdiction over licensed projects, project works, and licensees, the county is incorrect.

15. As discussed above, the Commission in September 2005 issued a notice that Duke was authorized to continue to operate the Dillsboro Project after the expiration of the project license. Such authorizations retain the status quo until ongoing licensing or other dispositive proceedings are completed.<sup>21</sup> Moreover, the Commission expressly provided

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<sup>16</sup> 18 C.F.R. § 385.214(c) (2009).

<sup>17</sup> That we have a relatively generous standard for allowing entities to intervene does not mean that by allowing them to do so we necessarily agree that they have either administrative or judicial standing. Where that becomes an issue, the burden will remain on the intervenor to show that it has a cognizable interest in the proceeding and is aggrieved by any orders we issue.

<sup>18</sup> Jackson County motion at 1. *See also id.*, referring to the "former project boundary;" *id.* at 3, noting "the Commission's decommissioning jurisdiction."

<sup>19</sup> *Id.* at 3.

<sup>20</sup> *Id.* at 7.

<sup>21</sup> In issuing original licenses for minor projects, such as Dillsboro, the Commission generally waives certain provisions of the Federal Power Act, including  
(continued...)

in the surrender order that surrender would not be effective until issuance by the Commission of a notice confirming that Duke had satisfied all of the surrender conditions.<sup>22</sup> Thus, Duke continues to be a licensee operating under the terms of its existing license, which remains in full force and effect. In fact, we have concluded that surrender of the Dillsboro Project will likely not be complete until July 2012.<sup>23</sup> We will retain jurisdiction until that time.<sup>24</sup>

16. We also take issue with the county's suggestion that the Commission has "decommissioning jurisdiction" that differs from its general hydropower jurisdiction. The Federal Power Act establishes the basis for the Commission's jurisdiction over non-federal hydropower projects, and does not divide that jurisdiction into different categories based on the nature of the Commission's oversight over a particular project. Either the Commission has complete jurisdiction or it has none.<sup>25</sup> There is no basis in the statute, in our regulations, or in case law for a contrary conclusion. Here, the Dillsboro Project

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section 15, 16 U.S.C. § 808 (2006), which provides that when a license expires the Commission must issue an annual license "under the terms and conditions of the existing license." With respect to minor projects the licenses for which expire, then, the Commission issues notice of continued operation under the Administrative Procedure Act, instead of annual licenses. Such notices are equivalent to annual licenses. *See Wisconsin Electric Company*, 73 FERC ¶ 61,208 (1995).

<sup>22</sup> We impose this type of condition to ensure that we can effectively oversee surrender activities, which may include demolition and site restoration, as is the case here.

<sup>23</sup> *See* 123 FERC ¶ 61,069 at P 70-71 and 61,588 (Ordering Paragraph (H), revising surrender order to require that post-dam removal monitoring be completed by July 19, 2012).

<sup>24</sup> Indeed, Jackson County itself recognizes that the Commission retained authority in the surrender order to modify the terms of the surrender if necessary. Jackson County motion at 4, n.1, *citing* 120 FERC ¶ 61,054 at 61,272 (Ordering Paragraph Q). This retention of authority would not be consistent with a lack of jurisdiction.

<sup>25</sup> The only instances in which there might be considered to be an exception to this concept are with regard to projects that contain project works over which the Commission does not have complete jurisdiction, such as those with dams spanning the U.S.-Canadian border. However, that fact pattern does not exist here, and, in any case, even in those instances the Commission has plenary jurisdiction over project works and portions of project works located in the United States.

remains within our jurisdiction and will do so unless and until we conclude that the surrender process is complete.

**C. Duke's Application**

17. Project boundaries are used to designate the geographic extent of the lands, waters, works, and facilities that are identified in a license and that the licensee needs to carry out project purposes. The Commission can enforce the terms of a license only through a licensee and the licensee's property rights. In consequence, we require licensees to obtain sufficient property rights to accomplish project purposes, which typically may include power production, flood control, irrigation, recreation, and environmental protection. In reviewing applications dealing with the extent of project lands, we examine whether lands in question are needed to further project purposes.<sup>26</sup>

18. We have determined that surrender of the Dillsboro Project, accompanied by the removal of the dam and the powerhouse, under conditions carefully crafted to protect the environment, is in the public interest. Accordingly, these activities are necessary in order to accomplish project purposes. Duke has explained in detail why the lands it seeks to add to the project are needed to accomplish activities required by the surrender order.<sup>27</sup> This demonstrates that the lands are needed for project purposes and should be included within the project boundary.

19. Jackson County does not dispute that the lands are needed for the activities Duke references, but rather asserts that these actions can be carried out without adding the lands to the project. It is conceivable that this might be the case, but the fact that it might be possible to accomplish project purposes without granting Duke's application is not a reason to deny the application. Our policy is to include within project boundaries lands needed for project purposes, not to exclude lands if project purposes still might be carried out in their absence.

20. The county argues that Duke previously identified the lands at issue as necessary for project removal activities, yet did not seek to include them within the project boundary.<sup>28</sup> If, as we have determined above, the lands are needed for project purposes, it is not relevant to our decision that the licensee seeks to bring them within the project boundary at a time that the county argues is late. In addition, it appears clear that at least

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<sup>26</sup> See generally *Wisconsin Public Service Corporation*, 104 FERC ¶ 61,295, *reh'g denied*, 105 FERC ¶ 61,191 (2003).

<sup>27</sup> See P 5-6, *supra*.

<sup>28</sup> Jackson County motion at 1-4.

some part of the genesis of Duke's application is the county's efforts to condemn the lands: Duke is concerned, with some justification, that if the county obtains control of the lands, Duke's efforts to comply with our surrender order will be made more difficult, if not impossible. While we believe that our exclusive jurisdiction over the Dillsboro Project would ultimately allow Duke to retain (or reacquire, if necessary) the rights to use lands it needs to comply with our directives, we cannot fault the company for seeking to bring the lands within the project boundary, a step that may discourage further condemnation litigation.

21. Jackson County contends that Duke failed to undertake pre-filing agency consultation, as required by sections 4.32, 4.38, 4.200 of our regulations and section 9 of the Federal Power Act.<sup>29</sup> However, section 4.32<sup>30</sup> applies only to applications for preliminary permits, exemptions, and licenses, not amendments.<sup>31</sup> Section 4.38<sup>32</sup> requires pre-filing consultation only with respect to those amendments that: (1) materially amend proposed plans or project development, (2) increase project capacity above a specified level, or (3) involve construction a new dam or diversion, modify an existing dam so as to significantly changes an impoundment, or add a new turbine.<sup>33</sup> The licensee's proposal does not entail any of these modifications, so that section 4.38 is inapplicable here. We agree with the county that section 4.200 and the succeeding regulations,<sup>34</sup> which govern applications for license amendments, do apply in this case. We do not see any manner in which Duke failed to comply with them. The county specifically cites section 4.201(a)(4),<sup>35</sup> which requires the applicant to set forth the proposed amendment and its purpose, which Duke did. Additionally, the county references section 4.201(a)(5),<sup>36</sup> which requires the applicant to set forth, and provide a compliance plan with respect to, state requirements regarding river banks and beds, and the appropriation, diversion, and use of water for project purposes. Given that the

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<sup>29</sup> While Jackson County references section 9, 16 U.S.C. § 802 (2006), that section deals only with license applications, not amendments.

<sup>30</sup> 18 C.F.R. § 4.32 (2009).

<sup>31</sup> See 18 C.F.R. § 4.32(a)(5) (2009).

<sup>32</sup> 18 C.F.R. § 4.38 (2009).

<sup>33</sup> See 18 C.F.R. § 4.38(a)(6) (2009).

<sup>34</sup> 18 C.F.R. § 4.200 *et seq.* (2009).

<sup>35</sup> 18 C.F.R. § 4.201(a)(4) (2009).

<sup>36</sup> 18 C.F.R. § 4.201(a)(5) (2009).

amendment here deals simply with the addition of land to the project, this section is irrelevant.<sup>37</sup> We also note that Duke has been consulting with federal and states resource agencies to address issues related to project removal,<sup>38</sup> and that the only agency that responded to our public notice of this proceeding – Interior – supports the amendment application.

22. Jackson County asserts that its condemnation action is not intended “to interfere with the current removal of sediments.”<sup>39</sup> We believe this statement is inconsistent with Jackson County’s actions. Jackson County’s state court complaint specifically asks the court to enjoin Duke from demolishing the dam and the powerhouse. Thus, while it may be true that the county does not object to a discrete part of the surrender process – the removal of sediments – it is clearly attempting to block the removal of project works, which we have ordered Duke to undertake. It is undisputed that the Federal Power Act is a “complete scheme of national regulation [designed by Congress to] promote the comprehensive development of the water resources of the Nation . . . .”<sup>40</sup> and that it preempts conflicting state and local law.<sup>41</sup> An attempt by a state or subdivision of a state to condemn project lands, works, or facilities in order to build a park is clearly preempted. Moreover, section 313(b) of the Act<sup>42</sup> provides that the exclusive forum for review of the Commission’s orders lies in the United States courts of appeals. Jackson County has filed an appeal of our surrender orders with the Court of Appeals for the District of Columbia Circuit. The county’s effort to undercut the Commission’s exclusive jurisdiction and to circumvent the Congressionally-mandated judicial review process in order to overturn our orders through state court proceedings is inappropriate.

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<sup>37</sup> Jackson County asserts, motion at 4-5, that Duke failed to inform the Commission either that it had begun dredging activities or that Jackson County had begun its condemnation action. As to the dredging activity, we are not aware that the company has failed to comply with any notification requirement of the surrender order. Duke filed a copy of the complaint with us on August 20, 2009.

<sup>38</sup> See Duke Answer at 6.

<sup>39</sup> Jackson County motion at 5.

<sup>40</sup> *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152, 180-81 (1946). See also *FPC v. Union Electric Co.*, 381 U.S. 90, 98 (1965).

<sup>41</sup> See, e.g., *California v. FERC*, 495 U.S. 490 (1990).

<sup>42</sup> 16 U.S.C. § 825l(b) (2006).

The Commission orders:

(A) The application filed by Duke Energy Carolinas, LLC on May 29, 2009, for amendment of license for the Dillsboro Project to include within the project boundary four additional parcels of land (designated Tracts 4, 10, 15, and 25) is approved, effective as of the date of this order.

(B) Within 60 days of the issuance date of this order, Duke Energy Carolinas, LLC shall file, for Commission approval, a revised Exhibit K drawing showing the amended project boundary as approved in this order.

(C) This order constitutes final agency action. Requests for rehearing may be filed within 30 days of the date of issuance of this order, pursuant to 18 C.F.R. § 385.713 (2009).

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.