

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Virginia Electric Power Company d/b/a
Dominion Virginia Power/Dominion North
Carolina Power

Project No. 2009-052

ORDER GRANTING LATE INTERVENTION AND ON REHEARING

(Issued November 14, 2005)

1. On May 17, 2005, the Commission's Division of Hydropower Administration and Compliance issued an order modifying and approving a dissolved oxygen (DO) monitoring plan for the 329-megawatt Roanoke Rapids and Gaston Project No. 2009, licensed to Virginia Electric Power Company, doing business as Dominion Virginia Power/Dominion North Carolina Power.¹ The project is located on the Roanoke River, on the Virginia-North Carolina border, in Brunswick and Mecklenburg Counties, Virginia, and in Halifax, Northampton, and Warren Counties, North Carolina. The plan, filed on April 1, 2005, was approved pursuant to the requirements of Article 403 of the project's license.
2. On June 16, 2005, North Carolina Department of Environment and Natural Resources Division of Water Quality (NC Water Quality) filed a timely request for rehearing of the order, but failed to file a notice of intervention or motion to intervene in order to become a party to the proceeding. Accordingly, by notice issued on July 1, 2005, NC Water Quality's rehearing request was rejected.²
3. NC Water Quality timely requested rehearing of the rejection notice and, as part of its submission, requested intervention in the proceeding concerning the plan.

¹ 111 FERC ¶ 62,170.

² See section 313(a) of the Federal Power Act, 16 U.S.C. § 825I(a), which only provides an opportunity for rehearing to parties to a proceeding.

4. For the reasons discussed below, we: (1) grant rehearing of the July 1, 2005 rejection notice; (2) grant late intervention in the post-license proceeding concerning the DO monitoring plan, and reinstate NC Water Quality's request for rehearing of the plan approval; and (3) grant rehearing of the May 17, 2005 Order approving the plan.

Late Intervention

5. NC Water Quality argues that: (1) its request for rehearing of the order modifying and approving the plan included, by implication, a timely notice of intervention in the proceeding; and (2) alternatively, that its motion to intervene, included in its request for rehearing of the rejection notice, is sufficient to accord it intervenor status with respect to its June 16 request for rehearing of the order modifying and approving the DO monitoring plan

6. Under section 313(a) of the Federal Power Act (FPA), only a party to the proceeding can file a request for rehearing. Although the NC Water Quality was a party to the relicense proceeding, its party status terminated when that license was issued and became final.³ Each post-licensing proceeding is a distinct matter, requiring intervention (if allowed) by those who wish to participate.⁴ The Commission only entertains such motions to intervene where the filing entails a material change in the plan of project development or in the terms and conditions of the license, or could adversely affect the rights of a property holder in a manner not contemplated by the license, or is being appealed by an agency or entity specifically given a consultation role with respect to the filing.⁵

7. NC Water Quality is named in license Article 403 as an entity to be consulted regarding the DO plan, and under the Commission's regulations may become a party to a proceeding upon its timely filing with the Commission a notice of intervention.⁶ Because the DO monitoring plan was not a material change to the license and did not adversely affect the rights of any property holders in a manner not contemplated by the license, Commission staff did not issue public notice of, or provide an opportunity for comments

³ See *Kings River Conservation District*, 36 FERC ¶ 61,365 at 61,881 (1986) (*Kings River*).

⁴ See *City of Tacoma, Washington*, 109 FERC ¶ 61,318 at P 9 (2004).

⁵ See *Id.* at P 6-7.

⁶ See 18 C.F.R. § 385.214(a)(2) (2005).

or interventions on, the DO monitoring plan. In these situations, it is the Commission's policy to accept, as timely filed, a notice or motion to intervene⁷ submitted by a consulted entity with its rehearing request or within the 30-day period for seeking rehearing.⁸ Thus, had NC Water Quality filed a notice of intervention or motion to intervene within 30 days of the issuance of the order on the plan, the intervention would have been timely.

8. NC Water Quality failed to intervene when it sought rehearing of the plan. After its rehearing request was rejected, NC Water Quality submitted (as part of its timely-filed request for rehearing of the rejection notice) a motion to intervene late in the DO plan proceeding. In support of its late intervention, NC Water Quality states that it has an interest that is not adequately represented by other parties and may be directly affected by the outcome of the proceeding. NC Water Quality explains that it is responsible for overseeing water quality in the waters of North Carolina and ensuring compliance with the state's water quality standards. The agency states further that granting it late intervention will not cause hardship to the parties or disrupt or unduly delay the proceeding because the proceeding is not lengthy or complicated, it has been involved in the process all along, and it has previously presented its views on the merits of the issues. In this instance, we will grant rehearing on the rejection notice, permit late intervention in the post-license proceeding concerning the plan, and entertain the agency's request for rehearing on the plan.⁹

⁷ Section 385.214(a)(2) of the regulations, 18 C.F.R. § 385.214(a)(2) (2005), specifies the entities (including the state water quality certification agency) that may obtain party status by timely filing a notice of intervention. If these entities seek late intervention, they must file a motion to intervene under 18 C.F.R. § 385.214(b) and (d).

⁸ See *Pacific Gas and Electric Company*, 40 FERC ¶ 61,035 at 61,099 (1987).

⁹ In granting late intervention, we reject NC Water Quality's contention that its request for rehearing included, by implication, a timely notice of intervention. Treating the rehearing request as a notice of intervention would be tantamount to a grant of automatic intervention. The Commission's regulations however do not provide for automatic intervention, nor do we think it would be appropriate. See *Hydroelectric Licensing Under the Federal Power Act, Notice of Proposed Rulemaking*, 68 Fed. Reg. 13,988 (March 21, 2003), FERC Statutes and Regulations, Proposed Regulations ¶ 32,568 at 34,737 (2003). That notice proposed rules governing the Commission's integrated licensing process. See *Order No. 2002*, 68 Fed. Reg. 51,070 (August 23, 2003), FERC Statutes and Regulations ¶ 31,150 (2003).

Order Modifying And Approving Do Monitoring Plan**A. Background**

9. The project includes two developments: the upstream Gaston development, which impounds Lake Gaston; and the Roanoke Rapids development, located 7.5 miles downstream of Gaston and impounding Roanoke Rapids Lake.

10. The Commission issued a new license for the project in 2004.¹⁰ On March 4, 2005, the Commission issued an order approving an offer of settlement, denying rehearing of the 2004 relicensure order, and amending the new license by replacing license Articles 401- 426 with revised articles 401-428 to reflect provisions of a comprehensive settlement agreement among numerous entities, including NC Water Quality.¹¹

11. Revised license Article 402¹² requires that the water discharged from the turbines at Roanoke Rapids, the downstream development, must meet state standards for DO. However, if water coming into the project has low DO levels, then DO at Roanoke Rapids does not have to meet state standards, but instead (because of the project's expected re-aerating effects, which increase DO) must equal or exceed the DO level of water entering the project.

12. To ensure that required DO levels are maintained, Article 403¹³ requires the licensee, in consultation with NC Water Quality, to develop and file for Commission approval a DO monitoring plan. The licensee is to monitor DO levels in the Roanoke Rapids tailwaters. In the event that those DO levels fall below specified levels, the licensee is to begin monitoring upstream in Lake Gaston and its tailwaters to verify that DO levels at Roanoke Rapids are no lower than what is coming into Gaston.¹⁴

¹⁰ 106 FERC ¶ 62,245.

¹¹ 110 FERC ¶ 61,241 at P 9.

¹² *Id.* at 61,917.

¹³ *Id.*

¹⁴ Article 403 also reserves the Commission's right to modify the DO monitoring plan and, if necessary, project operations.

13. On April 1, 2005, the licensee filed its proposed DO monitoring plan. The plan proposed continuous DO monitoring downstream at the Roanoke Rapids development. For the upstream Gaston development, the plan provided that, when water quality conditions at Roanoke Rapids require DO monitoring at Gaston, data collection would begin within two business days of any measured concentration of DO at the Roanoke Rapids tailrace falling below any applicable state standard.¹⁵ The plan proposed to continue monitoring DO at Gaston only for so long as DO standards are not being met at Roanoke Rapids.

14. The filing included NC Water Quality's comments on the plan. The agency recommended that, if a low DO event were to occur in project waters during warm weather months (June 1 through October 31), then the licensee should be required to monitor DO levels at Gaston continuously through the end of the warm weather season (until October 31).¹⁶ NC Water Quality argued that such an approach was consistent with, and indeed required by, the terms of the settlement agreement. The licensee disagreed with NC Water Quality's recommendation, contending that the settlement provides for monitoring at Gaston only for periods when the DO standards are not being met at Roanoke Rapids.¹⁷

15. On May 17, 2005, Commission staff issued its order modifying (in minor respects not relevant to this discussion) and approving the licensee's DO monitoring plan. NC Water Quality seeks rehearing of that order.

B. Discussion

16. On rehearing, NC Water Quality asks that the DO monitoring plan be modified as originally recommended by it to require that if DO monitoring at Gaston is triggered at any time during the monitoring season (*i.e.*, between June 1 and October 31), monitoring must continue until October 31. If DO monitoring is triggered during non-summer months, NC Water Quality recommends that monitoring continue until DO at Roanoke Rapids meets state standards.

¹⁵ See licensee's April 1, 2005 filing at Appendix 2B (DO Monitoring Plan), section 4.1.6.

¹⁶ *Id.* at Appendix 2A.

¹⁷ *Id.* at Attachment 2C, comment 5.

17. The license and the settlement agreement are silent on the issue of how long monitoring must continue at the Gaston development once the requirement has been triggered by low DO levels downstream,¹⁸ and Commission staff's May 17 Order on the plan approved the licensee's proposal to monitor DO at Gaston only for those periods when DO levels fall below state standards at Roanoke Rapids.

18. On rehearing, NC Water Quality contends that the plan's requirement will not provide for the collection of meaningful data sets. According to NC Water Quality, low DO events do not necessarily occur in isolation; rather, during warm summer months, DO may sink below the standard for a short period (hours or days), rise back above briefly, decline again, and so on. Requiring monitoring with a two-day delay and only for periods when DO is actually below the standard may result in small snippets of data that will be difficult to correlate with data from other parts of the system to diagnose any issues, such as water quality trends. NC Water Quality further explains that, because of the two-day delay in monitoring, if there are a series of brief violations, the sampling requirement may never be triggered.

19. We agree that modification of the licensee's DO monitoring plan as requested by NC Water Quality is warranted. Water entering Gaston reservoir comes from releases from the U.S. Army Corps of Engineers Kerr Dam 34 miles upstream. Low DO levels in releases from the Kerr Dam¹⁹ contribute to periodic downstream low DO conditions at Gaston and Roanoke Rapids in the summer. As approved, the monitoring plan will not provide any long-term detailed information that could be used to compare DO levels at

¹⁸ We do not accept NC Water Quality's contention that its recommendations on the length of monitoring are required by the settlement agreement and Article 403 of the license. The settlement agreement provides:

During any periods when the dissolved oxygen water quality standard is not met in the tailwater below Roanoke Rapids dam, the Licensee shall begin sampling for dissolved oxygen levels within two business days in Lake Gaston and in the tailwater below Lake Gaston.

See 110 FERC ¶ 61,241 at 61,949-950 (Appendix B, Article FL7, section 4.5). Article 403 of the license provides no additional guidance.

¹⁹ *See* EA for the Roanoke Rapids and Gaston Project issued on November 28, 2003 at 86-87.

these two sites. Short periods of data will show only that state standards are being met at the Gaston development within a few days of a low DO event at the Roanoke Rapids development.

20. Monitoring at Gaston for the entire monitoring season, if low DO levels occur downstream at Roanoke Rapids, would provide useful information. The DO data that would be recorded at the Gaston development could be compared to DO data recorded at the Roanoke Rapids development and provide real-time information on re-aeration through the project and the time it takes for low DO water to go from the Gaston development to the Roanoke Rapids development. These data would help determine if the project is enhancing DO levels in the Roanoke River as expected.²⁰

21. For the above reasons, we are granting rehearing and modifying the DO monitoring plan to require continuous monitoring of DO levels at the Gaston development during the monitoring season, as requested by NC Water Quality. If after a season or two of full monitoring at both developments (if triggered by a low DO event at Roanoke Rapids), it appears that the project is enhancing DO levels as expected, the licensee may seek an amendment to the plan to reduce the length of monitoring needed at Gaston after a low-DO incident at Roanoke Rapids.

The Commission orders:

(A) The North Carolina Department of Environmental and Natural Resources request for rehearing of the Commission's notice issued July 1, 2005 (rejecting the Department's request for rehearing), is granted.

(B) The Department's motion to intervene late is granted.

(C) The Department's request for rehearing of the Commission staff order issued May 17, 2005, is granted. Ordering Paragraph (B) of the order is amended to read as follows:

²⁰ Recent DO monitoring reports from the licensee for the 2005 monitoring season (filed on July 19, August 5, September 15, and October 6, 2005) indicate that DO levels fell below state standards at Roanoke Rapids on 20 days. Had the licensee been monitoring at the Gaston development from the onset of the first deviation, there would be a complete set of valuable information on DO levels of water passing through the project, including measurements of DO levels at Gaston for periods just before low DO levels occurred downstream at Roanoke Rapids.

Any dissolved oxygen (DO) monitoring at the project's Gaston development initiated between June 1 and October 31 under the DO monitoring plan approved by this order shall continue uninterrupted until October 31. Also, so that the Commission can monitor the licensee's compliance with the requirements of Article 402 and the provisions to conduct upstream monitoring when deviations occur below the project, the licensee shall file with its monthly report to the Commission information that includes: (1) operational data necessary to determine compliance with Article 402; (2) a description of any measures implemented at the time of occurrence and the measures implemented or proposed to ensure that similar incidents do not recur; and (3) comments or correspondence, if any, received from the resource agencies regarding the incident(s). Based on the report and the Commission's evaluation of the incident, the Commission reserves the right to require modifications to project facilities and operations to ensure future compliance.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.