

125 FERC ¶ 61,118
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Energy Carolinas, LLC

Project No. 2602-016

ORDER ON MOTION

(Issued October 29, 2008)

1. This order finds that it is not necessary to take any action on the January 7, 2008 joint motion filed by Jackson County, North Carolina, and several municipal and local entities (hereinafter referred to as community parties)¹ to “Present Evidence or, in the Alternative, Offer Proof and If Necessary, Motion to Reopen the Record.”² The motion asks the Commission to include two documents in the “decisional” record of the proceeding for Duke Energy Carolinas, LLC’s (Duke) surrender of its license and removal of the project works for the 225-kilowatt Dillsboro Hydroelectric Project No. 2602. As those two documents are already part of the record, the motion is moot.

Discussion

2. On July 19, 2007, the Commission granted the application of Duke Energy Carolinas, LLC (Duke) for surrender of its license and removal of the project works for the 225-kilowatt Dillsboro Hydroelectric Project No. 2602, located on the Tuckasegee River in Jackson County, North Carolina.³ The order authorized removal of the project

¹ Jackson County filed the motion with Macon County, North Carolina; the Town of Franklin, North Carolina; the Friends of Lake Glenville Association, Inc.; T.J. Walker and the Dillsboro Inn; and the Western North Carolina Alliance.

² The community parties filed the motion pursuant to sections 385.505 and 385.510(f) of Subpart E of the Commission’s regulations. 18 C.F.R. §§ 385.505 and 385.510(f) (2008). Subpart E pertains only to proceedings that are set for trial-type hearing; this proceeding was not set for such a hearing at the Commission.

³ *Duke Energy Carolinas, LLC*, 120 FERC 61,054 (2007) (July 19 Order).

facilities subject to several conditions, including those contained in a May 15, 2005 water quality certification issued for the project by the North Carolina Division of Water Quality (North Carolina DWQ) pursuant to section 401 of the Clean Water Act (CWA).⁴

3. On August 20, 2007, the community parties filed a request for rehearing of the July 19 Order, arguing, *inter alia*, that the May 15, 2005 water quality certification authorized surrender of the license, but not removal of the project facilities.

4. On November 18, 2007, while rehearing was pending, North Carolina DWQ issued a second water quality certification, which was a requirement of the U.S. Army Corps of Engineers for its dredge and fill permit issued for the project under section 404 of the CWA.⁵ This second certification contained additional, more detailed requirements for dam removal and monitoring than did the first certification. On December 6, 2007, Duke filed for “informational purposes” a copy of the second certification. On January 7, 2008, the community parties filed its motion, asking the Commission to include two documents in the “decisional” record of the proceeding: (1) a copy of Duke’s December 6, 2007 filing; and (2) a copy of handwritten notes, dated September 12, 2007, that include the words “old 401 May 2005 – for surrender, not removal” (meeting notes).

5. Duke and the community parties submitted their filings before we issued our April 22, 2008 Order on rehearing,⁶ and as a consequence the second certification that Duke filed for informational purposes (and the community parties refiled) and the meeting notes submitted by the community parties were part of the record upon which we based our decision on rehearing. In the absence of an order to the contrary, these documents, along with all other materials properly filed in the course of the proceeding, became part of the record at the time they were filed and docketed. No special action was required for us to take cognizance of the filings and treat them as part of the decisional record. So, too, it is with the community parties’ alternative request to reopen the record. Since the proceeding had not yet terminated at the time of the community parties’ request, there was no need to reopen the record to receive the documents into the record.⁷

⁴ 33 U.S.C. § 1341(a)(1) (2006).

⁵ 33 U.S.C. § 1344 (2006).

⁶ *Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,069 (2008) (April 22 Order). The order upheld the surrender of license and authorization of project removal.

⁷ *See Niagara Mohawk Power Corporation*, 82 FERC ¶ 61,085, at 61,327 (1998) (concluding that there was no need to reopen the record, and no special procedures were required, to consider filings that were already part of the record).

6. Our April 22 Order rejected the community parties' argument that the first certification did not authorize project removal, but concluded in any event that any defect in the first certification was cured by the second certification.⁸ Moreover, we attached the second certification to the rehearing order and made its conditions a requirement of the surrender and removal of project facilities.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁸ As for the meeting notes stating that the first certification authorized only license surrender (not project removal), the issue was rendered moot by the issuance of the second certification. In any event, the notes carried no weight, given their handwritten, informal, and unofficial nature and the lack of clarity as to their provenance.