

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Alabama Power Company

Project No. 2146-107

ORDER ON REHEARING

(Issued March 4, 2005)

1. The Talladega County Commission, of Talladega County, Alabama (Talladega County), seeks rehearing of a November 23, 2004 Order of the Commission staff that approved a non-project use of project lands and waters for Alabama Power Company's (Alabama Power) Coosa River Project No. 2146. We are granting Talladega County's late-filed motion to intervene in the proceeding, thereby permitting it to seek rehearing. For the reasons discussed below, we are denying rehearing of the staff's order but are clarifying the limitations on our authorization of the non-project use, as requested by Talladega County. Our action is in the public interest because it conforms to and clarifies the Commission's practice in authorizing non-project uses of project lands and waters.

Background

2. The Coosa River Project consists of five developments on the Coosa River, in Elmore County, Alabama, and Floyd County, Georgia. Lay Dam is one of the five developments. On February 12, 2004, Alabama Power filed an application to permit the withdrawal of 17.8 million gallons-per-day (mgd) from the Lay Reservoir for a municipal water supply.

3. The licensee's application was filed on behalf of the Shelby County (Alabama) Commission, which proposes to construct a raw water pumping station, submerged intake pipelines and screens, and a raw water distribution main. The intake structure and intake pipeline would require an easement from the licensee, while the pumping station would be located adjacent to, but outside of, the project boundary. Raw water withdrawn from the site would be pumped to a proposed water treatment plant, also outside of the project boundary. The licensee consulted with several resource agencies prior to submitting its application to the Commission, and a public notice of the proposed water withdrawal was issued on March 24, 2004. All of the resource agencies concurred with the proposed

action in letters submitted with the application, and the U.S. Army Corps of Engineers issued a permit for the withdrawal on May 15, 2002. No timely submissions were received in response to the Commission's notice.

4. The Commission staff prepared an environmental assessment (EA) for the proposed action. The EA explained that the maximum proposed withdrawal of 17.8 mgd from the reservoir would be equivalent to a withdrawal of 27.5 cubic feet per second (cfs), less than 0.2 percent of the average discharge from Lay Dam. The water velocity at the intake screens would be less than 0.5 feet per second (fps), which would be less than the 1.0 fps recommended by the U.S. Fish and Wildlife Service to protect fingerlings and other aquatic life. The EA concluded that the water withdrawal would have no impact on wildlife, aquatic, or recreational or cultural resources, and it recommended no additional mitigative or enhancement measures at the site.

5. The Commission's notice set a deadline of April 26, 2004, for filing comments, motions to intervene, and protests. On July 28, 2004, Talladega County filed a single pleading encompassing a motion for late intervention, a protest, and a request to hold the application in abeyance. No action was taken on the late-filed motion, and Talladega County's filing was not considered in the staff's order approving the water withdrawal.

6. On rehearing, Talladega County argues that, consistent with Commission practice, its late-filed motion should have been granted, and that the staff lacked authority to issue the order because Talladega County contested the application. Talladega County argues that the proposal is not in the public interest and violates existing agreements between it and Shelby County, and among the two counties and Alabama Power. Talladega County urges us either to deny the application or to hold it in abeyance pending arbitration or judicial proceedings that will have to be conducted to determine the rights of the parties to those agreements.

Discussion

7. Under section 313(a) of the Federal Power Act (FPA),¹ any person aggrieved by a Commission order in a proceeding may file a request for rehearing if it is a party to that proceeding. As relevant here, Rule 102(c) of the Commission's Procedural Rules²

¹ 16 U.S.C. § 825l.

² 18 C.F.R. § 385.102(c) (2004).

defines a party as a person whose intervention in a proceeding is effective under Rule 214.³ Under Rule 214, a person's intervention is effective, essentially, if it has been timely filed and is unopposed or if it has been expressly granted.

8. Talladega County's motion to intervene was not filed within the time period specified in the notice of the application. However, Talladega County correctly asserts that we have liberally granted late-filed motions to intervene, provided they are filed before issuance of a dispositive order. Talladega County's motion was filed before issuance of the staff's order and would normally have been granted if acted on when it was filed. Therefore, we will grant the motion here, thereby giving Talladega County party status and entitling it to seek rehearing.

9. Talladega County argues that staff was without authority to issue the order. The Commission's regulations, at 18 C.F.R. § 375.308(b)(1), authorize the Director, Office of Energy Projects, to take appropriate action on uncontested applications for amendments of licenses, including changes in the use or disposal of water power project lands or waters. Under section 375.301(c) of the regulations, an uncontested application is one in respect to which no motion to intervene, or notice of intervention, in opposition has been received by the Commission. Since the Commission had received Talladega County's motion to intervene in opposition to the application when the order was issued, even though that motion was late-filed and had not yet been granted, this matter was not delegated to staff under the Commission's regulations.

10. Talladega County argues that the staff's order must therefore be considered a nullity. However, the Commission, in an order on rehearing, may ratify an order of staff that has been issued without authority and may cure defects arising from staff's action, since our consideration of a rehearing request can embrace the record as a whole.⁴ Because staff's order did not consider Talladega County's arguments, we will consider them for the first time in this order on rehearing to determine whether they warrant a different disposition of the application from that reached by staff.

11. Talladega County explains that it and Shelby County own an undivided one-half interest in a raw water pumping station and water filtration plant on Lay reservoir, near Childersburg, Alabama, which they operate jointly pursuant to the terms of a 1991 joint venture agreement. Under this agreement, the two counties jointly hold contractual rights

³ 18 C.F.R. § 385.214 (2004).

⁴ *Eagle Mountain Energy Company*, 62 FERC ¶ 61,066 (1993); *Nockamixon Hydro Associates*, 53 FERC ¶ 61,303 (1990).

to withdraw water now and in the future pursuant to an agreement with Alabama Power. The counties supplemented the joint venture agreement in a 2001 contract that allocated water rights and improvements to the pumping station between them.

12. Talladega County states that the application filed in the present proceeding did not disclose relevant information regarding the proposal's relationship to these agreements. In particular, Talladega County asserts, the agreement between Alabama Power and Shelby County for the new withdrawal purports to remove 16.0 mgd of water withdrawal rights from the joint venture facilities, transfer 12.8 mgd of water rights to the new facility, and extinguish 3.2 mgd of water withdrawal rights. Talladega County alleges that Alabama Power and Shelby County negotiated the new agreement without its knowledge and consent. Subsequently, Talladega County informed Alabama Power that the new agreement violated provisions of the existing agreements and demanded its rescission.

13. Talladega County states that it is not asking the Commission to interpret the agreements but only to deny the application or to hold it in abeyance pending the outcome of arbitration or litigation to determine whether the agreement between Alabama Power and Shelby County violates the earlier agreements.⁵ Talladega County contends that it is not in the public interest to permit Shelby County to carry out the terms of the new agreement and burden the project lands with additional water withdrawal facilities before this matter is resolved. Talladega County argues that there is no immediate need for construction of the new facilities, because the existing joint venture facilities have sufficient capacity to meet Shelby County's water needs, as demonstrated by the fact that recent combined withdrawals by the two counties from the existing joint facilities during peak months of water use have been less than one-half the capacity of those facilities.

14. Talladega County argues that the proposed withdrawal operation would render the joint venture operations uneconomical, to its detriment. Moreover, Talladega County asserts, the existing facilities can be expanded to meet additional needs at a lower cost and with fewer environmental impacts than new withdrawal facilities. For these reasons, Talladega County argues that the application should be denied if it is not held in abeyance.

⁵ Talladega County explains that both it and Shelby County have initiated arbitration or court proceedings.

15. The application filed by Alabama Power on behalf of Shelby County was for a joint use of the project's reservoir.⁶ In considering joint use applications for water withdrawal, the Commission examines only whether, and to what extent, the proposed withdrawal will adversely affect any other beneficial use of the water and whether the benefits of the proposed use will outweigh those effects.⁷

16. Talladega County's arguments do not warrant overturning staff's decision to authorize the water withdrawal. As noted above, the staff's EA concluded that the proposed withdrawal would have no impact on wildlife, aquatic, recreational, or cultural resources. The staff did not evaluate effects of the proposal on other water withdrawals. However, Talladega County does not allege that construction of the proposed facilities would interfere physically with the existing joint venture withdrawal facilities, nor does it claim that the proposed withdrawal, constituting less than 0.2 percent of the average discharge from Lay Dam, would leave insufficient water in the reservoir for withdrawal by the joint venture facilities or would degrade the quality of the water withdrawn by Talladega County. Talladega County argues only that the joint venture facilities will become uneconomical to operate. Even if we could be certain of this, we would be disinclined to deny a joint use application based on the economic effects of one withdrawal operation on another.

17. We do not think it necessary to hold the authorization of the withdrawal in abeyance pending the counties' resolution of their dispute. Our amendment of the license grants the licensee permission to allow the construction of facilities and the withdrawal of water by Shelby County, but it does not require these activities. Whether Shelby County chooses to proceed with its proposal in the face of Talladega County's allegations of agreement violations is a matter for its own judgment. Our analysis is confined to determining that the proposal, if carried out, would not interfere with other beneficial uses of the project's water.

⁶ Standard license article 13 provides that, on the application of any person, association, corporation, federal agency, state, or municipality, a licensee shall permit such reasonable use of its reservoir or other project properties as may be ordered by the Commission in the interest of comprehensive development of the waterway involved and the conservation and utilization of water resources for water supply for various specified purposes.

⁷ *Alabama Power Company*, 74 FERC ¶ 61,157 at 61,537 (1996).

18. Talladega County asks that, if we do not deny the application or hold it in abeyance, we make clear that we are not adjudicating the rights of the parties under the agreements. Talladega County requests us to clarify that any authorization to construct the water withdrawal facilities and to withdraw water does not extinguish or modify its rights under the agreements or permit Shelby County or Alabama Power to act in contravention of Talladega County's contractual rights. We clarify that we have authority only over our own licensee, which we are here permitting to accommodate uses of its project reservoir by another entity. Such permission does not alter whatever contractual obligations Shelby County or the licensee may have to Talladega County.

The Commission orders:

(A) The motion to intervene out of time, filed July 28, 2004, by Talladega County Commission, is granted.

(B) The request for rehearing of the Commission staff's November 23, 2004, order in this proceeding, filed December 23, 2004, by Talladega County Commission, is denied.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.