

121 FERC ¶ 61,270
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.

AmerenUE

Project No. 2277-005

ORDER GRANTING INTERVENTION, DENYING REHEARING, AND
DISMISSING REQUEST FOR STAY

(Issued December 20, 2007)

1. Missouri Coalition for the Environment, the Sierra Club, and American Rivers (Petitioners) seek intervention and rehearing of an August 15, 2007 letter order authorizing Union Electric Company, doing business as AmerenUE (Ameren), licensee for the Taum Sauk Project No. 2277, to start reconstruction and repair of the project's upper reservoir. The project is located atop Proffit Mountain and on the East Fork Black River in Reynolds County, Missouri. Petitioners also request either clarification of the letter order or a stay. For the reasons discussed below, we grant intervention and deny rehearing. We also grant in part the request for clarification, and dismiss the stay request as moot.

Background

2. The Commission issued an original license for the Taum Sauk Pumped Storage Project in 1965, with an expiration date of June 30, 2010.¹ Although Ameren has not yet filed a relicense application, the licensee filed a notice of intent to apply for a new license on February 17, 2005, and is currently involved in pre-application activities required for relicensing.

3. On December 14, 2005, the Project's upper reservoir breached, rendering the facility inoperable. The upper reservoir overtopped when the pumps filling it failed to shut off. Erosion undercut the rockfill dam, creating a breach that emptied the reservoir. Floodwaters rushed down the west side of Proffit Mountain into the East Fork of the

¹ *Union Electric Co.*, 34 FPC 598 (1965), *modified on rehearing*, 35 FPC 316 (1966).

Black River, destroying the home of the Johnson's Shut-Ins State Park superintendent and endangering his family. Flows flooded motorists on a nearby highway and significantly damaged the State Park, campground, and adjacent properties before entering the Lower Taum Sauk Reservoir. Fortunately, there were no fatalities. After an investigation, the Commission entered into an October 2, 2006 stipulation and consent agreement with Ameren and required the company to pay a \$10 million civil penalty, as well as \$5 million into an escrow account to fund enhancements at or near the project.²

4. On February 5, 2007, Ameren filed a request to rebuild the upper reservoir. On February 13, 2007, Commission staff issued a notice of intent to prepare an environmental analysis. On February 21, 2007, Commission staff issued a scoping document for the proposed reconstruction, and subsequently held two public scoping meetings near the project on March 12, 2007. Staff released a draft environmental assessment (EA) on June 7, 2007. Petitioners' representatives attended one of the meetings and filed comments on both the scoping document and the draft EA.

5. Commission staff issued a final EA on August 14, 2007. The EA concluded that the proposed reconstruction, with staff's recommended mitigation measures, would not constitute a major federal action significantly affecting the quality of the human environment. The next day, on August 15, 2007, the Director of the Commission's Office of Energy Projects issued a letter authorizing Ameren to start reconstructing the upper reservoir. On September 14, 2007, Petitioners filed a motion for late intervention and request for rehearing of the Director's letter order. On October 1, 2007, Ameren filed an answer in opposition to the motion for late intervention.

6. Petitioners seek intervention for the purpose of requesting rehearing. They request that the Commission stay the Director's August 15, 2007 letter order until the Commission issues a supplement to the EA that addresses the cumulative and indirect impacts of the rebuild proceeding, including the reasonably foreseeable impacts caused by the future operation of the project. In the alternative, they request that the Commission amend the letter order to address how Ameren will assure that reconstruction will not interfere with timely relicensing of the project, and to expressly reserve the Commission's authority to require modifications to the facility as part of relicensing. Petitioners also take issue with staff's conclusions in the EA and letter order.

7. Ameren maintains that Petitioners have not shown they have a right to intervene and participate as a party, and have not demonstrated good cause for their failure to file a timely motion to intervene. Ameren further argues that Petitioners' concerns regarding future relicensing decisions are premature.

² *AmerenUE*, 117 FERC ¶ 61,001 (2006).

Discussion

8. Under rule 713 of the Commission's Rules of Practice and Procedure,³ only a party to a proceeding may file a request for rehearing. Thus, Petitioners correctly recognize that they may not seek rehearing of the Director's letter order without simultaneously filing a motion to intervene. Although Petitioners filed their request as a motion for late intervention, Commission staff did not establish a deadline for filing motions to intervene in any of the public notices issued in this proceeding. Therefore, Petitioners' motion to intervene was not late, and there was no need for them to establish good cause for late intervention in support of their motion.⁴

9. In light of the special circumstances surrounding the accident and the level of community interest in the proposed reconstruction, Commission staff determined, and we agree, that public notice of staff's environmental review and public participation in its scoping process was appropriate. Petitioners participated in scoping and filed comments on the draft EA. In addition, Petitioners have participated in the pre-filing phase of the relicensing process for the Taum Sauk Project.⁵ Accordingly, we will grant their intervention request and address their arguments on rehearing.

10. Petitioners argue that the Commission erred in limiting the scope of the EA to the immediate impacts of the proposed reconstruction, without also considering the environmental impacts associated with future operation of the Taum Sauk Project. They argue that, under the National Environmental Policy Act (NEPA), the Commission must disclose all significant impacts from projects, including not only direct impacts but also indirect impacts, which include any impacts that are reasonably foreseeable as a result of the proposed action. Petitioners maintain that the Commission's decision to allow the

³ 18 C.F.R. § 385.713 (2007).

⁴ In post-licensing proceedings concerning matters for which entities are given a specific consultation role and no intervention deadline is established, a motion to intervene is timely if it precedes or accompanies a request for rehearing of an order disposing of those matters. *See Pacific Gas & Electric Co.*, 40 FERC ¶ 61,035 at 61,099 and n. 13 (1987). In this case, Petitioners were not given a consultation role and therefore could not demonstrate that they had a right to intervene. Nevertheless, because no deadline was established, their motion was timely, and we may grant it in our discretion.

⁵ In that regard, Petitioners point out that, because Commission staff did not establish a separate sub-docket for the rebuild proceeding but instead used the same sub-docket for filings related to both the rebuild and the relicensing proceeding, it was unclear whether these two matters were related or distinct. *See* Petitioners' request for rehearing at 8.

upper reservoir to be rebuilt “will necessarily result in the operation of the project”⁶ and that, as a result, issuance of a new license for the project is a reasonably foreseeable future action that must be considered now, rather than later.

11. Petitioners consider it “inconceivable to think that the Commission would allow a licensee to construct a project and operate it for a single year (or less) only to deny the project a new operating license or issue a license that requires substantially different design or operational requirements.”⁷ They regard as “unpersuasive” the Director’s statement that authorizing the reconstruction will not affect the Commission’s future relicensing decision.⁸ Petitioners therefore conclude that the Commission’s NEPA analysis must consider the cumulative impacts of the decision to authorize reconstruction, including the reasonably foreseeable operational impacts that will occur under both the current license and any future license for the project.

12. Petitioners’ arguments are not correct. As we have explained in previous cases,⁹ section 10(c) of the Federal Power Act (FPA)¹⁰ requires a licensee to “maintain the project works in a condition of repair . . . for the efficient operation of said works in the development and transmission of power, [and to] make all necessary renewals and replacements” A licensee is responsible for keeping a project safe and operational. Failure to do so will place the licensee at risk of possible enforcement action, or may cause the Commission to regard the licensee’s behavior as an implied surrender of the

⁶ Petitioners’ request for rehearing at 9.

⁷ *Id.* at 10.

⁸ *Id.*

⁹ *See, e.g., El Dorado Irrigation District*, 94 FERC ¶ 61,031 at 61,118 n. 14 (2001) (authorizing dam reconstruction work while relicense application was pending and project was operating under annual license); *Citizens Utilities Co.*, 68 FERC ¶ 61,310 at 62,285 (1994) (authorizing dam stabilization and spillway reconstruction at one of the project’s five dams while relicense application was pending and removal of that particular dam was at issue in the relicensing proceeding). In the latter case, the licensee subsequently amended its relicense application and obtained authorization to remove the dam instead of rebuilding it. *See Citizens Utilities Co.*, 71 FERC ¶ 61,006 (1995), and 78 FERC ¶ 61,214 (1997).

¹⁰ 16 U.S.C. § 803(c) (2000).

license.¹¹ These principles are reflected in Article 21 of the license for the Taum Sauk Project.¹²

13. Unless the Commission determines that circumstances would warrant ceasing operation, a licensee has the right to operate its project in a manner consistent with the terms of the license. In the normal case, the Commission will ensure that a licensee repairs or replaces damaged project works in a timely manner. If a licensee has indicated that it will not seek a new license for a project, the Commission may permit the licensee to defer any needed repairs, provided that safety is not an issue and the public interest does not require immediate restoration of the project.¹³ However, if a licensee is applying for a new license, the Commission has permitted the licensee to undertake necessary project repairs prior to a decision on the relicensing application in all but extraordinary circumstances.¹⁴ Thus, Ameren's request to rebuild the upper reservoir

¹¹ See *Southern California Edison Co.*, 106 FERC ¶ 61,212 at P 16 (2004).

¹² Article 21 provides:

If the Licensee shall cease or suffer essential project property to be removed or destroyed or to become unfit for use, without replacement, or shall abandon or discontinue good faith operation of the project for a period of three years, or refuse or neglect to comply with the terms of the license and the lawful orders of the Commission mailed to the record address to the Licensee or its agent, the Commission will deem it to be the intent of the Licensee to surrender the license, and not less than 90 days after public notice may in its discretion terminate the license.

Article 21, Form L-11, *Terms and Conditions of License for Unconstructed Major Project Affecting the Interests of Interstate or Foreign Commerce* (July 1, 1965), 34 FPC 602 (1965), *incorp'd by ref.*, *Union Electric Co.*, 34 FPC 598, 601 (1965) (Ordering Paragraph C).

¹³ See *El Dorado Irrigation District*, 82 FERC ¶ 61,255 at 62,021 (1998) (dismissing complaint and finding that licensee's deferral of project repairs while it was in the process of surrendering its license did not violate the FPA or license terms).

¹⁴ See *Swift Creek Power Co.*, 61 FERC ¶ 61,277 (1992) (staying the effectiveness of a 1981 order authorizing rehabilitation and expansion of a project up for relicensing, finding that, because 11 years later the reconstruction had not yet commenced, it was in the public interest to revisit the matter in the pending relicensing proceeding).

was consistent with the FPA and the terms of its license, and staff properly approved it without requiring that the reconstruction await a decision on relicensing.

14. Moreover, as staff correctly noted in response to comments on the draft EA,¹⁵ the Director's approval of the dam reconstruction does not prejudice the Commission's decision on the relicense application. In contrast to a repair application, in a relicense proceeding both the FPA and NEPA require the Commission to examine whether the renewed commitment of a public resource to hydroelectric generation will be best adapted to the comprehensive development of the waterway for beneficial public purposes.¹⁶ This could involve major changes in project facilities or operation, new environmental measures that may substantially alter project economics, or in rare cases, perhaps even a determination that the project should no longer be used for power generation.¹⁷ In deciding to proceed with the reconstruction now, Ameren necessarily assumes that risk. In short, there is no legal or factual basis for concluding, as Petitioners maintain, that relicensing should be considered a reasonably foreseeable consequence of the reconstruction authorization. Consequently, there is no basis for concluding that the EA was in any way deficient for failing to include in its cumulative effects analysis the effects of future project operation that may result from relicensing. Staff properly restricted the scope of the EA to the impacts associated with rebuilding the upper reservoir.

15. Significantly, Petitioners do not assert, either here or in the relicensing proceeding, that the Taum Sauk Project should be decommissioned or that authorizing the reconstruction of the project will preclude the imposition of any particular environmental measure in a new license. Thus, Petitioners' concerns about the Commission prejudging relicensing are purely theoretical.

16. Contrary to Petitioners' request, we need not expressly reserve our authority to require changes to the project facilities or operation as part of relicensing. That authority is inherent in the relicensing process. There is no presumption, either equitable or legal,

¹⁵ See Appendix A to the final EA at p. A-2.

¹⁶ See *Yakima Tribes v. FERC*, 746 F.2d 466, 475-77 (9th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985).

¹⁷ See *City of Tacoma, Washington v. FERC*, 460 F.3d 63, 74 (D.C. Cir. 2006).

against the Commission's requiring such changes in any new license that may be issued for the Taum Sauk Project.¹⁸

17. Petitioners argue that the EA fails to provide substantial evidence to justify staff's recommendation that Ameren be allowed to clear 13.2 acres of forest for a staging area to be used during the reconstruction. Petitioners correctly point out that, in the draft EA, staff found that the clearing and grading of this forested area would cause long-term negative effects on wildlife habitat, and therefore recommended that the licensee not clear this area. They also point out that the Missouri Department of Natural Resources (Missouri DNR) filed comments in support of staff's recommendation that the area not be cleared. Petitioners then assert that Commission staff reversed its recommendation in the final EA without providing "any evidence in support of its conclusion."¹⁹

18. Petitioners overlook the fact that Commission staff reevaluated this issue in the final EA, not only in response to Ameren's comments, but also taking into account Ameren's July 31, 2007 filing in response to the Missouri DNR's concerns. As discussed in the final EA, Ameren stated that there are no practical alternatives for the location of this staging area, and staff's recommendation that this area not be cleared would affect plans for providing a safe construction environment. Ameren further stated that if this staging area were not available, some construction equipment would have to be moved offsite, resulting in increased traffic along public roads, and increased noise and air quality impacts to nearby residences. Ameren also noted that its dam safety engineering consultants considered the area essential for the safe and efficient reconstruction of the upper reservoir.²⁰ In response to the Missouri DNR's concerns about visual impacts of the clearing, Ameren filed a plan that would require grading into the area from east to

¹⁸ Petitioners also request that we amend the August 15, 2007 letter order to address how Ameren will assure that reconstruction will not interfere with timely relicensing of the project. Petitioners do not explain or otherwise address the reasons for their request. Ameren recently filed its draft license application with the Commission and transmitted it to the stakeholders in the relicensing, requesting their comments within 90 days. *See* letter to Kimberly Bose, Commission Secretary, from Thomas Hollencamp, Ameren (filed October 17, 2007). In its correspondence regarding the draft application, Ameren noted that, because of the impacts of the upper reservoir breach, some additional studies will be needed to assess the existing environment and to define environmental resources when the project is back in operation. *Id.* at 2. Ameren must file its application for a new license on or before June 30, 2008. Relicensing is a separate matter from project reconstruction, and any concerns about the timing of relicensing should be raised and considered in that proceeding.

¹⁹ Petitioners' request for rehearing at 13.

²⁰ Final EA at 71.

west at a gradual slope, thus allowing the use of the space without having a scenic impact on the ridgeline view from Johnson's Shut-Ins State Park and locations along the Ozark Trail.²¹ Commission staff found that, with the 40-50 foot high tree line, this approach would shield the cleared area from view for most of the year.²² Staff further found that erosion control measures would minimize soil loss, and that the licensee should be required to mitigate for the loss of forest habitat by developing and implementing a reforestation plan.²³

19. As the foregoing discussion demonstrates, Commission staff explained the reasons for changing its recommendation to allow the clearing of the staging area, and analyzed the environmental effects of Ameren's revised proposal. Nothing more is required under NEPA. We therefore find that final EA provides substantial evidence in support of staff's recommendation.

20. Petitioners argue that the final EA fails to justify Commission staff's statement that there is a need for power from the project in the face of competing evidence to the contrary. Petitioners maintain that the EA simply states that the project generates power for use in the region during periods of peak demand. They add that, in comments on the draft EA, Missouri Coalition for the Environment pointed out that, shortly after the collapse of the upper reservoir, Ameren announced that it was buying three more power plants that would provide sufficient generating capacity and reserve power to serve its Missouri customers the following summer, even without the Taum Sauk Project. They criticize the final EA for failing to address this evidence.

21. The reconstruction of the upper reservoir is not a licensing action under the FPA. Rather, it is a compliance matter that falls under the Commission's project safety authority under Part 12 of its regulations.²⁴ For licensing actions, need for power is one of the many public interest factors that the Commission must consider in determining whether the project should be licensed under FPA section 10(a)(1). In contrast, the Commission is not required to revisit these section 10(a)(1) factors for post-licensing

²¹ *Id.* at 69.

²² *Id.*

²³ *Id.* at 72-73.

²⁴ *See* 18 C.F.R. Part 12 (2007). Among other things, Part 12 authorizes the Regional Engineer or other authorized representative of the Commission to require an applicant or licensee to take any action with respect to the design, construction, operation, maintenance, repair, use, or modification of the project or its works that is, in the judgment of that official, either necessary or desirable. 18 C.F.R. § 12.4(b)(2)(iv) (2007).

matters such as project repairs, reconstruction, or compliance filings.²⁵ Commission staff was not required to make a finding in the EA that power is needed before recommending that Ameren be allowed to reconstruct the upper reservoir and return the project to service, because these matters are governed by FPA section 10(c) and Article 21 of the existing license. The Commission will consider whether there is a need for power in the upcoming relicensing proceeding.

22. Compliance and review actions that do not have a significant effect on the environment are categorically excluded from the requirement to prepare an EA,²⁶ although the Commission may elect to prepare an environmental analysis for an action that is otherwise categorically excluded from NEPA analysis.²⁷ In this case, Commission staff chose to prepare an EA, and followed its usual practice of identifying the purpose and need for the proposed action as part of its analysis.²⁸ In a licensing action, need for power and need for the proposed action are closely aligned, because even if a project has multiple purposes, one of them is the generation of electric power. For reconstruction, however, the purpose and need for the proposed action are different: the purpose of the action is to authorize the reconstruction, and the action is needed so that the project can resume power generation as provided in the license. During the term of a license, the Commission would have no basis for revoking it simply because new sources of replacement power had become available. Similarly, the Commission could not prevent a licensee from repairing its licensed project based on such a showing. Thus, we conclude that need for power is not relevant in this proceeding. Accordingly, Commission staff was not required to consider it in the EA, and staff adequately described the purpose and need for the proposed action by stating that rebuilding the Taum Sauk Project would allow project power to again be available in meeting part of the regional need for on-peak power.

23. Petitioners maintain that, because the August 15, 2007 letter order relies on a flawed EA which was not itself supported by substantial evidence, the letter order also is not supported by substantial evidence. As we have seen, however, Petitioners' arguments concerning the EA are unfounded. We therefore find no basis for concluding that the letter order lacks evidentiary support.

²⁵ See *Marysville Hydro Partners*, 62 FERC ¶ 61,011 at 61,041 (1993).

²⁶ See 18 C.F.R. § 380.4(a)(3) (2007).

²⁷ See 18 C.F.R. §380.4(b) (2007).

²⁸ See 40 C.F.R. § 1502.10(d) (2007), which lists “[p]urpose of and need for action” as part of the recommended format of the Council on Environmental Quality (CEQ) for an environmental impact statement (EIS). Commission staff follows the same CEQ-recommended format in preparing an EA.

The Commission orders:

(A) The motion to intervene filed on September 14, 2007, by the Missouri Coalition for the Environment, the Sierra Club, and American Rivers in this proceeding is granted.

(B) The request for rehearing filed on September 14, 2007, by the Missouri Coalition for the Environment, the Sierra Club, and American Rivers in this proceeding is denied.

(C) The request for a stay of the Director's August 15, 2007 letter order, filed on September 14, 2007, by the Missouri Coalition for the Environment, the Sierra Club, and American Rivers in this proceeding is dismissed as moot. The alternative request for clarification of the August 15, 2007 letter order is granted to the extent discussed in this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.