

137 FERC ¶ 61,065
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Appalachian Power Company

Project No. 2210-212

ORDER ON REHEARING

(Issued October 20, 2011)

1. Appalachian Power Company (Appalachian), Gangplank Pointe Condominium Association (Gangplank), Smith Mountain Lake Association (Association), Cut Unnecessary Regulatory Burden, Inc. (CURB), Association of Lake Area Communities (Lake Communities), and the Tri-County AEP Relicensing Committee (Tri-County) have filed requests for rehearing of a Commission staff letter order dealing with an allegation of non-compliance with the shoreline management plan (SMP) for Appalachian's Smith Mountain Lake Pumped Storage Project.¹ We grant rehearing, to the extent set forth below.

Background

2. Appalachian is the licensee for the 636-megawatt Smith Mountain Pumped Storage Project, located on the headwaters of the Roanoke River, in Bedford, Campbell, Franklin, and Pittsylvania Counties, Virginia. The 20,260-acre Smith Mountain Lake is the upper reservoir of the project's Smith Mountain Development.² The lake has approximately 500 miles of shoreline, along which are private residences and a number of public and private recreation sites.³

¹ *Appalachian Power Company*, Project No. 2210-090 (issued August 24, 2011) (unpublished letter order) (August 24, 2011 order).

² The project also includes a lower reservoir, Leesville Lake, which is not relevant here.

³ *Appalachian Power Company*, 112 FERC ¶ 61,026, at P 2 (2005).

3. On September 2, 2003, Appalachian filed with the Commission a request for approval of an SMP for the Smith Mountain Lake Project. The company stated that

Appalachian has prepared and is filing the SMP of its own volition. There is neither a Commission Order nor condition of the project license that requires Appalachian to file such a plan. . . . [N]umerous applications . . . for activities within the project boundaries . . . have brought to light the need for a comprehensive plan for managing development along the project shorelines.[⁴]

The company further explained that "[d]evelopment of the SMP was accomplished through a collaborative process including individuals from State agencies, local governments, and non-governmental organizations representing the interests of the stakeholders along both Smith Mountain and Leesville Lake."⁵ The purposes of the plan included: environmental protection, preserving scenic quality, protecting cultural resources, enhancing recreational opportunities, cooperating with government entities to coordinate land uses and permitting efforts, minimizing impacts among contrasting, and striving for a balance between local economic interests and environmental resources.⁶

4. Section 2.5 of the plan contained regulations regarding, among other things, docks. Section 5.5.2 established high density, multi-use regulations, including those for community docks. The regulations included limitations on length and height, and a requirement that docks run perpendicular to the shore and include a minimum 100-foot setback from adjacent property lines.⁷ Of particular relevance here, Section 2.5.2(23) provided, in pertinent part, that:

[d]ocks . . . constructed . . . prior to the implementation of the Shoreline Management Plan do not need to be modified to meet the new requirements. These structures may continue to exist despite their nonconforming nature and may be expanded provided the nonconforming aspect of the structure is not increased. Maintenance of all structures is encouraged. If maintenance requires more than 50% of the physical

⁴ Letter from Frank M. Simms (Appalachian) to Magalie Roman Salas (Commission Secretary) at 1.

⁵ *Id.* at 3.

⁶ September 3, 2003, Shoreline Management Plan at 1-2.

⁷ *Id.* at 17-20.

structure, excluding the pilings, to be replaced or repaired, the structure must conform to the new requirements.

5. After Commission staff prepared an environmental analysis of the proposal and held a public meeting to receive comments, the Commission modified and approved the SMP by order dated July 5, 2005.⁸ The sections of the SMP regarding the grandfathering treatment of existing docks did not elicit comment during the review phase, were not modified by the Commission, and were not raised on rehearing. No entity sought appellate review of the SMP orders.

6. On December 15, 2009, the Commission issued an order granting Appalachian a new 30-year license for the project.⁹ The order noted that Appalachian had filed the current version of the SMP with its license application, and had asked that it be made part of the new license. This request was granted by Ordering Paragraph (J). No issues related to the matters under consideration were raised in the relicensing proceeding.¹⁰

7. Gangplank maintains three docks (Docks 100, 200, and 300), with a total of 54 boat slips, at the terminus of Gangplank Circle, in Franklin County, Virginia. The docks were completed in 1987.¹¹

8. On May 4, 2011, Mr. Preston Michael, a resident in the Gangplank Townhomes, next to the Gangplank Pointe Condominiums, filed a letter with the Commission, alleging that Gangplank was out of compliance with the SMP as a result of rebuilding a dock. Mr. Michael stated that the dock did not comply with the SMP because it was

⁸ Appalachian Power Company, 112 FERC ¶ 61,026, *reh'g denied*, 113 FERC ¶ 61,168 (2005).

⁹ *Appalachian Power Company*, 129 FERC ¶ 62,201 (2009).

¹⁰ The license order noted that stakeholders had agreed that the SMP should address the replacement of shoreline habitat that is affected by construction, that the plan did not include a setback or buffer between commercial/residential and resource protection areas, and the order itself required some new measures relating to the SMP. Accordingly, license Article 413 required Appalachian to address at least these issues in an updated SMP to be filed no later than July 5, 2010. The updated SMP has been filed and is under review, and issues relating to that proceeding will not be addressed here. The relevant portions of the SMP were not revised in the update.

¹¹ *See* Letter from Elizabeth B. Parcell (Appalachian) to Kimberly Bose (Commission Secretary) at 2, 4 (filed June 23, 2011).

approximately 225 feet in length and 25 feet wide, was located in part some 28 feet over the extended property line running between the condominiums and the townhomes, and did not have a setback. According to Mr. Michael, because Gangplank was reconstructing more than 50 percent of the dock, it could no longer be grandfathered and therefore should be required to come into compliance with the current standards established by the SMP.¹²

9. By letter dated May 23, 2011, Commission staff asked Appalachian for information regarding the dock and the company's understanding of the SMP.¹³ Staff stated that, while docks that existed prior to the SMP were grandfathered, "[i]f over 50% of the physical structure of a non-conforming dock is rebuilt or replaced, then the dock must then conform to the SMP requirements (50% rebuild rule)."

10. Appalachian filed a response to staff's request on June 23, 2011.¹⁴ The company stated that it issued an occupancy and use permit to Gangplank in connection with the dock repairs on March 3, 2011, and that it "did not intend for the Permit to authorize maintenance greater than 50% of the physical structure of the dock in question,"¹⁵ but that, including maintenance activities conducted prior to issuance if the permit and "if all decking is taken into account, it appears that Appalachian staff issued a permit allowing maintenance of 58% of the structure." Appalachian stated that no modifications to the size or configuration of the dock had been made, that the modifications did not adversely affect the project in any way, and in fact were beneficial, safety hazards having been eliminated, and that it believed "that issuance of the Permit results in a minimal discrepancy with the SMP."¹⁶ Appalachian conceded that the dock (as well as Gangplank's two neighboring docks) would not conform with current SMP requirements because they run parallel to the shoreline and do not meet setback standards.¹⁷

¹² See Letter from Preston G. Michael to Kimberly Bose.

¹³ See Letter from Robert J. Fletcher (Chief, Land Resources Branch) to Frank M. Simms (Appalachian).

¹⁴ See Letter from Elizabeth B. Parcell to Kimberly Bose.

¹⁵ June 23, 2011, Letter at 1.

¹⁶ *Id.* at 2. Appalachian also asserted that tearing down and rebuilding the dock could result in a longer and higher dock running perpendicular to the shoreline, which would still impact Mr. Michael's view of the lake.

¹⁷ *Id.* at 2.

11. As to the history of the rebuild, Appalachian said that during a December 7, 2010, site visit, it had been told by the contractor working on Dock 100 that boards were being replaced only on the dock's upper deck, a procedure that would not require a permit, since it involved less than 50 percent of the structure. This was confirmed during a second site visit, in January 2011. Later in the month, the company stated, Gangplank's manager informed Appalachian that it also wanted to replace floating docks and walkways, at which point the company explained that a permit would be required. Appalachian thereafter issued a permit for the rebuild on March 3, 2011. The company stated that a recent inspection had disclosed that additional walkways had been recovered, and that work was also proceeding on Dock Nos. 200 and 300.¹⁸

12. On August 24, 2011, Commission staff issued an order in which it concluded that Gangplank's activities had not been permitted by Appalachian consistent with the SMP. Staff stated that because 58 percent of the dock structure had been replaced, the dock was now required to come into compliance with the SMP, explaining that "the purpose of the 50% rebuild rule is to eventually bring all docks in[to] conformance with the SMP through attrition when significant repairs are needed, without requiring dock owners to immediately conform to the SMP." Staff noted that the Gangplank docks had been documented as non-conforming in 2005, and stated that the issue was not aesthetics or safety, but conformance with the SMP.¹⁹ Staff concluded that, regardless of which party (Appalachian or the contractor which may have provided misleading information) was at fault, the Gangplank docks were now inconsistent with the requirements of the SMP. Accordingly, Staff ordered Appalachian to file a plan and schedule for modifying the docks to bring them into conformity with the SMP, and to explain how it planned to prevent further similar occurrences.²⁰

13. Appalachian, Gangplank, the Association, CURB, Lake Communities, and Tri-County filed requests for rehearing, urging reversal of the August 24, 2011 order.

Discussion

A. Motions to Intervene

14. As a general matter, the Commission does not entertain requests for rehearing in compliance matters. Such motions are appropriate only where a filing entails a material

¹⁸ *Id.* at 3.

¹⁹ August 24, 2011, order at 2.

²⁰ *Id.* at 3.

change in project development or terms and conditions of license, or could adversely affect rights of property owners in manner not contemplated by the license.²¹ This is because these cases are between the Commission and the licensee, which is automatically a party to proceedings involving questions of its conduct. In cases involving complaints, the complainant also has no need to intervene. There is generally no reason to allow other entities to intervene.

15. Here, there is no material change proposed in project development, nor is there any way in which the general rights of property owners could be affected in a manner not contemplated by the license. Rather, we are simply construing an already-approved SMP, in an individual case. Therefore, this is not the type of proceeding in which interventions lie.

16. Gangplank's docks are the subject of this proceeding, and Appalachian could be required to take steps that would result in physical alterations to those facilities and expenses that could be borne by Gangplank. In consequence, because Gangplank has a direct, unique interest in these proceedings that cannot be represented by another party, we make an exception to the general rule, and will grant its motion to intervene.

17. The same is not true of the Lake Association, CURB, and Tri-County. In addition to the fact that intervention is usually not appropriate in this type of proceeding, these entities do not have a direct stake in the proceeding. Rather, they make arguments that the SMP is unfair, unconstitutional, or ambiguous, and that it warrants revision. None of these entities has demonstrated a more than general interest in this matter: there will be no direct, certain harm to them if we deny rehearing. In other words, they have no standing here, because any injury to them is purely theoretical. Further, they have demonstrated no special interest that cannot be represented by Appalachian or Gangplank. In consequence, we dismiss their motions to intervene and, because requests for rehearing can only be filed by parties, we reject their rehearing requests.²²

²¹ See, e.g., *Merimil Limited Partnership*, 115 FERC ¶ 61,087 (2006). The Commission also may allow intervention by an entity that is specifically named in a license article as one that must be consulted regarding the subject matter of a post-licensing proceeding (as where we may require a licensee to consult with resource agencies regarding fishery plans), an exception that is not at issue here, where no provision of the license requires that Appalachian consult with any entity when enforcing the terms of the SMP in individual cases.

²² See, e.g., *Puget Sound Energy, Inc.*, 112 FERC ¶ 61,244 (2005). In addition, to the extent that these entities have complaints about the SMP, their arguments represent an untimely collateral attack on the 2005 order that approved it. See, e.g., *City of*

(continued...)

18. The Lake Communities' pleadings must be viewed slightly differently, because they were late. Section 313(a) of the Federal Power Act²³ provides that requests for rehearing must be filed with the Commission within 30 days of the issuance of the order in question. While the Lake Communities' motion and request for rehearing are dated September 22, 2011, they were not filed with the Commission until September 27, 2011, 34 days after the August 24, 2011 order was issued. The Commission cannot extend the rehearing deadline, even where it is alleged that a delay in filing may have been caused by the Postal Service.²⁴ Accordingly, we must reject the Lake Communities' request for rehearing, and, because the only purpose for intervening in a proceeding is to preserve the right to seek rehearing, we dismiss as moot the accompanying motion to intervene.

B. The Merits

19. Appalachian contends that Commission staff incorrectly interpreted the 50 percent rule, that the August 24, 2011 order incorrectly concluded that Appalachian was not diligent in investigating Mr. Michael's complaints, and that the order's requirements that Appalachian submit a schedule to bring Gangplank into compliance and to provide a plan to avoid future similar incidents are arbitrary and capricious and not supported by substantial evidence. Appalachian asks that it be given an extension of time to consult with the technical review committee of stakeholders established by the SMP to clarify the 50 percent rule. For its part, Gangplank argues that the 50 percent rule is unclear and ambiguous, and that Commission staff misinterpreted it. It also in effect contends that it kept Appalachian fully apprised of its maintenance plans.

20. As an initial matter, we reject arguments by both Appalachian and Gangplank that staff misinterpreted the SMP. The plain language of the SMP states that "[i]f maintenance requires more than 50% of the physical structure, excluding the pilings, to be replaced or repaired, the structure must conform to the new requirements." As discussed above, Appalachian itself informed staff that it had approved work on some

Wadsworth, Ohio, et al., 123 FERC ¶ 61,272 (2008). In fact, the Association, Lake Communities, and the counties that comprise Tri-Counties were among the stakeholders that developed the SMP. Some of these entities also question whether the Commission's regulation of Smith Mountain Lake violates state law or is unconstitutional. It is beyond question both that the FPA establishes a comprehensive scheme of regulation over the nation's waters and that it preempts conflicting state regulation. See *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946).

²³ 16 U.S.C. 825l(a) (2006).

²⁴ See *Village of Potsdam, New York*, 100 FERC ¶ 61,006 (2002).

58 percent of Dock 100, and that this was inconsistent with the terms of the SMP. Thus, staff's interpretation of the SMP was reasonable and consistent with its plain language and Appalachian's understanding of that language.

21. On rehearing, for the first time, Appalachian asserts that the 50 percent rule is ambiguous and could, if strictly applied, unintentionally discourage dock maintenance.²⁵ We agree. While staff's interpretation was reasonable and supported by Appalachian's initial interpretation, we find that the SMP is ambiguous because it does not address how the 50 percent rule is to be applied (e.g., does it apply only in cases where more than 50 percent of a structure is repaired at one time, or is the 50 percent cumulative?). Appalachian argues that the rule is not meant to apply to well-tended structures, but rather to those that have been left derelict, yet the rule does not make this explicit.

22. Under these circumstances, Appalachian should consult with the technical review committee established in the SMP to help carry out the plan, and with other stakeholders, to consider the best manner for carrying out the 50 percent rule and file an application to amend the SMP to clarify the manner in which the rule is to be applied. We caution that we have already approved the general principal that grandfathered facilities that do not conform to current SMP standards should, over time, be brought into conformance. While the SMP is ambiguous in how this principle is to be implemented, it is not ambiguous in establishing this principle. Thus, we do not expect that principle to be revisited as result of this order. Instead, we expect any proposed amendment to be guided by the principals underlying the SMP, and to set standards that can be easily applied in a manner that accommodates, to the extent practicable, the needs of the stakeholders.

23. Based on the foregoing, because this is a case of first impression, because there appears to have been some confusion among Appalachian, Gangplank, and Gangplank's contractor, and because Gangplank's repairs appear to have improved the safety of the docks without any increase in size or configuration, we will not require Appalachian to file the plans required by the August 24, 2011 order.²⁶ We nonetheless expect strict compliance with the SMP in the future.

²⁵ See Appalachian Request for Rehearing at 5.

²⁶ Given this resolution, we find it unnecessary to address the portions of Appalachian's and Gangplank's requests for rehearing that highlight their differing versions of the facts at issue, and that debate staff's conclusion regarding the company's diligence.

The Commission orders:

(A) The motion to intervene filed by Gangplank Pointe Condominium Association on September 23, 2011, is granted.

(B) The motions to intervene filed by Smith Mountain Lake Association, Cut Unnecessary Regulatory Burden, Inc., and the Tri-County AEP Relicensing Committee on September 22, 2011, are dismissed.

(B) The requests for rehearing filed by Smith Mountain Lake Association, Cut Unnecessary Regulatory Burden, Inc., and the Tri-County AEP Relicensing Committee on September 22, 2011, are rejected.

(C) The request for rehearing filed by the Association of Lake Area Communities on September 27, 2011, is rejected and its concurrent motion to intervene is dismissed as moot.

(D) The requests for rehearing filed by Appalachian Power Company and by Gangplank Pointe Condominium Association on September 23, 2011 are granted to the extent discussed herein and are otherwise denied.

(E) Appalachian Power Company shall consult with the entities required to be consulted in Article 413 of the license for the Smith Mountain Pumped Storage Project, as well as with other stakeholders, and, within six months of the date of the order, file for Commission approval a proposed amendment to the project Shoreline Management Plan that clarifies the manner in which section 2.5.2(23) and any similar sections of the plan are to be implemented.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.