

137 FERC ¶ 61,124
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Energy Carolinas, LLC

Project No. 2601-015

ORDER DENYING REHEARING

(Issued November 17, 2011)

1. Ms. Paulette Smart has filed a request for rehearing of a September 20, 2011, notice¹ denying her late motion to intervene in the relicensing proceeding for the Bryson Hydroelectric Project No. 2601. As discussed below, we deny rehearing, based on our conclusions that Ms. Smart has not provided good cause for intervening late, and because she is not aggrieved by the underlying order.

Background

2. The 980-kilowatt Bryson Project, licensed to Duke Energy Carolinas, LLC, is located on the Oconaluftee River in Swain County, North Carolina. As relevant here, the Bryson Project includes the Ela Reservoir, which encompasses 38 acres at an elevation of 1,828.41 feet mean sea level (msl).² Approximately 1.5 miles of the northern and eastern shoreline of the reservoir adjoins the Qualla Boundary, a reservation held in trust by the United States for the Eastern Band of Cherokee Indians.³

3. On July 22, 1980, the Commission issued a minor license authorizing Duke's predecessor to operate and maintain the project.⁴ The order explained that the project

¹ *Duke Energy Carolinas, LLC*, 136 FERC ¶ 61,199 (2011).

² *See Duke Energy Carolinas, LLC*, 136 FERC ¶ 62,062, at P 9 and Ordering Paragraph (B)(2) (2011) (July 22 Order).

³ *See Preliminary Final Environmental Assessment for Hydropower Licenses* [Bryson Project No. 2601 and others], Federal Energy Regulatory Commission, Office of Energy Projects, Division of Hydropower Licensing (issued June 2006) at C-26; 198.

⁴ *Nantahala Power and Light Company*, 12 FERC ¶ 62,044 (1980).

included lands enclosed by the project boundary, as described in the Exhibit K filed by the applicant.⁵ Exhibit K showed that the project boundary that abutted the Qualla Boundary ran along the 1,837.41 msl contour line.

4. On July 23, 2003, Duke filed an application for a subsequent license to continue to operate and maintain the project.⁶ The Commission issued public notice of the application on November 7, 2003, and thereafter had the notice published in the Federal Register on November 19, 2003. The notice established January 6, 2004, as the deadline for filing motions to intervene.

5. On June 23, 2006, the U.S. Department of the Interior filed comments on behalf of its constituent agencies, including the Bureau of Indian Affairs (BIA), regarding the draft environmental assessment (EA) prepared by Commission staff to study, among other things, the relicensing of the Bryson Project.⁷ In its part of the comments, BIA stated that it had become aware (apparently during a public meeting to review the draft EA) that a portion of the Bryson Project might occupy lands within the Qualla Boundary, and suggested that, as a result, mandatory licensing conditions and the assessment of annual charges for the use tribal lands might be necessary.⁸

6. Duke filed responsive comments on July 7, 2006.⁹ Duke asserted that the tribe had conveyed to its predecessor lands for the proposed Ela reservoir prior to the acquisition by the United States of the Qualla Boundary lands, and that the tribe and the company had subsequently agreed that the boundary between company-owned and tribal lands was the 1,837.41 msl contour line.¹⁰ The company provided documents to support its claims.

⁵ *Id.* at 63,086.

⁶ The Commission issues a "subsequent" license under Part I of the Federal Power Act after the expiration of a minor or minor part license that is not subject to sections 14 and 15 of the statute. *See* 18 C.F.R. § 16.2(d) (2011).

⁷ *See* letter from J. Nicklas Holt (Interior) to Magalie Salas (Commission Secretary).

⁸ Also on June 23, 2006, the Band filed comments stating that it reserved the right to address the project boundary issue in the future, after reviewing further information. *See* letter from Michael L. Bolt (stakeholder representative, Eastern Band of Cherokee Indians) to Magalie R. Salas. The Band filed no further comments on the matter.

⁹ *See* letter from John A. Whitaker, IV to Magalie R. Salas.

¹⁰ *Id.* at 2.

7. On July 7, 2006, Interior filed revised comments, stating that “BIA has reviewed additional information that has been either provided to or pointed out to BIA by the Applicant” based on which it deleted from its comments all references to tribal lands being within the project boundary.¹¹ The issue did not arise again in the proceeding.

8. On July 22, 2011, Commission staff issued a delegated order granting Duke a subsequent license for the Bryson Project.¹² The order stated that “[t]he project boundary around Ela Reservoir includes the reservoir and associated lands up to contour elevation 1,843.41 msl. Duke proposes no change to the project boundary.”¹³

9. On August 22, 2011, Ms. Smart filed a late motion to intervene and a request for rehearing. Ms. Smart noted that the license order stated that the project boundary around the reservoir extended to 1,843.41 msl, which she asserted was in conflict with the longstanding use of 1,837.41 msl as the project boundary.¹⁴ Ms. Smart also alleged that the 1,837.41 project boundary has always conflicted with property interests that she holds in lands extending to 1,828 msl.¹⁵ Ms. Smart stated that late intervention was justified because the July 22 Order’s description of the project boundary as the 1,843.41 msl contour differed from that set forth in Duke’s filings and in the EA prepared by Commission staff, without public notice and the opportunity to intervene being given as to that matter.¹⁶

10. On September 15, 2011, Commission staff issued an order clarifying and amending the July 22 licensing order.¹⁷ Among other things, the September 15 order explained that, with the exception of the area near the dam and the powerhouse (which is located some 4,000 feet downstream of Ms. Smart’s property), the project boundary follows the same contours as those approved in the prior license.¹⁸ Thus, the 1,837.41

¹¹ See letter from J. Nicklas Holt (Interior) to Magalie Salas.

¹² July 22 Order 136 FERC ¶ 62,062.

¹³ *Id.* P 10.

¹⁴ See August 22, 2011 Request for Rehearing at 1; 4.

¹⁵ *Id.* at 4.

¹⁶ *Id.* at 10-11.

¹⁷ *Duke Energy Carolinas, LLC*, 136 FERC ¶ 62,226 (2011) (September 15 Order).

¹⁸ *Id.* at P 9.

msl boundary in the area of the Qualla Reservation and Ms. Smart's property had not changed.

11. On September 20, 2011, the Commission issued a notice denying Ms. Smart's motion to intervene and accordingly rejecting her request for rehearing. The notice concluded that, given the public notice of the relicensing proceeding, Ms. Smart had failed to demonstrate good cause for not intervening timely. The notice also explained that the September 15 Order had clarified that the project boundary in the area of Ms. Smart's property remained at the same contour it had been set at in the 1980 license, rather than at the higher contour.

12. On October 20, 2011, Ms. Smart filed a request for rehearing of the notice.

Discussion

13. As a general matter, the Commission freely allows intervention in hydropower licensing proceedings. However, with respect to late motions to intervene, the Commission Rules of Practice and Procedure provide that the movant must show good cause why the established time limit should be waived.¹⁹ In acting on such a motion, the decisional authority may consider whether: good cause existed for not filing the motion within the time prescribed; any disruption of the proceeding will result from permitting intervention; the movant's interest is not adequately represented by other parties; and any prejudice to existing parties that might result from permitting the intervention.²⁰ In addition, once a dispositive order has been issued in a proceeding, an entity seeking to intervene bears a high burden to justify late intervention.²¹ We have previously found that allowing intervention after the issuance of a dispositive order will likely impose substantial prejudice and burden on the Commission and other parties.²² The courts have affirmed these policies.²³

¹⁹ 18 C.F.R. § 383.214(b)(3) (2011)

²⁰ See 18 C.F.R. § 385.214(d) (2011).

²¹ See, e.g., *North American Electric Reliability Corporation*, 126 FERC ¶ 61,021, at P 9 (2009); *FPL Energy Maine Hydro, LLC*, 124 FERC ¶ 61,037, at P 15 (2008).

²² See *City of Orrville, Ohio v. FERC*, 147 F.3d 979, 991 (D.C. Cir. 1998) citing *Central Vermont Public Service Corporation, et al.*, 53 FERC ¶ 61,204, at 61,817-18 (1990)).

²³ See, e.g., *California Trout, et al. v. FERC*, 572 F.3d 1033 (9th Cir. 2009); *City of Orrville, Ohio v. FERC*, 147 F.3d 979, 991-92 (D.C. Cir. 1998).

14. In her August 22, 2011 motion to intervene, Ms. Smart asserted that she had met the required higher burden because the July 22, 2011 license order had set the project boundary at a different contour than that previously discussed in the draft and final EAs.²⁴ By itself, this would not be enough to justify late intervention. As discussed above, the Commission issued public notice of the licensing proceedings. In such proceedings, all aspects of a project, including the project boundary, are open for consideration. The Commission expects persons seeking to participate in Commission proceedings to intervene in a timely manner based on the reasonably foreseeable issues arising from the licensee's filings and the Commission's notice of proceedings.²⁵ A prospective party bears the responsibility for determining when a proceeding is relevant to its interests, such that it should file a motion to intervene. When an entity fails to intervene in a timely fashion, it assumes the risk that the case will be settled in a manner that is not to its liking.²⁶ Thus, the fact that the project boundary appeared to have been set at a level that was different than that discussed at certain points in the proceeding does not demonstrate good cause for late intervention.

15. In addition, Ms. Smart's motion and request for rehearing are moot. The September 15 Order on clarification made clear that the project boundary in the area of Ms. Smart's property has not changed. Thus, Ms. Smart is not aggrieved by the July 22 Order.

16. Based on the foregoing, we conclude that the September 20, 2011 notice properly denied Ms. Smart's late motion to intervene and rejected her request for rehearing, and we accordingly deny her October 20, 2011 request for rehearing. We will nonetheless address her substantive assertions, below, in order to provide clarity.

17. Ms. Smart appears to allege that her property interests differ from those of the Band. Thus, she asserts that the Band's interests extend to 1,837.41 msl, while her interests extend to 1,828.41msl.²⁷ She suggests that both her interests and those of the Band require a more precise delineation of the project's boundary.²⁸

²⁴ August 22, 2011 Motion to Intervene and Request for Rehearing at 11.

²⁵ See *California Water Resources Department and the City of Los Angeles*, 120 FERC ¶ 61,057, at n.9 (2007) (*California DWR*), *reh'g denied*, 120 FERC ¶ 61,248 (2007), *aff'd sub nom. California Trout, et al. v. FERC*, 572 F.3d 1003 (9th Cir. 2009).

²⁶ *California DWR*, 120 FERC ¶ 61,057 at P 13.

²⁷ See August 22, 2011 Request for Rehearing at 12.

²⁸ August 22 2011 Request for Rehearing at 5-6.

18. Neither the Band, which participated in the licensing proceeding, nor BIA, which did the same, has made any complaint about the project boundary or asserted that the boundary improperly encroaches on tribal lands.²⁹ Indeed, as noted in the September 15 Order, the project boundary follows the same contours as those approved in the 1980 license, which followed the 1,837.41 msl contour line along the north side of the reservoir in the area of concern to Ms. Smart. Accordingly, and as discussed above,³⁰ there are no issues here regarding the project boundary vis a vis Cherokee lands.³¹

19. To the extent that Ms. Smart alleges that she holds rights in property down to the 1828 msl contour, this is an issue between Ms. Smart and Duke. If the project boundary encloses lands needed for project purposes to which the licensee does not have rights, it must acquire them properly. The extent of Ms. Smart's rights, and whether Duke is improperly encroaching on them, are matters to be settled by a court with authority to resolve property issues. The Commission has no such jurisdiction. In addition, nothing in the July 22 Order dealt with these land rights issues. If Ms. Smart felt that the Commission should take action with regard to this matter, which by Ms. Smart's own statements dates back to the prior license, she should have intervened and raised the matter during the recently-concluded proceeding. She makes no showing that anything in the July 22 Order dealt with this matter at all, let alone in a way regarding which she was not fairly put on notice. Thus, it is too late to raise the issue now.

²⁹ Ms. Smart suggests that the Band might intend to intervene in this proceeding and seek rehearing (August 22, 2011 Request for Rehearing at 12), but the Band has not done so. In addition, it does not appear that Ms. Smart, rather than the Band's government, has standing to raise issues on the Band's behalf.

³⁰ See P 5.

³¹ Ms. Smart also suggests that the Commission has not satisfied its trust responsibility to the Band and to Ms. Smart. See October 20 Request for Rehearing at 2; 4-5. To the extent that Ms. Smart is asserting her rights as a private landowner, no trust responsibility with respect to her exists. As we have noted, the Band itself has not asserted any error in the July 22 licensing Order. Moreover, as the courts have held, the Commission carries out its trust responsibility to tribes by meeting the requirements of the Federal Power Act, rather than by affording tribes greater rights than they would otherwise have. See *Skokomish Indian Tribe v. FERC*, 121 F.3d 1303 (9th Cir. 1997); *Covelo Indian Community v. FERC*, 895 F.2d 581 (9th Cir. 1990). Thus, the Commission's licensing procedures satisfy its trust responsibility.

20. Ms. Smart contends the Commission should not rely on land contours to describe project boundaries, because land can shift over time.³² Again, this issue could have been raised during the licensing proceeding and there is no excuse for waiting until this stage to bring it up.³³ The Commission's regulations state that the preferred method for describing a project boundary around an impoundment is contour lines (including contour elevation), although a licensee may also use specific courses and distances (metes and bounds), lines based on a public land survey, or any combination of these methods.³⁴ The reason that we prefer the use of contour lines is because the extent of a reservoir may change over time, due to changing flows, erosion, or other factors, even though the reservoir elevation does not change.³⁵ Given that the entire reservoir needs to be within the project boundary, it would be inefficient to require licensees to file revised project boundary maps any time such changes occur. Rather, if a reservoir grows, the project boundary remains at the same contour, and the licensee is required to acquire the right to use any additional lands that come within those contours. The use of contour lines to designate the extent of the Ela Reservoir was reasonable and in accordance with our regulations.

21. To the extent that, as Ms. Smart suggests, the reservoir has grown as a result of erosion and other forces, Duke is responsible for acquiring the right to use any new lands that the project now occupies. If the reservoir now covers lands owned by Ms. Smart, the licensee is required, by the terms of the standard license Article 5, to acquire interests in those lands,³⁶ and must compensate Ms. Smart accordingly.³⁷

³² See October 20 Request for Rehearing at 6-8.

³³ That contour lines were used to establish the project boundary has been clear throughout the licensing proceeding, and, indeed, dates back to the previous license.

³⁴ See 18 C.F.R § 4.41(h)(2)(i) (2011).

³⁵ If a licensee proposes to change reservoir elevation, it must obtain Commission authorization before doing so.

³⁶ Standard license Article 5 appears in the Commission's "L-Forms," which are published at 54 FPC 1792-1928 (1975), and are incorporated into project licenses, as appropriate, by an ordering paragraph. See 18 C.F.R. § 2.9 (2011).

³⁷ Ms. Smart questions, October 20 Request for Rehearing at 6-7, why the license order stated that the normal elevation of the reservoir is 1,824.81 msl, when the Commission has spoken of the project boundary as being at 1,837.41 msl near Ms. Smart's property, and at 1,841.71 msl elsewhere. This is because the project boundary encompasses not only the reservoir, but also lands around the shoreline.

The Commission orders:

The October 20, 2011 request for rehearing filed by Ms. Paulette Smart is denied.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.