

137 FERC ¶ 61,208
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. 2210-214

ORDER DENYING REHEARING

(Issued December 15, 2011)

1. The Tri-County AEP Relicensing Committee (Tri-County) has filed a request for rehearing of the Commission's October 20, 2011 order,¹ to the extent that the order denied Tri-County's motion to intervene in a proceeding dealing with an allegation of non-compliance with the shoreline management plan (SMP) for Appalachian Power Company's Smith Mountain Lake Pumped Storage Project. As discussed below, we deny rehearing.

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 The Commission has approved an SMP for the project,⁴ and an update to the plan is currently pending before the Commission.

3. After investigating a complaint by a local resident that some docks along the shoreline had been reconstructed in a manner inconsistent with the SMP, Commission

¹ *Appalachian Power Company*, 137 FERC ¶ 61,065 (2011) (October 20 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).

⁴ *Appalachian Power Company*, 112 FERC ¶ 61,026, *reh'g denied*, 113 FERC ¶ 61,168 (2005).

staff issued an August 24, 2011 Order in which it concluded that the dock reconstruction was indeed not consistent with the requirements of the SMP, and required Appalachian to remedy the situation.⁵

4. Various entities including Tri-County filed requests for rehearing, urging reversal of the August 24 Order. Tri-County also filed a motion to intervene in the proceeding.

5. On the merits, the Commission granted rehearing, finding that, while staff's interpretation of the SMP was reasonable, the Commission would not impose compliance measures with respect to the docks at issue under the facts of the case. However, given its conclusion that the relevant portion of the SMP was ambiguous, the Commission required that Appalachian consult with the technical review committee established in the SMP to help carry out the plan, and with other stakeholders, consider the best manner for carrying out the SMP, and, if appropriate, file an application to amend the SMP.

6. In addition, the Commission denied various requests to intervene, including that by Tri-County. The Commission explained that, as a general matter, it does not entertain requests for rehearing in compliance matters, such motions being appropriate only where a filing entails a material 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. In cases involving complaints, the complainant is automatically a part of the proceeding and has no need to intervene.

7. The Commission concluded that motions to intervene did not lie in the case at hand, because there was no material change proposed in project development, nor was there any way in which the general rights of property owners could be affected in a manner not contemplated by the license. Rather, the Commission was simply construing an already-approved SMP, in an individual case.

8. As to Tri-County and similarly-situated entities, the Commission further noted that they did not have a direct stake in the proceeding. Rather, they made arguments that the SMP is unfair, unconstitutional, or ambiguous, and that it warrants revision. The Commission concluded that none of the entities has demonstrated a more than general interest in this matter: there would be no direct, certain harm to them if we denied rehearing. In other words, they had no standing in the proceeding, because any injury to them was purely theoretical. Further, they had demonstrated no special interest that could not be represented by Appalachian or the entity that owned the docks in question. In consequence, the Commission dismissed their motions to intervene and, because requests for rehearing can only be filed by parties, rejected their rehearing requests.

⁵ *Appalachian Power Company*, Project No. 2210-090 (unpublished letter order) (August 24 Order).

9. On November 18, 2011, Tri-County filed a request for rehearing. On December 2, 2011, Appalachian filed a motion for leave to answer and answer to Tri-County's rehearing request. The Commission's Rules of Practice and Procedure provide that answers generally may not be made to requests for rehearing,⁶ so we deny the motion and reject the answer.

Discussion

10. Tri-County argues that interventions should be allowed in this proceeding because it involved construction of a specific rule in the SMP that was not clear on its face, was not otherwise explained by the licensee in the SMP, and had not been previously interpreted by the Commission.⁷ This by itself is not sufficient to require an exception to our general rule that interventions are not appropriate in post-licensing and compliance proceedings. Many of these proceedings involve the interpretation of licenses, SMPs and other plans, Commission orders, and our regulations. As we explained above, intervention will be allowed only where a post-license matter entails a material change in project development or terms and conditions of a license, or could adversely affect rights of property owners in manner not contemplated by the license. Neither of these things occurred here.

11. Tri-County asserts that this proceeding does involve a material change in project development that could adversely affect the rights of property owners because, in its view, the August 24 Order interpreted the SMP in a manner different than that intended by Appalachian and could have a different effect on property owners than the licensee planned.⁸ We are not persuaded that such is the case.

12. First, there has been no material change in project development or in the terms and conditions of the license, the first part of our test. Such a change would involve a significant alteration in the project, such as building a new dam or powerhouse, changing the project's flow regime, or acquiring new lands to be included in the project. In contrast to these types of changes, this proceeding involves the interpretation of a provision in a six-year old SMP that addresses the point at which maintenance on an existing dock is so extensive that it requires the dock to conform to the requirements for new docks. We do not regard this as a material change of any kind. Thus, this proceeding has not resulted in a change in project development or in the terms and conditions of Appalachian's license that would require the Commission to issue public notice and provide an opportunity to intervene.

⁶ See 18 C.F.R. § 385.213(a)(2) (2011).

⁷ Request for Rehearing at 6.

⁸ *Id.* at 6-8.

13. Tri-County also has not shown that the actions here could adversely affect rights of property owners in a manner not contemplated by the license. When Appalachian's license was issued in 2009, the SMP had been in place for four years, and the license specifically contemplated that the plan would be an ongoing requirement. The provision of the SMP requiring existing docks to conform to the requirements for new docks once a certain threshold of maintenance has been reached was present in the SMP at the time of the license. Consequently, nothing has occurred here that was not contemplated by the license.

14. In any case, this proceeding is a discrete one, dealing with the question of whether construction regarding a specific set of docks was consistent with Appalachian's SMP. It is not a proceeding to establish or update the SMP. The former occurred several years ago, and the latter is the subject of an ongoing proceeding. Tri-County has been party to both proceedings, and the Commission specifically made Tri-County an entity that Appalachian must consult as to SMP updates. Further, in the October 20 Order, the Commission required Appalachian to consult with stakeholders as to the proper interpretation of the portion of the SMP at issue. Thus, Tri-County has had, and will continue to have, the opportunity to be heard on global issues regarding the plan.

15. Tri-County alleges that the counties which comprise it⁹ have economic and regulatory interests in lakeside development such that they should be allowed to intervene. These general concerns do not amount to the particularized showing of an interest that would support intervention in a post-license or compliance proceeding. As the Supreme Court has held with regard to establishing Article III standing, an entity must show, *inter alia*, an injury that is concrete, particularized, and actual or imminent and is fairly traceable to the defendant's challenged action.¹⁰ Here, the only specific injury that Tri-County alleges is based on a claim by another entity that, had we required the docks at issue to be reconstructed, the assessed value of nearby condominiums could have been greatly reduced.¹¹ Even assuming that this unsupported statement should be given some weight, it is irrelevant, given that we decided not to require the docks to be rebuilt.

16. Similarly, even if the Commission considered Tri-County's sole argument regarding the merits of the October 20 Order, Tri-County would not prevail. Tri-County

⁹ Tri-County represents Bedford, Franklin, Campbell, and Pittsylvania Counties, all in Virginia

¹⁰ *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

¹¹ *See* Request for Rehearing at 10.

challenges staff's conclusion as to the purpose of the SMP provision at issue.¹² This argument is relevant only with respect to the meaning of the provision. As we have explained, however, the Commission found that while the plain language of the SMP specifies that grandfathered docks that require more than 50 percent rehabilitation must meet SMP standards, there is ambiguity about how to apply the 50 percent requirement.¹³ As a result, the Commission required Appalachian to 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 find that this renders Tri-County's argument moot.

The Commission orders:

(A) The request for rehearing filed by the Tri-County AEP Relicensing Committee on November 18, 2011, is denied.

(B) The motion to file answer filed on December 2, 2011 by Appalachian Power Company is denied, and the accompanying answer is rejected.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹² As a threshold matter, we note that even if we granted Tri-County's motion to intervene, Tri-County would be barred from raising this argument because it failed to raise it in its rehearing request. Commission staff reached the conclusion in question in the August 24 Order. *See* August 24 Order at 2 ("As you know, the purpose of the 50% rebuild rule is to eventually bring all docks in conformance with the SMP through attrition when significant repairs are needed, without requiring dock owners to immediately conform to the SMP"). In its September 22, 2011 Request for Rehearing, while Tri-County questioned whether Commission staff had properly interpreted the portion of the SMP that provided that grandfathered docks more than 50 percent of which were rebuilt would have to meet standards established in the SMP, it did not take issue with staff's conclusion as to the purpose of that provision.

¹³ *Appalachian Power Company*, 137 FERC ¶ 61,065 at P 21.