

147 FERC ¶ 61,037
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

Duke Energy Carolinas, LLC

Project No. 2232-522

ORDER DENYING PETITION FOR DECLARATORY ORDER

(Issued April 17, 2014)

1. Duke Energy Carolinas, LLC has filed a petition requesting the Commission to declare that the State of South Carolina has waived water quality certification for the relicensing of Duke Energy's Catawba-Wateree Hydroelectric Project No. 2232. For the reason discussed below, we deny the petition.

Background

2. The 839-megawatt Catawba-Wateree Project is located on the Catawba River in the Counties of Burke, McDowell, Caldwell, Catawba, Alexander, Iredell, Mecklenburg, Lincoln, and Gaston in North Carolina, and the Counties of York, Lancaster, Chester, Fairfield, and Kershaw in South Carolina. In 1958, the Federal Power Commission, this Commission's predecessor, issued a 50-year original license authorizing Duke Power Company, Duke Energy's predecessor, to construct and operate the project.¹ That license expired on August 31, 2008; the project has been subject to an annual license since that time.

3. On August 29, 2006, Duke Energy applied for a new license for the project. Pursuant to section 401(a) of the Clean Water Act,² the Commission cannot issue a license for a project, such as the Catawba-Wateree project, that may result in a discharge into the navigable waters of the United States unless the state or states in which a discharge may originate has either issued a water quality certification that the discharge will comply with specified portions of the act or has waived certification. Accordingly, on June 5, 2008, Duke Energy filed a request for water quality certification with the

¹ *Duke Power Company*, 20 FPC 360 (1958).

² 33 U.S.C. § 1341(a) (2012).

South Carolina Department of Health and Environmental Control (South Carolina DHEC).³

4. Clean Water Act section 401(a) provides that if a state fails or refuses to act on a request for certification within a reasonable time, not to exceed one year, certification will be waived.⁴ Thus, to avoid waiver, South Carolina DHEC was required to act on Duke Energy's certification request by June 5, 2009.

5. On May 15, 2009, South Carolina DHEC issued a "Notice of Department Decision – Water Quality Certification" in which it reached "a proposed decision" finding that, with compliance with several conditions, there was reasonable assurance that the project could be operated consistent with the Clean Water Act, and stating that "[t]he final 401 Water Quality Certification will be issued unless there is a timely request for review of the Proposed Decision" The notice also stated that "[t]he issuance of this Notice of Department Decision represents a final staff action that may be appealed," and explained that requests for review of the decision must be filed within 15 days.⁵

6. On May 29, 2009, South Carolina Coastal Conservation League and American Rivers jointly filed a request with the South Carolina Board of Health and Environmental Control (South Carolina Board), seeking review of the South Carolina DHEC decision.⁶

7. On July 9, 2009, the South Carolina Board conducted a "final review" of South Carolina DHEC's decision, and, by oral vote, denied water quality certification. The board issued a written order on August 6, 2009, explaining that it had determined that the water quality certification did not provide sufficient flow to protect classified uses of the waterway, the endangered shortnose sturgeon, and adequate downstream flow of the Catawba River into South Carolina, such that there would be reasonable assurance that water quality standards in the river would be met.⁷

³ Because the project discharges into the navigable waters in both North and South Carolina, Duke Energy also requested, and was duly granted, certification from North Carolina.

⁴ 33 U.S.C. § 1341(a) (2012).

⁵ See Duke Energy petition, Attachment B.

⁶ *Id.*, Attachment C.

⁷ *Id.*, Attachment D.

8. On August 11, 2009, Duke Energy filed a petition asking the Commission to declare that South Carolina failed to take “any final action” within one year of the date that the company filed its request for water quality certification,⁸ so that the Commission could act on the relicense application.
9. Duke Energy also pursued remedies at the state level.
10. As provided by South Carolina procedure, the company appealed the South Carolina Board’s decision to the South Carolina Administrative Law Court, which concluded that South Carolina DHEC had been required to act on Duke Energy’s certification request within 180 days from when it was filed, the period specified by South Carolina law, so that the failure to do so waived certification.⁹
11. South Carolina Coastal Conservation League and American Rivers appealed the decision of the Administrative Law Court to the South Carolina Court of Appeals, which on December 12, 2012, issued an opinion reversing the Administration Law Court’s decision, based on the conclusion that South Carolina DHEC had not been required to act within 180 days and so had not waived certification. On January 13, 2013, Duke Energy filed a petition for rehearing with the court of appeals. That petition is pending.
12. Duke Energy has filed two requests asking the Commission to act on its petition, first on December 19, 2012, and, most recently, on March 18, 2014. The company continues to assert that South Carolina has waived water quality certification.

Discussion

13. Duke Energy argues that, because it applied for water quality certification on June 5, 2008, and the South Carolina Board denied certification on August 6, 2009, South Carolina failed “to take final action” within one year and therefore waived certification.¹⁰ The company claims that South Carolina DHEC’s decision “was merely a *proposed* decision which did not constitute a final agency action and which had no legal effect,” and that the final agency action did not occur until the South Carolina Board acted.¹¹

⁸ *Id.* at 1.

⁹ While the Clean Water Act requires that a state act on a certification within one year, nothing in the statute precludes a state from establishing a shorter deadline.

¹⁰ *Id.* at 4.

¹¹ *Id.* at 5.

14. Duke Energy attempts to distinguish *FPL Energy Maine Hydro LLC*,¹² a case that appears wholly apposite. In *FPL*, the state timely issued a water quality certification within the one-year period, but denied certification on appeal. In granting a stay of FPL's license pending resolution of the water quality certification issue, the Commission found that Maine had met the statutory time frame by granting certification within one year and that "[t]here is nothing in the language of Section 401 to suggest that a state must not only act on the certification request but also take action on any appeals that subsequently might be filed within one year."¹³

15. On rehearing, the Commission denied the licensee's argument that the state waived certification because its ultimate action occurred after the one-year deadline. Looking at the text of the certification, the Commission noted that the state indicated that it "has now issued Water Quality Certification" and "approves" the application and "grants certification."¹⁴ The Commission found these statements to be indicia of a decision by the state. The Commission went on to reject FPL's argument that issuing a non-final certification resulted in waiver of the deadline, explaining that the Commission lacked authority to determine the finality of state decisions, questions regarding which were matters for state courts to determine.¹⁵

16. Duke Energy asserts that "in stark contrast" to the state decision in *FPL*, the "decision in the instant case was clearly not a final decision with legal effect, since it was clearly labeled (repeatedly) as a 'proposed' decision and clearly indicated that a 'final' decision would not occur until later."¹⁶

¹² 111 FERC ¶ 61,104 (2005), *aff'd*, **on other grounds**, *FPL Energy Maine Hydro LLC v. FERC*, 551 F.3d 58 (1st Cir. 2008) (state held not to have waived certification where it issued certification within the one-year period and then, on appeal, denied certification after the one-year period had expired year).

¹³ *FPL Energy Maine Hydro LLC*, 108 FERC ¶ 61,261, at P 7 (2004).

¹⁴ *See* 111 FERC ¶ 61,104 at P 7.

¹⁵ 111 FERC ¶ 61,104 at P 8, citing *Roosevelt Campobello Int'l Park Commission v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982). The Maine courts determined that the state had not waived certification. *See FPL Energy Maine Hydro LLC v. Maine Department of Environmental Protection*, No. 04-50, 2006 WL 2587989 (Me. Super. Ct. May 25, 2006), *aff'd*, 926 A.2d 1197, 1199 (Me. 2007), *FPL Energy Maine Hydro LLC v. Maine Department of Environmental Protection*, *cert. denied*, 128 S.Ct 911, 2008 U.S. LEXIS 186 (2008).

¹⁶ Duke Energy petition at 8-9.

17. We disagree, and conclude that this case and *FPL* are not distinguishable. As noted above, the South Carolina DHEC decision was styled “Notice of Department Decision -- Water Quality Certification.” While the agency indeed did state that it had reached “a proposed decision,” it also stated that a final certification would be issued unless there was a timely request for review of the decision and that the decision was a “final staff decision that may be appealed.”¹⁷ Attached to the decision was a statement that “this decision . . . becomes the final agency decision [within] 15 days . . . unless a written request for review is filed,” and information on how to file for review. Given the potential finality of South Carolina DHEC’s decision, we see no substantive distinction between Maine’s actions in *FPL* and South Carolina’s actions here, and cannot conclude that the state failed to act in a timely manner on Duke Energy’s application.

18. Even if South Carolina’s notice were deemed not to be a “final action,” this would not help Duke Energy. Section 401 of the Clean Water Act does not mandate “final action” by a state, but rather provides that a state must “act on a certification request within one year” (emphasis added). While we might agree that the issuance of a draft certification (which some states elect to provide) with no provision for it becoming final would not satisfy the requirement to act, we conclude that where, as here, a state timely issues a certification that will by its terms become final within 15 days if not appealed, the state action is sufficient to avoid waiver.¹⁸

19. Based on the foregoing, we find that South Carolina has not waived water quality certification in this proceeding and deny Duke Energy’s petition.

¹⁷ Had no appeal been filed, the water quality certification would have become final less than one year from the date of Duke Energy’s application.

¹⁸ Duke Energy also contends that a finding of waiver would be consistent with Commission policy to the effect that a water quality certification agency should act within a year of a certification request. Duke Energy petition at 6-7. The fact that the Commission has recognized the Clean Water Act’s general requirement of state action within a year, however, does not amount to a policy regarding waiver, and has no bearing on the issue of whether South Carolina’s issuances constituted action sufficient to avoid waiver.

The Commission orders:

The petition filed by Duke Energy Carolinas, LLC on August 11, 2009 is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.