

147 FERC ¶ 61,051
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Appalachian Power Company

Project No. 2210-240

ORDER DENYING REHEARING

(Issued April 17, 2014)

1. On January 30, 2014, Commission staff issued an order modifying and approving Appalachian Power Company's (licensee) shoreline management plan (SMP) update for the Smith Mountain Pumped Storage Project No. 2210 (Smith Mountain Project).¹ On February 28, 2014, Automatic Boat Covers of VA & NC, LLC and Innovative Marine Technologies (ABC/IMT) jointly filed a timely request for rehearing of the January 30 Order, arguing that the SMP's definition of "structure" should not include "automatic boat covers." As discussed below, we deny ABC/IMT's request for rehearing.

I. Background

2. The 636-megawatt Smith Mountain Project is a combination pumped storage and conventional hydropower project located on the headwaters of the Roanoke River in Bedford, Campbell, Franklin, and Pittsylvania Counties, Virginia.² The project consists of two developments: Smith Mountain and Leesville. The Smith Mountain development is the upper reservoir of the pumped storage development and includes a 20,260-acre impoundment with approximately 500 miles of shoreline. The Leesville development has conventional hydropower and also serves as the pumped storage project's lower reservoir. It includes a 3,260-acre impoundment with approximately 100 miles of shoreline.

¹ *Appalachian Power Company*, 146 FERC ¶ 62,083 (2014) (January 30 Order).

² *Appalachian Power Company*, 129 FERC ¶ 62,201 (2009).

3. The licensee's consideration of requests to use its project shoreline and waters is guided by its SMP, which was first approved in 2005,³ and amended in 2006 and 2007.⁴ The SMP provides guidelines, shoreline classifications, and regulations for shoreline development of the project's reservoirs. Under the SMP, the licensee protects important natural, environmental, and aesthetic resources at the project through measures that limit development in areas with sensitive resources, allow for public recreation, and allow certain existing high density uses at the project.⁵

4. The Commission issued a new license for the Smith Mountain Project on December 15, 2009,⁶ and required the licensee to continue implementation of the original SMP, as amended, and file an SMP update by July 5, 2010.⁷

5. On January 3, 2011, the licensee filed the SMP update with the Commission, modifying the original SMP's definitions, shoreline classifications, and regulations for shoreline management. The SMP update enables the licensee to issue permits for non-project uses of project lands, including the construction or modification of "structures" within the project boundary. As relevant to this proceeding, the SMP update added a new definition for "structure," which is defined as a "mode of building, construction, or organization; an arrangement of parts, elements, or constituents which includes but is not limited to erosion control structures, trampolines, boat docks, piers and their parts including automatic boat covers, walls, ramps, etc."⁸

6. The SMP update specifies that structures constructed within the project boundary meet certain requirements, some of which are dependent on the structure's location within a specific shoreline classification.⁹ The SMP update provides that structures

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

⁴ *Appalachian Power Company*, 115 FERC ¶ 62,071 (2006); 118 FERC ¶ 62,149 (2006).

⁵ See 112 FERC ¶ 61,026 at P 9, 21, and 69. See also 146 FERC ¶ 62,083 at P 1.

⁶ *Appalachian Power Company*, 129 FERC ¶ 62,201.

⁷ *Id.* at 64,600. On April 20, 2010, Commission staff granted the licensee's request for an extension of time to file its SMP update.

⁸ Licensee's January 3, 2011 SMP update at x. The original SMP did not define "structure." See the original SMP filed on September 2, 2003.

⁹ For example, structures must maintain minimum setbacks from dock delineation lines and those setback distances could range from 15 to 60 feet depending on the SMP's shoreline classification's requirements.

constructed or modified within the project boundary must (among other requirements): (1) comply with all applicable local, state, and federal regulations and require written authorization from the licensee prior to construction; (2) maintain a minimum fairway between docks;¹⁰ (3) be located within dock delineation lines and maintain a minimum setback from the delineation line (specified by shoreline classification); (4) meet maximum height limitations (specified by shoreline classification); (5) include amber lighting installed on the outermost end of all dock and pier structures that are located at the ends of peninsulas or between the line of sight of two lateral marks or aids to navigation; and (6) maintain a setback of 30 feet from the edge of the Resource Protection Areas to ensure there is no impact to these sensitive areas.¹¹

7. On March 17, 2011, the Commission issued a public notice accepting the SMP update application and established April 15, 2011, as the deadline to file motions to intervene and comments.¹² In response to the public notice, the Tri-County AEP Relicensing Committee and Mr. Bill Brush filed motions to intervene in opposition to the SMP update. On April 15, 2011, ABC/IMT filed comments on the SMP update.¹³ Specifically, ABC/IMT expressed concern that the SMP update's definition of "structure" included "automatic boat covers."¹⁴ ABC/IMT stated that automatic boat

¹⁰ The SMP defines a "fairway" as "an area of open water extending outward from an open end of a boat slip intended to provide navigation room for a boat to exit or enter its moorings. Adjacent docks with opposing slips share the same fairway." Licensee's January 3, 2011 SMP update at viii.

¹¹ The Resource Protection Area classification includes shoreline areas that have one or more of the following characteristics: (1) contain large woody debris; (2) are located near known cultural sites; (3) are located near the Smith Mountain Wildlife Management Area; (4) are identified as scenic; (5) are identified as habitat for the Roanoke logperch; (6) are identified as stream beds; (7) contain wetlands or scrub-shrub habitat; (8) are identified by the Virginia Natural Heritage Program as important natural communities; or (9) are located near restriction zones such as boat barriers and dams. Development within the Resource Protection Areas would be limited, but possible, depending on resource agencies' review and project resource mitigation. 146 FERC ¶ 62,083 at P 22.

¹² 76 Fed. Reg. 18,745 (April 5, 2011).

¹³ ABC/IMT did not file a motion to intervene in response to the March 17, 2011 notice.

¹⁴ "Automatic boat covers" are boat-covering devices that surround boats and watercraft on all sides. A fixed canopy holds the cover, which is lowered automatically to enclose the boat or watercraft. Typically, an automatic boat cover is custom made for a specific boat.

covers were the only item identified by product name, while other boat covering devices were omitted from the definition.¹⁵

8. On December 7, 2011, the licensee, along with the Tri-County AEP Relicensing Committee, the Tri-County Lake Administrative Committee, and the West Piedmont Planning District Commission, filed a request for the Commission to delay action on the SMP update while the licensee pursued settlement negotiations to resolve opposition to the SMP update.

9. On February 28, 2013, the licensee filed a settlement agreement that revised the licensee's proposed SMP update and resolved a number of issues regarding the SMP update.¹⁶ The revised SMP update did not propose any revisions to the definition of "structure."

10. On March 7, 2013, the Commission issued a notice of the filing of the revised SMP update, establishing April 8, 2013, as the deadline to file comments and motions to intervene.¹⁷ Timely motions to intervene were filed by the Smith Mountain Marine Business Association and ABC/IMT. On April 16, 2013, the licensee filed an answer in opposition to the Smith Mountain Marine Business Association's and ABC/IMT's motions. On October 29, 2013, the Commission issued a notice granting the motions.¹⁸

11. ABC/IMT's motion to intervene also contained comments on the SMP, restating its April 15, 2011 comments. On May 8, 2013, the licensee filed an answer to ABC/IMT's comments. The licensee states that the SMP's definition of "structure" includes "automatic boat covers" to provide an example of the types of facilities it considers structures, not to specifically target ABC/IMT's product. The licensee explains that it included "automatic boat covers" in the definition because: (1) the cover must be included in the calculation for a dock's maximum square footage, if the cover extends past the dock structure; and (2) the U.S. Coast Guard requires placement of amber lighting on the outermost point of the dock, if the dock is located on a peninsula or

¹⁵ ABC/IMT is the installing dealer for "The Touchless Boat Cover™," a type of automatic boat cover.

¹⁶ Following the settlement agreement filing, the Tri-County AEP Relicensing Committee and Mr. Brush, separately, filed statements withdrawing their comments in opposition to the SMP update, and supporting Commission approval of the SMP update without material modification.

¹⁷ 78 Fed. Reg. 16,489 (March 15, 2013).

¹⁸ See Notice Granting Intervention issued on October 29, 2013, in Project No. 2210-207.

between the line of sight of two lateral marks or aids to navigation. The licensee stressed that the SMP does not preclude the installation of automatic boat covers; the licensee wants to ensure that the outermost portion on the dock is adequately lit to aid in safe navigation.¹⁹

12. On January 30, 2014, Commission staff issued an order modifying and approving the licensee's SMP update. The order found that the SMP is in the public interest because it allows the licensee to comprehensively manage the project shoreline in a manner that protects environmental and public recreation resources.²⁰ In addition, the January 30 Order found no reason to require the licensee to exclude "automatic boat covers" from the SMP's definition of "structure," because automatic boat covers are permanent fixtures and may extend past a dock footprint.²¹

13. On February 28, 2014, ABC/IMT filed a request for rehearing of the January 30 Order. On rehearing, ABC/IMT argues that the January 30 Order erred by allowing "automatic boat covers" to remain in the definition of "structure" based on Commission staff's conclusion that they are "permanent fixtures that may extend beyond the dock footprint."²² First, ABC/IMT contends that automatic boat covers are not permanent structures because they can be moved and reinstalled as needed from one boat slip to another and from one boat to another. ABC/IMT states that local authorities do not require building permits for the construction of the automatic boat covers; therefore, if the project's surrounding counties do not consider automatic boat covers to be permanent structures, then the Commission cannot consider automatic boat covers to be permanent structures.²³ Second, ABC/IMT explains that each boat cover is custom made for each boat and the boat cover will only extend past the dock footprint if the boat extends past the dock footprint. Finally, ABC/IMT argues that, if the SMP's definition of "structure" is enforced, it will put ABC/IMT at a severe competitive disadvantage, because its

¹⁹ See licensee's May 8, 2013 comments at 10-11.

²⁰ *Appalachian Power Company*, 146 FERC ¶ 62,083.

²¹ *Id.* at P 65.

²² *Id.*

²³ To support its proposition that "automatic boat covers" are not permanent devices, ABC/IMT states that the U.S. Patent and Trademark Office defines The Touchless Boat Cover™ as a boat covering device. We consider this assertion irrelevant. Further, as stated below, the licensee included "automatic boat covers" within its definition, not because they are permanent structures, but because they could restrict visibility for safe navigation.

competitors, who offer boat covers that attach directly to the boat, are not required to obtain a permit from the licensee.

II. Discussion

14. The SMP enables the licensee to issue, without prior Commission approval, permits for non-project uses of project lands, including the construction or modification of “structures” within the project boundary. The SMP defines “structure” as a “mode of building, construction, or organization; an arrangement of parts, elements, or constituents which includes but is not limited to erosion control structures, trampolines, boat docks, piers and their parts including automatic boat covers, walls, ramps, etc.”

15. We find that the licensee’s inclusion of “automatic boat covers” in the SMP’s definition of “structure” is reasonable. As stated above, automatic boat covers are boat covering devices, which operate by lowering a cover (via remote control or switch) mounted on fixed canopy around all four sides of the boat. The canopy is typically held in place with a frame (similar to a tent). Automatic boat covers are appropriate examples of structures, because their frame and cover have the potential to restrict visibility and to pose a hazard to navigation. A cover may exceed the maximum height allowed for the structure to which it is attached or may extend beyond the structure’s footprint. Consequently, if boat covers were not included within the definition of “structures” they could restrict the fairway between dock structures, encroach into setbacks or dock delineation lines, or fail to provide amber lighting necessary for safe navigation along the waterway.²⁴ Accordingly, the licensee’s inclusion of “automatic boat covers” in the definition of “structure” is reasonable because the licensee has an obligation to ensure public safety.

16. Unlike the January 30 Order, our determination does not hinge on whether an automatic boat cover is a permanent structure.²⁵ However, as ABC/IMT acknowledges, an automatic boat cover may extend past the dock, thereby increasing the dock’s maximum square footage and impinging on safe navigation. Accordingly, automatic boat covers must be adequately lit, if necessary, and otherwise satisfy the SMP’s regulations.

²⁴ Unlike boat covers that attach directly to the boat and are removed and stored when the boat is not docked, an automatic boat cover’s canopy remains in place whether or not the boat is docked.

²⁵ ABC/IMT states that steps, which it argues are permanent structures, are excluded from the square footage calculation of a dock and that automatic boat covers should be excluded as well. The definition of structure does not depend on permanence. Steps from a walkway to the shore do not extend into the reservoir and thus do not pose a risk to navigation, as automatic boat covers may.

17. Finally, the SMP does not place ABC/IMT at a competitive disadvantage. The installation of automatic boat covers is not precluded under the SMP, and all similar boat covering products will be treated in the same manner; the SMP uses the generic term “automatic boat cover” and does not specify the product installed by ABC/IMT. The record, including the SMP and the licensee’s comments, does not indicate that applying for a permit to construct an automatic boat cover will be burdensome or will discourage potential customers from using ABC/IMT’s products. The language from the SMP at issue provides a mechanism for ensuring that a variety of structures, including automatic boat covers, does not pose a hazard to navigation or public safety, and do not violate the SMP’s rules regarding dock size, setbacks, etc. We find this provision to be reasonable and not unduly burdensome to ABC/IMT or any other entity that proposes to construct lakefront structures.

The Commission orders:

The request for rehearing filed by Automatic Boat Covers of VA & NC, LLC and Innovative Marine Technologies on February 28, 2014, is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.