

148 FERC ¶ 61,026
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. 2210-244

ORDER DENYING REQUEST FOR RECONSIDERATION AND REJECTING
REQUEST FOR REHEARING

(Issued July 17, 2014)

1. In this order, the Commission denies the request for reconsideration and rejects the request for rehearing by Automatic Boat Covers of VA & NC, LLC and Innovative Marine Technologies (ABC/IMT) of the order issued on April 17, 2014, in this proceeding.

I. Background

2. 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 (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, arguing that the SMP's definition of "structure" should not include "automatic boat covers." On April 17, 2014, the Commission denied the request for rehearing.²

3. On May 16, 2014, ABC/IMT filed a request for reconsideration and/or rehearing of the April 17 Order. On June 9, 2014, the licensee filed an answer to this request. On June 13, 2014, ABC/IMT filed an answer to the licensee's answer.

4. The Commission's Rules of Practice and Procedure, although silent with respect to requests for reconsideration and answers to requests for reconsideration, do not normally

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

² *Appalachian Power Co.*, 147 FERC ¶ 61,051 (2014) (April 17 Order).

permit answers to requests for rehearing.³ We have previously indicated that the concerns that militate against answers to requests for rehearing similarly should apply to answers to requests for reconsideration.⁴ We find no cause to depart from this practice. Accordingly, we reject the licensee's June 9, 2014 answer. Similarly, Rule 213 of the Commission's Rules of Practice and Procedure explains that an answer may not be made to an answer unless otherwise ordered by the decisional authority.⁵ We find no cause to waive this rule. Accordingly, we reject ABC/IMT's June 13, 2014 answer to the licensee's answer.

II. Discussion

5. The April 17 Order denying rehearing provided extensive background information about the Smith Mountain Project and the SMP.⁶

6. The project's SMP governs the licensee's process for permitting non-project uses of project lands, including the construction or modification of structures. 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."⁷

7. In its February 28, 2014 Request for Rehearing, ABC/IMT argued that the Commission erred by refusing to require the licensee to exclude "automatic boat covers" from the SMP's definition of "structures."⁸ It disagreed with Commission staff's conclusion that automatic boat covers are "permanent fixtures that may extend beyond

³ 18 C.F.R. § 385.713(d) (2013).

⁴ See *JD Wind 1, LLC*, 130 FERC ¶ 61,127, at P 13 (2010); *CGE Fulton, L.L.C.*, 71 FERC ¶ 61,232, at 61,880-81 (1995); *Conn. Light & Power Co.*, 71 FERC ¶ 61,035, at 61,151 (1995).

⁵ 18 C.F.R. § 385.213(a)(2) (2013).

⁶ *Id.* PP 2-13.

⁷ Appalachian Power Co. Smith Mountain Pumped Storage Project Shoreline Mgmt. Plan (SMP) at viii (as approved Jan. 30, 2014), http://www.smithmtn.com/ShorelineMgmt/Plan/UpdatedSMP03_05_14.pdf.

⁸ ABC/IMT February 28, 2014 Request for Rehearing.

the dock footprint.”⁹ Under the SMP’s definition, automatic boat covers are subject to the SMP’s permitting scheme for docks, piers, and similar structures.

8. In the Commission’s April 17 Order denying rehearing, we found that the licensee reasonably included “automatic boat covers” in the SMP’s definition of “structure” because the licensee has an obligation to ensure public safety.¹⁰ The Commission concluded that 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,¹¹ because the cover may exceed the maximum height allowed for the structure to which it is attached or may extend beyond the structure’s footprint.¹² The April 17 Order noted explicitly that the Commission’s determination did not hinge on whether an automatic boat cover is permanently fixed.¹³ Further, the Commission rejected the argument that ABC/IMT will bear a severe competitive disadvantage, given that all similar products will be treated equally under the SMP and that nothing in the record indicated that compliance with the SMP would be unduly burdensome or would discourage potential customers.¹⁴

A. Request for Reconsideration

9. The purpose of reconsideration is to provide an aggrieved party with an opportunity to alert the Commission to a situation in which the Commission may not have fully grasped the facts presented on rehearing.¹⁵ In their request for reconsideration and/or rehearing, ABC/IMT argues that the April 17 Order rested on false assumptions and factual inaccuracies. We find that these arguments lack merit.

⁹ January 30 Order, 146 FERC ¶ 62,083 at P 65.

¹⁰ April 17 Order, 147 FERC ¶ 61,051 at P 16.

¹¹ *Id.* P 15.

¹² *Id.*

¹³ *Id.* P 16.

¹⁴ *Id.* P 17.

¹⁵ *Clifton Power Corp.*, 94 FERC ¶ 61,346, at 62,277 (2001); *see, e.g., Great N. Paper, Inc.*, 86 FERC ¶ 61,184, at 61,635 (1999); *Racehorse Co.*, 59 FERC ¶ 61,170, at 61,612 (1992).

10. ABC/IMT repeats the previously rejected argument that automatic boat covers are not permanent and so are not structures.¹⁶ Though ABC/IMT argues that the “hallmark,” “key,” and “implied” trait of a structure is permanence, the April 17 Order explicitly excluded the permanence of automatic boat covers as a rationale for the Commission’s determination.¹⁷ A licensee may define “structure” at its discretion and submit that definition for Commission review and approval. Automatic covers are appropriately grouped with other “structures” not because they are permanent but because they have the same potential as other “structures” to obscure visibility and to impair navigation.¹⁸ ABC/IMT does not rebut this basis for equal treatment under the SMP.

11. In a related argument, ABC/IMT objects to the Commission distinguishing automatic boat covers from other types of boat covers.¹⁹ ABC/IMT contends that, like automatic boat covers, many other types of boat covers remain in place when the boat is removed from the dock.²⁰ All types of boat covers, ABC/IMT continues, even covers that are removed and stowed while a boat is away from its dock, should be treated equally under the SMP because a boat is covered “the vast majority of the time.”²¹ We reassert that automatic boat covers have a greater potential than other boat covers to obstruct visibility and to pose a hazard to navigation. Nothing in the record for the

¹⁶ ABC/IMT May 16, 2014 Request for Reconsideration and/or Rehearing at 3, 4, 5, 7, 8, 9, 10, and 13.

¹⁷ April 17 Order, 147 FERC ¶ 61,051 at P 16; *see also* April 17 Order, 147 FERC ¶ 61,051 at n.23 (“... the licensee included “automatic boat covers” within its definition, not because they are permanent structures, but because they could restrict visibility for safe navigation.”); April 17 Order, 147 FERC ¶ 61,051 at n.25 (“The definition of structure does not depend on permanence.”).

¹⁸ Photographs of ABC/IMT’s product, the Touchless Boat Cover, included in their February 28, 2014 request for rehearing at page 5 demonstrate that when an automatic boat cover is lowered it exists as a large opaque box that is necessarily longer, wider, and higher than the covered boat. ABC/IMT states that boats sit unused and covered in this way “the vast majority of the time.” ABC/IMT May 16, 2014 Request for Reconsideration and/or Rehearing at 7.

¹⁹ May 16, 2014 Request for Reconsideration and/or Rehearing at 7 (addressing April 17 Order, 147 FERC ¶ 61,051 at P 16 n.24).

²⁰ May 16, 2014 Request for Reconsideration and/or Rehearing at 7.

²¹ *Id.*

January 30 Order, in ABC/IMT's February 28, 2014 Request for Rehearing, or in ABC/IMT's May 16, 2014 Request for Reconsideration and/or Rehearing disproves this heightened potential.

12. ABC/IMT argues that automatic boat covers are not unsafe because they improve the *personal* safety of the boat owner in various ways.²² ABC/IMT fails to address the *public* safety concerns that appropriately supported the licensee's including automatic boat covers within the definition of "structure."

13. ABC/IMT argues that the Commission's statements that an automatic boat cover might exceed the maximum height or footprint allowed for the structure to which it is attached are "nonsensical" because to ABC/IMT's knowledge these excess dimensions have not yet occurred.²³ ABC/IMT's argument does not disprove the potential for excessive height, length, or width. Such dimensions would restrict visibility and pose a hazard to navigation.²⁴

14. In a similar way, ABC/IMT argues that to its best knowledge there have been no accusations over the past 15 years that an automatic boat cover caused a navigational accident.²⁵ Regarding Smith Mountain Lake in particular, ABC/IMT argues that because

²² *Id.* at 5, 12.

²³ May 16, 2014 Request for Reconsideration and/or Rehearing at 5-6. ABC/IMT also clarifies an argument from its request for rehearing that because the steps extending from a dock into the reservoir are exempt from an SMP's limits on a dock's footprint, any extension of an automatic boat cover beyond the footprint of a dock should be similarly excluded from the SMP's limits. *Id.* at 7-8. We disregard this argument because ABC/IMT fails to explain why an automatic boat cover's potential to restrict visibility and to pose a hazard to navigation is equal to or less than the steps' potential to do the same. The Commission assumes that an automatic boat cover standing ten or twelve feet above the water, *id.* at 7, has a greater potential to restrict visibility than have steps extending into the reservoir.

²⁴ Also on the topic of navigation, ABC/IMT asserts that night-time boat lighting requirements are not enforced on Smith Mountain Lake and that ABC/IMT has already voluntarily sewn reflective tape on some of its automatic boat covers "when necessary." *Id.* at 6. These assertions are immaterial because they do not rebut the licensee's conclusion, upheld by the Commission on rehearing, that including automatic boat covers within the definition of "structures"—and so requiring a permit for them—is a reasonable means to preserve safe navigation.

²⁵ *Id.* at 10.

boat drivers are subject to a speed limit of two to five miles per hour within fifty feet of a dock, a lawfully operated boat would collide with a structure at a speed of five miles per hour at most, and thus automatic boat covers are not a hazard to navigation.²⁶ Given that restricted visibility increases the likelihood of boat-to-boat collisions in addition to boat-to-structure collisions, and given that the licensee was concerned about lighting the automatic boat covers at night²⁷ when boat drivers are less able to determine their proximity to a structure or to shore, the Commission finds that ABC/IMT's speed argument does not address relevant concerns.

15. ABC/IMT again states that it will bear a competitive disadvantage.²⁸ ABC/IMT makes unsupported claims that the licensee interprets, implements, and enforces its SMP in a way that is arbitrary and burdensome.²⁹ ABC/IMT adds, without figures or support, that the cost of obtaining a permit for an automatic boat cover and the threat of the licensee arbitrarily removing the cover both aggravate the disadvantage.³⁰ We reject these assertions for lack of support. If in the future homeowners have difficulty obtaining permits for structures such as automatic boat covers, they may avail themselves of the dispute resolution provisions included in the SMP.³¹

16. ABC/IMT also disputes the Commission's conclusion in the April 17 Order that "all similar boat covering products will be treated in the same manner" under the SMP.³²

²⁶ *Id.*

²⁷ April 17 Order, 147 FERC ¶ 61,051 at P 11 (citing Appalachian Power Co. May 8, 2013 Answer to Comments at 10-11). In its answer to ABC/IMT's motion to intervene and attached comments, the licensee explained that the Coast Guard requires nighttime amber lighting on the outermost portions of docks located on a peninsula or located between the line of sight of two lateral marks or aids to navigation. The licensee concluded that automatic boat covers that extend beyond the footprint of the dock may interfere with amber lighting if the covers are not lit themselves. Appalachian Power Co. May 8, 2013 Answer to Comments at 10-11.

²⁸ May 16, 2014 Request for Reconsideration and/or Rehearing at 8, 11.

²⁹ *Id.* at 11.

³⁰ *Id.* at 12.

³¹ See the Appeal Process in section 3.3 of the SMP at page 85, http://www.smithmtn.com/ShorelineMgmt/Plan/UpdatedSMP03_05_14.pdf.

³² April 17 Order, 147 FERC ¶ 61,051 at P 17.

ABC/IMT argues that its product, the Touchless Boat Cover, is unique but also equal to all other boat covers.³³ The Touchless Boat Cover is unique as the only automatic boat cover in the marketplace, according to ABC/IMT, which is evidence that the licensee targeted ABC/IMT specifically. But ABC/IMT adds that its product is patented as a “boat covering product” and should be treated like other boat covers that are not considered “structures” under the SMP.³⁴

17. The Commission notes, again, that the SMP uses the generic term “automatic boat cover” and does not specify the product installed by ABC/IMT.³⁵ As we stated in the April 17 Order, “the language from the SMP at issue provides a mechanism for ensuring that a *variety* of structures, including automatic boat covers, do not pose a hazard to navigation or public safety, and do not violate the SMP’s rules regarding dock size, setbacks, etc.”³⁶ That ABC/IMT’s Touchless Boat Cover may be the only regulated product on the market at present does not prove that ABC/IMT has been singled out or that ABC/IMT is being treated differently under the SMP than future vendors of similar products. None of the arguments or information from ABC/IMT persuades us to revisit our finding that the definition of “structure” is reasonable and not unduly burdensome to ABC/IMT or any other entity that proposes to construct lakefront structures.³⁷

18. ABC/IMT argues that because the definition singles out ABC/IMT, the SMP acts as a “Bill of Attainder” violating Article I, Section 10 of the Constitution and violates the equal protection of the laws guaranteed by the Fourteenth Amendment.³⁸ As stated above, we find no merit in ABC/IMT’s claims of individual persecution. Also, we note that Article 1, Section 10 and the Fourteenth Amendment address the states, not the federal government.

³³ May 16, 2014 Request for Reconsideration and/or Rehearing at 11-12.

³⁴ *Id.* at 11.

³⁵ April 17 Order, 147 FERC ¶ 61,051 at P 17.

³⁶ *Id.* (emphasis added).

³⁷ April 17 Order, 147 FERC ¶ 61,051 at P 17.

³⁸ May 16, 2014 Request for Reconsideration and/or Rehearing at 12-13.

19. As a final matter, as to ABC/IMT's unsupported allegations that a certain employee of the licensee has targeted their business to exact a personal vendetta,³⁹ we consider such ad hominem attacks to be inappropriate in filings before us.⁴⁰

B. The Request for Rehearing

20. Rehearing of an order on rehearing lies when the order on rehearing modifies the original order's result in a manner that gives rise to a wholly new objection.⁴¹ The April 17 Order does not modify the result of the January 30 Order. Therefore, the request for rehearing by ABC/IMT is rejected.

The Commission orders:

(A) The request for reconsideration filed by Automatic Boat Covers of VA & NC, LLC and Innovative Marine Technologies on May 16, 2014, is denied.

(B) The request for rehearing filed by Automatic Boat Covers of VA & NC, LLC and Innovative Marine Technologies on May 16, 2014, is rejected.

(C) The motion for leave to file an answer and the answer filed by Appalachian Power Company on June 9, 2014, are rejected.

³⁹ See, e.g., *id.* at 3.

⁴⁰ See, e.g., *Union Elec. Co. d/b/a AmerenUE*, 114 FERC ¶ 61,038, at P 9 (2006).

⁴¹ See, e.g., *Union Elec. Co. d/b/a AmerenUE*, 114 FERC ¶ 61,230, at 61,745-46 (2006); *Duke Power*, 114 FERC ¶ 61,148, at P 1 (2006); *Gustavus Elec. Co.*, 111 FERC ¶ 61,424, at P 3 (2005); *Symbiotic, L.L.C.*, 99 FERC ¶ 61,064, at 61,300 (2002); and *PacifiCorp*, 99 FERC ¶ 61,015, at 61,052 (2002). See also *S. Natural Gas Co. v. FERC*, 877 F.2d 1066, 1073 (D.C. Cir. 1999) (citing *Tenn. Gas Pipeline v. FERC*, 871 F.2d 1109-10 (D.C. Cir. 1988)).

(D) The answer filed by Automatic Boat Covers of VA & NC, LLC and Innovative Marine Technologies on June 13, 2014, is rejected.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.