

114 FERC ¶ 61,038
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Union Electric Company d/b/a
Ameren UE

Project No. 459-141

ORDER DENYING REHEARING

(Issued January 19, 2006)

1. On September 30, 2005, Duncan's Point Lot Owners Association, Inc.; Duncan's Point Homeowners Association, Inc.; and Nancy A. Brunson, Juanita Brackens, Helen Davis, and Pearl Hankins, individually (Complainants) filed a request for rehearing of Commission staff's letter order of September 1, 2005. In that letter, staff found that Union Electric Company, doing business as AmerenUE, licensee of the Osage Hydroelectric Project No. 459, had fulfilled some of the requirements of a previous staff compliance order. Complainants dispute staff's findings and request that the licensee be sanctioned for noncompliance with staff and Commission orders. For the reasons discussed below, we deny rehearing.

Background

2. The Osage Project is located on the Lake of the Ozarks in Missouri. The present controversy concerns matters related to the Pebble Creek development, a private development of lake-front homes located outside the project boundary and in or near Duncan's Point resort, founded by Daniel Ralph Duncan in 1952 as an African-American resort. As discussed in more detail in our two previous orders concerning this matter,¹ Complainants initially brought their concerns to Commission staff informally, and the Commission's Dispute Resolution Service attempted but was unable to assist the parties in resolving their conflicts. On September 7, 2004, staff issued a letter order determining

¹ 111 FERC ¶ 61,190 (2005) (order denying complaint); 112 FERC ¶ 61,289 (2005) (order denying rehearing).

that AmerenUE had authorized the developer to build a seawall without first considering whether the seawall was necessary or whether plantings or rip-rap could be used instead, and halting any further construction of the seawall. Staff further found that, although the licensee had issued a permit to the developer for a wastewater treatment facility discharge pipe without first notifying the Commission, the discharge pipe had been properly authorized, because the developer had obtained all necessary permits for it.

Complainants did not attempt to intervene and seek rehearing of staff's September 7, 2004 letter, but instead filed comments in opposition to it. After AmerenUE made several compliance filings, staff issued a second letter order regarding these matters on February 23, 2005. Again, Complainants did not intervene and seek rehearing of staff's letter order, but instead filed a formal complaint against the licensee on March 4, 2005. We denied the complaint on May 9, 2005, finding that it duplicated matters already examined and resolved by Commission staff.² Complainants sought rehearing of our order, which we denied on September 15, 2005.³

3. On August 11, 2005, while their request for rehearing of our denial of their complaint was pending, Complainants filed a second complaint, alleging that AmerenUE had failed or refused to comply with staff's letter order of September 7, 2004, and our order of May 9, 2005. The Commission Secretary issued a notice dismissing the complaint as premature, because the matters raised therein either related to an ongoing compliance proceeding for which staff had not yet completed its determinations, or were the subject of Complainants' pending request for rehearing.⁴ Complainants did not seek rehearing of the dismissal.

4. On September 1, 2005, Commission staff issued a letter order regarding some outstanding compliance issues concerning the Osage Project.⁵ On September 30, 2005, Complainants filed a request for rehearing of staff's September 1 Letter Order. On October 14, 2005, AmerenUE made a compliance filing in response to staff's September 1 letter, providing a scale drawing and photographs of measures it had taken

² 111 FERC ¶ 61,190.

³ 112 FERC ¶ 61,289. Complainants have filed a petition for judicial review of these decisions. *Duncan's Point Lot Owners Ass'n, Inc. v. FERC*, No. 05-1421 (D.C. Cir. filed Nov. 10, 2005).

⁴ Notice dismissing complaint as premature (issued August 18, 2005).

⁵ See letter from John Estep, FERC, to Warren Witt, AmerenUE (dated September 1, 2005).

with regard to staff's requirement that it construct a walkway near the seawall to ensure public access to the shoreline. On November 14, 2005, while their request for rehearing of staff's September 1 Letter Order was pending, Complainants filed a third complaint, again alleging that AmerenUE had failed or refused to comply with Commission staff's letter order of September 7, 2004, and our order of May 9, 2005. In support, Complainants raised issues concerning staff's site visit report of July 29, 2005, and the licensee's compliance filing of October 14, 2005. The Commission Secretary issued a notice dismissing the complaint as premature, because the matters raised therein either related to an ongoing compliance proceeding for which staff had not yet completed its determinations, or were the subject of Complainants' pending request for rehearing.⁶ Complainants did not seek rehearing of the dismissal. As a result, the only matter currently pending before us is Complainants' request for rehearing of staff's September 1, 2005 letter order.⁷

Discussion

A. Preliminary Matters

5. Complainants devote nearly four pages of their rehearing request to matters that are unrelated to the substance of Commission staff's September 1, 2005 Letter Order. Most of their arguments are devoted to unsupported (and, in our view, wholly inappropriate) allegations against the Commission and its staff. Complainants state, for example, that the September 1, 2005 letter "is but another example of FERC[']s continued refusal to afford African American citizens the most basic constitutional right to due process, equal treatment under the law, and the unlawful taking of property for the benefit of a private entity."⁸ They accuse the Commission and staff of "a consistent

⁶ Notice dismissing complaint as premature (issued December 1, 2005).

⁷ Complainants request, without elaboration, that AmerenUE's compliance with Commission and staff orders be "referred to an Administrative Law Judge for an expedited hearing on the merits." Request for rehearing at 1. Complainants do not address why they think such a hearing might be in order. We find that Complainants have been afforded ample opportunity to present their views in this proceeding, and the matters at issue have been, or can be, satisfactorily resolved without the need for an evidentiary hearing. *See, e.g., Sierra Association for Environment v. FERC*, 744 F.2d 66, 664 (9th Cir. 1984) (trial-type hearing not required in light of party's extensive participation in the licensing proceeding and failure to identify specific disputed facts material to the agency's decision).

⁸ Request for rehearing at 2.

pattern of deliberate indifference to the constitutional rights of African Americans, refus[al] to follow [Commission] regulations and or abide by the mandates of Congress.”⁹ They add that the Commission has failed to properly regulate the activities of its licensee, AmerenUE, along with the Pebble Creek developer, in their efforts “to plot the demise of a Historic African American resort, pollute the Lick Creek Cove with phosphorous, nitrogen, chlorine and dangerous pathogens, and the giving away of project boundaries and the re-introduction of racial segregation at the Lake of the Ozarks.”¹⁰

6. Complainants offer nothing specific in support of these allegations. As discussed in our two previous orders, we and our staff have seriously and respectfully considered Complainants’ arguments, but have rejected many of them on legal grounds, in some cases because they were beyond our jurisdiction to investigate or enforce. In doing so, we carefully explained the reasons for our decisions.¹¹ This does not in any way constitute denial of, or indifference to, Complainants’ constitutional rights.

7. Complainants next assert that Duncan’s Point residents are being subjected to disparate treatment. In support, they reiterate arguments already disposed of in our earlier orders concerning the Commission’s compliance with the National Environmental Policy Act and the Clean Water Act. They also cite two cases involving different facts and regulatory requirements, without attempting to show how they are being treated unfairly.¹² We find no evidence of disparate treatment in this case.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *See, e.g.*, 111 FERC ¶ 61,190 at PP 10-41; 112 FERC ¶ 61,289 at PP 11-25.

¹² *See Indiana Michigan Power Co.*, 103 FERC ¶ 62,154 (approving the placement of removable aluminum boat docks, for which the applicant obtained water quality certification and a dredge-and fill permit, under sections 401 and 404, respectively, of the Clean Water Act (CWA), and staff prepared an environmental assessment); and *Indiana Michigan Power Co.*, 111 FERC ¶ 62,190 (involving modification and approval of a channel wetland mitigation report, which was required to compensate for the filling of 0.25 acres of an existing wetland channel in the project area). Complainants make no attempt to address any similarities or differences between their own case and the cited examples, or to explain how they believe they are being subjected to disparate treatment in light of these cases. Moreover, this is the first time that Complainants have made any mention of CWA section 401, which applies by its terms to applicants for a federal license or permit. The licensee obtained water quality

(continued)

8. Complainants also criticize Commission staff's letter order of September 7, 2004, which preceded their formal complaint by nearly five months. They complain that the September 7, 2004 order was not issued as a Commission order and posted in the Commission's e-Library system, as other orders; was not directed to the complaining party; did not give notice that it was a Commission order; and did not advise Duncan's Point residents of any appeal rights. Complainants assert that these faults constitute "trickery and deceit" on the part of Commission staff. To the contrary, Commission staff, acting under delegated authority, routinely issues this type of letter order to licensees as part of the process of ensuring post-license compliance with license requirements. Such letters are not parts of formal Commission proceedings and thus are not issued by the Commission's Secretary.¹³ Compliance letters are sent to the licensee and are available to the public, because they are placed in the Commission's e-Library system (as was this one). In addition, Complainants did not become a party to a

certification for its existing license in 1973. *See Union Electric Co.*, 15 FERC ¶ 62,038 at p. 63,042 (1981). As we held earlier, the authorizations involved in this case are categorically excluded from the requirement to prepare an environmental assessment. *See* 112 FERC ¶ 61,289 at P 14. Similarly, they do not require a license amendment, and thus do not give rise to the possible need for a new certification. *See* 18 C.F.R. § 4.34(b)(5) (2004).

¹³ As noted in our previous order denying rehearing of the complaint, participation in post-licensing compliance proceedings is limited to filings that involve material changes to the project or license, adversely affect property rights in a manner not contemplated by the license, or concern matters in which an entity is specifically given a consultation role in the license. *See* 111 FERC ¶ 61,190 at P 4 and n. 5. Thus, Complainants were not entitled to service of post-licensing compliance documents in this case. *See National Committee for the New River, Inc., v. FERC*, No. 03-1251, 2005 U.S. App. LEXIS 27710, at *8 (D.C. Cir. Dec. 16, 2005); *City of Tacoma, Washington*, 109 FERC ¶ 61,318 at PP 6-7 (2004). However, they could have advanced their claims of adversely affected property interests in support of a motion to intervene and request for rehearing.

proceeding until the filing of their complaint on March 4, 2005.¹⁴ Again, we find that their allegations are without basis.¹⁵

9. As a final matter, we note with extreme disapproval that Complainants' request for rehearing makes completely unsupported allegations questioning the good faith and character of an individual Commission employee. We consider such *ad hominem* attacks to be inappropriate in filings before us. We also note that Complainants' representative has made many dozens of telephone calls to a number of Commission employees, to the point of harassing them and interfering with the normal course of business. While we respect any group's efforts to present its views, such efforts are also subject to a rule of reason, which the Complainants have exceeded. We remind Complainants that our regulations provide, in appropriate circumstances, for the suspension of any person's privilege of appearing before the Commission.¹⁶

B. Commission Staff's September 1, 2005 Letter Order

1. The Walkway

10. In its September 1, 2005 Letter Order, Commission staff reviewed a number of outstanding compliance issues for the Osage Project, finding that the licensee's response to some items was satisfactory. Among other things, staff reviewed AmerenUE's filing of July 11, 2005, and described the results of staff's site visit on July 27, 2005, to

¹⁴ Although Complainants claim they requested rehearing of staff's letter order in their filing of October 6, 2004, their filing nowhere mentions the word "rehearing." All documents filed with the Commission must include a heading which describes the filing. *See* 18 C.F.R. § 385.2002(d) (2004). Moreover, only a party may seek rehearing, and their filing was not accompanied by a motion to intervene. *See* 18 C.F.R. § 485.713(b) (2004).

¹⁵ Complainants also criticize a Commission staff official for responding to their inquiries on two occasions without using official Commission letterhead. Request for rehearing at 5 and exhibits 1-3 (attached). Our examination of these exhibits reveals that they are personal, hand-written notes included with copies of documents that Complainants had requested, rather than official correspondence requiring the use of Commission letterhead. They reflect an attempt to be courteous, and are in no way discriminatory.

¹⁶ *See* 18 C.F.R. § 385.2102 (2005).

inspect the completed walkway and public access area to ensure compliance with the licensee's public access plan.¹⁷

11. Staff found that the walkway providing access to the seawall was unacceptable because of loose, uneven flag stones placed on the earth with little ground preparation, weeds and grasses growing between some of the stones, and a width of less than 36 inches for much of the walkway. Staff required that the licensee immediately revise the walkway to meet the specifications of the approved public access plan, including widening the walkway, ensuring that it is properly maintained, and providing safe access from the adjoining properties at both ends of the walkway, by either ramps or steps.

12. Complainants object to the fact that, although staff required the licensee to widen the walkway to five feet to comply with the public access plan, staff did not also insist that the licensee move the walkway to a minimum of fifteen feet from the seawall's closest point. In a July 7, 2005 letter, AmerenUE explained that it had built the walkway closer than fifteen feet to the seawall in some areas to avoid the need to cut down some native trees. Complainants reject this explanation as unsatisfactory, arguing that "the developer had no problem clearing native trees from in front of the homes."¹⁸ They further maintain that the licensee's noncompliance has resulted in a continued denial of public access to the shoreline.

13. We disagree. By finding that the walkway must be widened and properly maintained, Commission staff ensured that the walkway would provide the requisite public access to the shoreline. Staff did not require that the walkway be relocated to a minimum of fifteen feet from the seawall in all areas, thus indicating that these deviations were acceptable. We agree that these deviations are reasonable. The purpose of the walkway is to ensure public access to the shoreline adjacent to the seawall.

¹⁷ AmerenUE filed its plan on November 15, 2004, in response to staff's letter order of September 7, 2004, and staff approved the plan by letter dated February 23, 2005.

¹⁸ Request for rehearing at 6. Complainants also state, without elaboration, that the adjustments for the walkway "appear to have been brought about by the placement of septic tanks on project boundaries." *Id.* We find nothing in the record to support this assertion.

Routing the walkway closer to the seawall in some areas to preserve native trees does not interfere with that purpose. We therefore deny rehearing of this issue.¹⁹

2. The Project Boundary

14. In its September 1, 2005 Letter Order, staff reviewed AmerenUE's response of July 11, 2005, concerning project boundary issues. In that response, the licensee stated that its project boundary and ownership of land had not changed and included all of the property located within the 664 foot contour line. As a result, the licensee reported that there was no need to acquire any land and place it in the project boundary. Staff found the licensee's response to this item satisfactory.

15. Complainants assert that staff's finding is "grossly in error."²⁰ In support, they point to evidence from the Camden County Register of Deeds Office, which they assert demonstrates that Pebble Creek Development, LLC, claimed ownership down to the seawall, which sits on the 659-foot contour line. Because the project boundary is at the 664-foot contour line, Complainants assert that the developer illegally claimed or appropriated this land, and that the property must be conveyed back to the licensee. Complainants acknowledge that AmerenUE filed affidavits of subsequent purchasers of properties along the seawall, reflecting their understanding that they do not possess, and have never possessed, any ownership interest below the 664-foot contour elevation. Complainants maintain, however, that these disclaimers are insufficient to convey a property interest in land. They therefore argue that the licensee is not in compliance with Commission staff's letter order of September 7, 2004, which required the licensee to notify the Commission when it had obtained and placed in the project boundary all property below the 664-foot contour line.

16. Complainants misunderstand the purpose of staff's directive regarding the project boundary. In the face of uncertainty about whether or not the developer had acquired some project lands, as Complainants had contended, staff ordered the licensee to ensure that the project boundary remained at the 664-foot contour line, and to notify the Commission when it had obtained and placed in the project boundary any such property that the developer might have acquired. AmerenUE responded that the project boundary

¹⁹ Complainants also assert that there is no egress or ingress to the walkway from the road to the shoreline. The shoreline is accessible from either end of the walkway, and we find nothing in the public access plan that would require a connection between the walkway and the road.

²⁰ Request for rehearing at 7.

has always been, and continues to be, all of the property located within the 664-foot contour line. Because AmerenUE never conveyed any project property to the Pebble Creek developer, the developer never acquired any ownership interest in any project lands. Regardless of the property descriptions included in the deeds to subsequent purchasers, the developer could not convey what he did not own. As a result, the subsequent property owners did not acquire any interest in land within the project boundaries. In short, there was no need to reacquire any project property because it was never sold, and staff reasonably concluded that the licensee's response concerning this matter was satisfactory. We therefore deny rehearing as to this issue.²¹

3. The Park

17. In its response of July 11, 2005, AmerenUE stated that it had completed the trail and shoreline access toward the back of Lick Creek Cove and designated the area as the Daniel R. Duncan Park, and had designated the area at the crossroads of the Pebble Creek development and Duncan's point development as a public access area. In the September 1, 2005 letter order, Commission staff found these actions satisfactory, and reminded the licensee that it must maintain this area to provide safe public access.

18. On rehearing, Complainants assert: "There is no park. There is only a pile of large rocks."²² They maintain that the "mitigation efforts of the licensee are an absolute joke," and that the Commission and the licensee "have created a separate but unequal park and public access."²³ In support, they assert that twelve other public access points in and around the Lake of the Ozarks have first class facilities, with good lighting, ample parking, rest rooms, concrete boat launches, and observation posts. They maintain that the "licensee's effort along with the assistance of its prime contractor has amounted to an insulting, humiliating and laughing matter for the residents."²⁴ They add that the licensee's decision to allow the Pebble Creek developer to construct the

²¹ There is nothing in the legal description of the 38-acre Pebble Creek subdivision to suggest that the developer acquired any project lands. See AmerenUE's letter of July 7, 2005, and attached documents.

²² Request for rehearing at 10.

²³ *Id.* at 10-11.

²⁴ *Id.*

“so-called park, public access area and the trails” was “a real slap in the face to the community.”²⁵

19. As described in staff’s letter order of September 7, 2004, the park was intended as a public access area, to address concerns that the seawall built in connection with the Pebble Creek development blocked public access to the shoreline. A second public access area was to be designated next to the Pebble Creek development for public access to the lake. As discussed in staff’s site inspection report, the land next to the Pebble Creek development for public access to the lake has a grass parking area and sign posted. The licensee also designated the Daniel R. Duncan Park public access area to provide public access to the back area of Lick Creek Cove. For the area comprising the park, the licensee constructed a gravel stone walkway and parking area sufficient to accommodate 3 to 4 vehicles. The foot trail is approximately 4 feet wide and 300 feet long, and ends at the lake shoreline. A sign designating this area as Daniel R. Duncan Park is posted in the parking area near the trail head advising of the public lake access.

20. This is clearly more than “a pile of large rocks,” as Complainants assert. Given that the purpose of the park was to provide public access to the shoreline as partial mitigation for construction of the seawall, rather than to provide for a more elaborate public recreation facility, we find that the park is adequate to meet its intended purpose. Moreover, we find nothing degrading, insulting, or discriminatory about staff’s requirement that the licensee designate a simple public access area in memory of the founder of Duncan’s Point. Similarly, we have no basis for rejecting the park because the licensee employed the services of the Pebble Creek developer in constructing it. Licensees are permitted to use the services of contractors in fulfilling their license obligations, provided that they remain ultimately responsible for ensuring that the requirements are met and the work is done properly. Thus, we find no basis for Complainants’ assertion that the licensee was required to undertake these actions itself. We therefore deny Complainants’ request for rehearing of these issues concerning the park.²⁶

²⁵ *Id.* at 11.

²⁶ Complainants also maintain that the park adversely affects wetlands, and that the licensee failed to obtain water quality certification under CWA section 401 or a dredge and fill permit under CWA section 404 for filling in the wetland area for the park and trail. The wetlands issue is addressed below. As discussed earlier (*see* n. 12), we have no basis for concluding that water quality certification was required in connection with the licensee’s implementation of its public access plan. The U.S. Army Corps of

4. History of Duncan's Point

21. In the September 1, 2005 letter, Commission staff observed that AmerenUE had stated that it was working with Duncan's Point Homeowners' Association to develop a display on the history of Duncan's Point for the Wilmore Lodge Museum and a written history for the Lake of the Ozark's shoreline management plan. Staff requested that the licensee provide, by November 30, 2005, an update of its consultation efforts, including any correspondence with the Association and a schedule for installing the display in the museum.

22. On rehearing, Complainants assert without elaboration that the licensee has been unwilling to include them in the process, and "has tried to distort our history by changing the location of our beloved Duncan's Point by avoiding the mentioning of Lick Creek as a part of its location."²⁷ They add that, rather than "presenting historic photos and data of early Duncan's Point which the residents provided months ago, instead they present photos of current homes."²⁸ It is unclear to what materials Complainants are referring, as they did not attach any historic photos or documents to their rehearing request, and no party has filed materials that purport to depict the licensee's museum display.²⁹ We therefore have insufficient information to evaluate their arguments concerning the contents of the proposed display.

Engineers is responsible for implementing and enforcing the permit program under CWA section 404. *See* 112 FERC ¶ 61,289 at PP 17-18.

²⁷ Request for rehearing at 12.

²⁸ *Id.*

²⁹ Complainants provided copies of several photos in an attachment to their March 3, 2005 complaint, with a caption indicating that they were an example of their shoreline access. At least one of these photos appears to bear a date of October 1959, but there is no information to indicate whether the other photos are current or historic. *See* letter from Nancy A. Brunson to Commission Secretary, Exhibit 2b (filed March 10, 2005). In addition, there is a brief discussion of the history of Duncan's Point included in materials placed in the Commission's e-Library system in 2003, long before the complaint was filed. *See* memorandum from Deborah Osborne, FERC, to the public record (filed April 17, 2003), attaching a copy of an undated report by Ms. Brunson entitled, "Duncan's Point, An African American Resort." It is unclear whether these are the materials to which Complainants refer, or whether Complainants ever provided them to the licensee.

23. On January 3, 2006, the licensee filed an update of its consultation, including any correspondence with the Association.³⁰ The material included in the filing suggests that representatives of the licensee and the Association have been consulting regarding this matter since mid-June of 2005, some changes have been made in response to the Association's comments, and some issues remain to be resolved. The licensee states that it hopes to reach resolution of the issues and have the project completed later this month. Thus, we find no basis for concluding that the licensee has been unwilling to include Complainants in the process of developing its display.

5. Wetland Areas

24. Staff's letter order of September 7, 2004, required AmerenUE to request the U.S. Army Corps of Engineers (Corps) to determine if any property owned by Pebble Creek is, or was at the time of purchase, a wetland area. In its July 11, 2005 letter, AmerenUE stated that all wetlands in the Pebble Creek Development area had been identified by Corps or National Wetland Inventory maps and would be included and designated as such in the shoreline management plan for the Osage Project. In its September 1, 2005 letter, staff found that this mapping fulfilled part of the requirement, and directed the licensee to file, by September 30, 2005, a letter including the results of the licensee's consultation with the Corps and clearly identifying which areas of the Pebble Creek development, if any, the Corps has designated as wetlands.

25. On rehearing, Complainants object that the licensee has had over a year to provide this material and was given an extension. They add that the shoreline management plan will not be due until after the Commission acts on AmerenUE's application for a new license, which is pending.

26. Staff's September 4, 2004 letter required AmerenUE, within 60 days, to confirm by letter that it had complied with this item. Subsequently, in its February 23, 2005 letter, staff stated that the licensee was required to notify the Commission in writing when this item was completed. After reviewing AmerenUE's July 11, 2005 response, staff required the licensee to file additional information. Staff is currently reviewing the licensee's response, which it filed on November 1, 2005. As a result, any arguments concerning the adequacy of that response are not yet ripe for consideration here.

³⁰ Letter from Mark Jordan, Ameren, to Magalie Salas, FERC, dated December 14, 2005 (filed January 3, 2006).

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27. As we found in our earlier order, the Corps is responsible for implementing and enforcing the CWA section 404 permitting program.³¹ Therefore, any arguments concerning the licensee's compliance with that program must be directed to the Corps. However, AmerenUE's continued failure to file timely responses to staff's letter orders concerning this matter is cause for concern.³² We remind the licensee that staff's compliance deadlines must be taken seriously, and failure to meet them may result in sanctions.

The Commission orders:

The request for rehearing filed in this proceeding on September 30, 2005, by Duncan's Point Lot Owners Association, Inc.; Duncan's Point Homeowners Association, Inc.; and Nancy A. Brunson, Juanita Brackens, Helen Davis, and Pearl Hankins, individually, is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

³¹ See 112 FERC ¶ 61,289 at PP 17-18.

³² In that regard, we note that AmerenUE's response to staff's request for documentation of consultation concerning the history of Duncan's Point was more than a month late.