

UNITED STATES OF AMERICA 114 FERC ¶61,148  
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Power

Project No. 2232-500

ORDER REJECTING REQUEST FOR REHEARING,  
DENYING RECONSIDERATION, AND GRANTING REQUESTS FOR  
CLARIFICATION AND EXTENSION OF TIME

(Issued February 16, 2006)

1. On May 13, 2005, Commission staff issued a letter order requiring Duke Power, a division of Duke Energy Corporation, licensee for the Catawba-Wateree Project No. 2232, to relocate or remove a common-use dock located on Lake Norman, one of the project's reservoirs, in Mecklenburg County, North Carolina. On October 20, 2005, the Commission denied Duke Power's timely request for rehearing of the May 13 Order, and ordered the company to remove the common-use dock and file a report documenting its compliance efforts within 45 days of the Commission's order. Duke Power now seeks rehearing and clarification of the Commission's prior order denying rehearing.
2. In this order, we are rejecting Duke Power's second rehearing request. Rehearing of an order on rehearing lies when the order on rehearing modifies the result reached in the original order in a manner that gives rise to a wholly new objection.<sup>1</sup> Here, Duke Power essentially argues that, by requiring it to remove the dock, the Commission substantially changed its position and took new action. Duke Power also asserts that we failed to consider other alternatives, such as relocating the dock, but, as discussed below, this is incorrect.

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<sup>1</sup> See *Gustavus Electric Co.*, 111 FERC ¶ 61, 424 (2005); *Symbiotics, L.L.C.*, 99 FERC ¶ 61,064 (2002); and *PacifiCorp*, 99 FERC ¶ 61,015 (2002). See also *Southern Natural Gas Co. v. FERC*, 877 F.2d 1066, 1073 (D.C. Cir. 1999), citing *Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1109-10 (D.C. Cir. 1988).

3. Although we are rejecting Duke Power's second rehearing request, we think it is appropriate to grant reconsideration for the purpose of responding to new legal arguments that Duke Power raises. This order also responds to the licensee's requests for clarification of certain aspects of the order and grants an extension of the deadline to comply.

### **Background**

4. Article 39 of the project's license gives Duke Power the authority, without prior Commission approval, to grant permission for certain types of non-project use and occupancy of project lands and waters and to convey interests in project lands and waters for certain other types of non-project use and occupancy.<sup>2</sup> Under this article, Duke Power may permit the construction of private boat docks on its shoreline for single family dwellings.

5. Duke Power's consideration of requests for permission to use its project shoreline and waters is guided by its shoreline management plan (SMP).<sup>3</sup> As part of its SMP, Duke Power has developed shoreline management guidelines to regulate activities within the project reservoirs and administer a dock permitting program.<sup>4</sup>

6. On January 4, 2005, Alan and Suzanne Smith, owners of a lot in the Peninsula subdivision on Lake Norman, filed a letter alleging, among other things, that Duke Power had violated the terms of its SMP guidelines by allowing an oversized houseboat and common-use dock to obstruct their shoreline and boat access to and from the subdivision. The subdivision consists of residential property and a series of common-use boat docks, each shared by two adjoining lot owners. As owners of Lot 79, the Smiths share a common-use dock located on the boundary line between their lot and Lot 78. The intrusive common-use dock is on the boundary line between adjacent Lots 80 and 81.

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<sup>2</sup> See 24 FERC ¶ 61,346 (1983) (order adding the Commission's standard land use article and approving the licensee's requests to lease project lands and waters for private marinas and other shoreline development).

<sup>3</sup> The Commission approved the updated (and current) SMP in 2003. 105 FERC ¶ 62,027.

<sup>4</sup> The most recent guidelines were approved in 2003 as part of Duke Power's SMP and are found in Duke Power's "Final Shoreline Management Plan Update," filed July 30, 2001, Vol. II, Appendix F.

7. After investigating the allegations and reviewing responses and surveys filed by Duke Power and the Smiths, Commission staff issued its May 13, 2005 Letter Order finding that construction of the common-use dock serving Lots 80 and 81 had not been authorized under the guidelines and that, as constructed, the dock limited the Smiths' access. Commission staff therefore required that Duke Power remove or relocate the dock to remedy the situation. Duke Power filed a timely request for rehearing, which we denied in our October 20, 2005 Order.

8. In the October 20 Order, we rejected Duke Power's argument that the dock's construction was authorized by an unrecorded permit issued under the SMP guidelines and by a Mecklenburg County permit, and we rejected its argument that retroactive issuance of a permit for the dock's prior construction would be appropriate and consistent with the guidelines. We affirmed Commission staff's determination that the dock was unauthorized and found that, because the dock was improperly installed in such close proximity to the Smith's property line, a boat of average size could not be moored to the left side of the dock without crossing the adjacent owner's property line, thereby violating the SMP guidelines.<sup>5</sup> Because the common-use dock, which had been constructed without a permit from Duke Power, interfered with the Smiths' access to their dock and failed to allow safe, unobstructed ingress and egress of boats, we ordered Duke Power to remove the dock.

9. In its second rehearing request, Duke Power contends that the Commission acted arbitrarily and capriciously in ordering removal of the dock without first considering other less burdensome and harsh measures, such as relocating the dock, to accommodate the interests of other dock users. The Commission did in fact consider the possibility of relocating the dock. Staff's May 13 letter provided the options of removing or relocating the dock, but Duke Power rejected this alternative when it stated in its earlier rehearing request that relocating the dock was not feasible and that even relocating the dock any meaningful distance would likely cause the dock to extend past the projected property line in violation of the SMP guidelines.<sup>6</sup>

10. Reiterating that relocation of the dock might not be a solution, Duke Power requests that the Commission consider other alternatives. Duke Power suggests the following alternatives to removing the dock: (1) allowing only a small boat to be moored

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<sup>5</sup> The SMP guidelines provide that no part of a proposed private facility (including the anchoring system) may cross the property lines as projected, without a written release from the adjoining property owner. *See id.*

<sup>6</sup> *See* Duke Power's rehearing request, filed June 13, 2005, at 5-6.

to the outside of the left pier; (2) prohibiting the mooring of any boat to the outside of the left pier and limiting the size of any boat moored to the inside of the left pier; and (3) alternative (2) plus shortening the left pier.

11. Duke Power has had a considerable amount of time to explore alternatives and to propose them for consideration, just as it previously proposed relocating the houseboat until that option proved to be infeasible. Duke Power stated in its January 21, 2005 filing on this matter that it was first contacted by the Smiths concerning the dock's location in March 2004, and that it spent the next 9 months investigating the complaint and developing a proposed course of action. Duke Power then had an additional 9 months (from the time it received staff's January 5, 2005 letter requesting a report addressing the Smiths' concerns, until the issuance of the Commission's October 20, 2005 Order on the first rehearing) to submit at least one of its identified alternatives as a proposal.

12. When the licensee has established a dock permitting program pursuant to its authority under the license, as Duke Power has, it is incumbent upon the licensee to provide measures or solutions to accommodate continued use and access under that program. While the Commission may subsequently review and approve the licensee's plans, it is not the Commission's responsibility in the first instance to identify options and strategies for solving problems related to the licensee's permitting program.

13. In its second rehearing request, Duke Power also contends that the Commission violated section 6 of the Federal Power Act<sup>7</sup> by changing the SMP guidelines' prohibition on docks extending across projected property lines to a prohibition on docks or "a boat of average size" moored thereto extending across projected property lines. Section 6 provides that, "Licenses may be ... altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice."<sup>8</sup> Duke Power asserts that, because the SMP guidelines have been approved as part of the license, the Commission's action of prohibiting a boat of average size from extending across projected property lines constitutes a unilateral alteration of the license.

14. Duke Power has misconstrued our statements regarding the dock and protruding boats moored to the dock. In the October 20 Order, we stated:

Although the SMP guidelines do not specifically restrict the encroachment of a boat (only the pier), a purpose of the guidelines

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<sup>7</sup> 16 U.S.C. § 799.

<sup>8</sup> *Id.*

is to ensure that docks are built to minimize interference with other facilities in the area and to ensure the owners' ability to safely access them. Under these circumstances, it is not unreasonable to require that a dock be located such that it and a boat of average size will not cross the adjacent lot owner's extended property line. Otherwise, docks could be built at the property line, as is the case here, so that the entire boat would extend across the property line, increasing the potential for interference with an adjacent lot owner's access to its dock.<sup>9</sup>

15. Our statements speak more to the size, design, and location of the dock than to the size of a boat moored to the dock. By requiring that the dock be situated such that a boat of average size will not protrude, we are not changing the SMP guidelines but giving meaning and relevance to the guidelines in the current situation. Contrary to Duke Power's assertions, prohibiting the dock's placement in such a way that a boat moored to the dock obstructs access does not entail any alteration of the project license, but rather is simply requiring the company to comply with its own guidelines. Indeed, the SMP guidelines, which Duke Power correctly points out are part of the license, provide that, as a consequence for any violation of the guidelines, Duke Energy can order removal of the non-complying structure and restoration of the area at the owner's expense. As stated previously, the dock's construction was not authorized under the guidelines, and because of this, and because of the obstruction that results from its placement, the dock is a violation of the guidelines.<sup>10</sup>

16. Duke Power states that, if we determine section 6 does not apply, it needs clarification as to what constitutes "a boat of average size." It indicates that by not

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<sup>9</sup> 113 FERC ¶ 61,070 at P 17.

<sup>10</sup> Duke Power claims that there is no factual evidence that the Smiths' use of their boat or dock is obstructed by the common-use dock and houseboat, and in so doing, it contradicts itself. We read Duke Power's argument in an earlier filing that the houseboat does not block access *completely* to mean that the boat does, in fact, block access at least partially. See Duke Power's letter, filed in this proceeding on January 21, 2005, at 2-3. In the letter Duke Power states that "the houseboat (but not the dock structure) projects across the projected property line ..." and "the vessel does not prohibit *all* access to the adjoining lot or to the similarly constructed common use pier ... nor does it *completely* block access for the existing boat currently moored ... along the outermost side of the adjoining dock ... ." (Emphasis added.)

defining the term, we have made it very difficult to go forward with its permitting program, because the project reservoirs are used by thousands of boats of varying sizes and “a boat of average size” could differ from owner to owner. Without this clarification, Duke Power believes it will be unable to act on most future permit applications, especially since the permit applicant is most often a developer who has no idea what type of boat a prospective owner may decide to use.

17. When we referred to “a boat of average size,” we did not intend to capture in terminology a precisely-defined boat structure that could be used as a measuring stick for permit and boat applicants. Rather, we intended for the licensee to exercise a sense of reasonableness in assessing what might fit within the parameters of a dock without crossing over extended property lines<sup>11</sup> and obstructing access. To clarify, when issuing permits in the future, a dock should be situated or constructed in size, dimension, or design such that boats to be moored to it would not, without the consent of the adjacent property owner, cross the adjacent lot owner’s extended property line and interfere with the owner’s access to its dock.<sup>12</sup>

18. Duke Power also contends in its second rehearing request that we have hindered its ability to administer its permitting program by determining that it could not rely on the building permit issued by Mecklenburg County. Duke Power therefore seeks Commission guidance on how it should address the validity of county building permits and related property line projections in order to administer its permitting program in the future.

19. We determined in our October 20 Order that construction of the dock was not authorized, because there was no evidence of a requisite permit issued by Duke Power. Nor could this lack of a permit be cured by authorization from the county, especially given that the county authorization would have been based on 1995 and 2005 applications that contained incomplete and sketchy information and did not show the dock’s location in relation to other existing structures, to property lines, or property lines as extended into the reservoir, as required by the application form.

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<sup>11</sup> An extended property line means extending a theoretical line into the reservoir from the edges of each lot owner’s property.

<sup>12</sup> To the extent that Duke Power finds it necessary to require developers to set a maximum size of boats that may be docked without permission of adjacent slip owners (so as to avoid the type of situation that has arisen here), it is free to do so.

20. Duke Power admits on the one hand that, “since it cannot be demonstrated that Duke ever issued a permit for the common use dock, removal of the dock is a potential means to resolve the matter.” Yet, on the other hand, it would have us believe that the validity of the county’s permit and Duke Power’s reliance on it are necessary in order for Duke Power to administer its permitting program. If the dock should be removed because it was not properly authorized by a Duke Power permit, the validity of a county-issued permit for the dock is immaterial.<sup>13</sup> The fact that a single dock caused an infraction should not interfere with Duke Power’s ability to continue administering its permitting program as usual. Duke Power need not evaluate whether a county building permit is adequate, as it suggests. As long as it has properly issued a permit consistent with its SMP guidelines, there would be no reason to question the construction of a dock.

21. Duke Power requested that it be given an extension until 45 days after the issuance of this order to comply with our October 20 Order. The October 20 Order required Duke Power to have the common-use dock removed, and to submit, within 45 days of the order’s issuance, a plan and schedule for removing the dock by May 1, 2006. We will grant the requested extension.

The Commission orders:

(A) The request filed by Duke Power on November 21, 2005, for rehearing and clarification of the Commission’s October 20, 2005 Order in this proceeding is rejected insofar as it seeks rehearing.

(B) Clarification of the Commission’s October 20, 2005 Order in this proceeding is granted to the extent set forth in this order.

(C) Reconsideration of the Commission’s October 20, 2005 Order in this proceeding is denied.

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<sup>13</sup> Contrary to Duke Power’s argument, our prior order did not make a finding as to the validity of the county permit. Rather, it rejected Duke Power’s contention that the issuance of a county permit demonstrates the dock’s compliance with the property-line requirements of the SMP guidelines. The order noted moreover that the drawing of the dock in the application for the county permit was incomplete because, among other things, it showed no property lines.

Project No. 2232-500

8

(D) The deadline by which the licensee must submit a plan and schedule for complying with the October 20, 2005 Order's requirement to remove the common-use dock is extended to 45 days following the issuance of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.