

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. 459-153

ORDER DENYING REHEARING

(Issued July 20, 2006)

1. On April 27, 2006, 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 issued on March 28, 2006. 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 letter order. Complainants dispute staff's findings and maintain that the licensee has failed or refused to comply 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. Complainants continue to raise arguments 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 three previous orders concerning this matter,¹

¹ 111 FERC ¶ 61,190 (2005) (order denying complaint); 112 FERC ¶ 61,289 (2005) (order denying rehearing); 114 FERC ¶ 61,038 (2006) (order denying rehearing of staff letter order). Complainants have filed petitions for judicial review of these decisions. *See Duncan's Point Lot Owners Ass'n, Inc. v. FERC*, No. 06-1157 (D.C. Cir.

(continued)

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 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.

3. 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

4. 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.

filed May 1, 2006); *Duncan's Point Lot Owners Ass'n, Inc. v. FERC*, No. 05-1421 (D.C. Cir. filed Nov. 10, 2005).

² 111 FERC ¶ 61,190.

³ 112 FERC ¶ 61,289.

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

5. 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. While the request for rehearing was pending, AmerenUE made a compliance filing on October 14, 2005, in response to staff's September 1 letter. Complainants filed a third complaint on November 14, 2005, once 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, and raising issues concerning staff's site visit report of July 29, 2005, and the licensee's compliance filing of October 14, 2005. On December 1, 2005, the Commission Secretary issued a notice dismissing the complaint as premature.⁶ Complainants did not seek rehearing of the dismissal.

6. On January 19, 2006, we denied Complainants' request for rehearing of staff's September 1, 2005 letter order.⁷ On February 21, 2006, Complainants filed a request for rehearing or reconsideration of our denial of rehearing. On March 1, 2006, the Commission Secretary issued a notice rejecting Complainants' request for rehearing on the grounds that a party may not seek rehearing of an order on rehearing unless the order modifies the result in a manner that gives rise to a wholly new objection.⁸

7. On March 28, 2006, Commission staff issued a letter order approving two of AmerenUE's previous filings.⁹ On November 1, 2005, AmerenUE had filed information concerning the identification and location of wetlands.¹⁰ On January 3, 2006, AmerenUE had filed information concerning consultation with Duncan's Point Homeowners' Association (Association) to develop information on the history of Duncan's Point for the Wilmore Lodge Museum display and the Lake of the Ozarks' shoreline management

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

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

⁷ 114 FERC ¶ 61,038 (2006).

⁸ Notice rejecting request for rehearing or reconsideration (issued March 1, 2006).

⁹ See letter from John Estep, FERC, to Warren Witt, AmerenUE (issued March 28, 2006).

¹⁰ Letter from Mark Jordan, AmerenUE, to Magalie Salas, FERC (filed Nov. 1, 2005).

plan.¹¹ In its March 28, 2006 letter order, staff approved both filings, finding that they fulfilled the requirements of staff's September 7, 2004 letter. On April 27, 2006, Complainants filed a request for rehearing of staff's March 28, 2006 letter.¹²

Discussion

8. Complainants maintain that staff's March 28, 2006 letter is in error because of AmerenUE's "proven violations" and "failure and or outright refusal to comply" with staff's September 7, 2004 letter and our May 9, 2005 order.¹³ In support, they reiterate many of their previous arguments, which we have already considered and disposed of in our three previous orders on matters arising out of their complaint. We need not reconsider arguments already disposed of in our previous orders. Instead, we address only those arguments that challenge the findings of staff's March 28, 2006 letter or could not have been raised earlier because they are based on new information.

9. Complainants argue that AmerenUE is not in compliance with the requirement to include the history of Duncan's Point in the shoreline management plan for the project. In support, they argue that there is no such plan because the licensee has withdrawn it and does not intend to file a revised plan for a year or more.

10. Although Complainants are correct that the licensee intends to file a revised shoreline management plan, this does not constitute a violation of the license or provide a basis for a finding of noncompliance with previous Commission orders. Staff's September 7, 2004 letter required the licensee to "include the history of Duncan's Point in its shoreline management plan."¹⁴ Staff's September 1, 2005 letter required the licensee to provide an update of its consultation with the Association to develop this history. Staff's March 28, 2006 letter found acceptable the information that the licensee had filed on January 3, 2006, including information on consultation that occurred during

¹¹ Letter from Mark Jordan, AmerenUE, to Magalie Salas, FERC (filed Jan. 3, 2006).

¹² Although captioned as a request for rehearing or reconsideration, the filing makes no further mention of reconsideration and contains no arguments in support of it. We therefore find no basis for granting reconsideration.

¹³ Request for rehearing at 1.

¹⁴ Letter from John Estep, FERC, to David Fitzgerald, AmerenUE, at 5 (issued Sept. 7, 2004).

June of 2005 concerning the written history of Duncan's Point for inclusion in the shoreline management plan.

11. The existing license does not include a shoreline management plan. Issues associated with the shoreline management plan are being evaluated in connection with the relicense application. As part of the ongoing relicensing proceeding, AmerenUE filed a draft shoreline management plan on August 22, 2005, and included the history of Duncan's Point as Appendix E to the plan.¹⁵ After receiving numerous public comments on other aspects of the plan, on April 11, 2006, the licensee requested that the Commission and the Missouri Department of Natural Resources suspend review of the proposed plan pending a public process for developing a revised plan within one year.¹⁶ Staff has requested periodic status reports, and will monitor the licensee's progress toward completion of the revised plan.¹⁷ Staff will also review the revised plan for adequacy, and will require changes, if necessary, before it is approved. We fully expect that the revised plan will also include the history of Duncan's Point. However, we agree with staff's assessment that, by including that history in its draft shoreline management plan, AmerenUE has complied with the requirement of staff's September 7, 2004 letter.

12. Complainants next state, without elaboration: "How can the discharge pipe have been properly permitted when it was only approved January 13, 2006 and is under appeal with the [U.S. Army Corps of Engineers (Corps)]. Yet, as was mentioned FERC made this determination in early 2004."¹⁸

¹⁵ Apart from restating arguments already considered in our January 19, 2006 order, Complainants raise no objections to the content of that history. See 114 FERC ¶ 61,038 at P 22.

¹⁶ Letter from Fred Springer, Troutman Sanders LLP (on behalf of AmerenUE), to Magalie Salas, FERC (filed April 11, 2006).

¹⁷ See Letter from Mark Pawlowski, FERC, to Jerry Hogg, AmerenUE, at 2 (issued April 21, 2006).

¹⁸ Request for rehearing at 2. In support, Complainants simply reference "exhibit 1," which is apparently an attachment to their February 21, 2006 request for rehearing. The attachment consists of a letter from the Corps to Jim Hoerl, the Pebble Creek developer, in response to an application for a Corps permit concerning the effluent discharge pipe.

13. Insofar as we can determine, Complainants are asserting that the easement for the effluent discharge pipe could not have been properly permitted in 2004, as staff had found, because the Corps did not determine that the project was authorized by a nationwide permit until January 13, 2006.¹⁹ Although staff's March 28, 2006 letter mentions the effluent pipe, it makes no findings regarding the pipe or the easement. However, this issue could not have been raised earlier because it is based on new information.

14. As noted in our previous orders, staff found in its September 7, 2004 letter that the licensee had properly authorized the easement for the discharge pipe, because Missouri had issued the necessary permits to the developer for construction and operation of the wastewater treatment facility.²⁰ At the time staff made this finding, there was nothing in the record to indicate that a Corps permit was required. Subsequently, the developer filed an application for a Corps permit, and the Corps determined that the completed project is authorized by a nationwide permit. Throughout this proceeding, we have indicated that arguments concerning the Corps' administration of matters within its jurisdiction should be brought to that agency's attention. In light of these considerations, we do not regard the Corps' jurisdictional determination as providing a basis for a finding of noncompliance on the part of the licensee.

15. Complainants assert, without elaboration: "There is still at least one no-trespassing sign on project boundaries in Pebble Creek."²¹ This is a new allegation concerning a matter not addressed in our previous orders. Staff's September 7, 2004 letter required the licensee to ensure that all signs referring to no fishing on Pebble Creek were removed immediately and that fishing be allowed. The licensee addressed the removal of no-fishing signs in a letter filed on July 11, 2005, and staff found that the licensee had fulfilled this requirement in its letter issued on September 1, 2005.²² In a subsequent inspection of the project site, staff did not observe any signs referencing no fishing or otherwise restricting public access along the shoreline at the Pebble Creek

¹⁹ Complainants first sought to raise this issue on rehearing of our January 19, 2006 denial of rehearing, but they were not permitted to do so because rehearing of that order did not lie.

²⁰ See 111 FERC ¶ 61,190 at P 34-36; 112 FERC ¶ 61,289 at P 15.

²¹ Request for rehearing at 3.

²² See Letter from John Estep, FERC, to Warren Witt, AmerenUE, at 2 (issued Sept. 1, 2005).

development.²³ Although staff mentioned removal of the signs in its March 28, 2006 letter as part of a summary of the contents of its September 7, 2004 letter, staff did not make any further findings with respect to no-fishing signs. If, as Complainants suggest, a no-trespassing sign has been posted within the project boundary in the vicinity of Pebble Creek, we expect the licensee to remove it. However, Complainants' unsupported allegation, without more, is insufficient to provide a basis for further consideration.

16. Complainants maintain: "Neither the [Corps] [n]or AmerenUE has presented any professional creditable information regarding wetlands within Pebble Creek and Duncan's Point." They add that the licensee "has withdrawn [its] wetland area maps from [its] shoreline plan."²⁴

17. As discussed above, although the draft shoreline management plan is being revised, it has not been withdrawn. All wetlands in the Pebble Creek Development area have been identified by Corps or National Wetland Inventory maps, and these wetlands will be included and designated as such in the plan. In its March 28, 2006 letter, staff found that the information that the licensee filed on November 1, 2005, fulfilled the requirements of staff's September 7, 2004 Letter. Complainants have provided no specific arguments in opposition to staff's finding. We therefore deny rehearing of this issue.

18. Finally, Complainants argue, again without elaboration, that the "walkway is still unacceptable, unsafe and too narrow," and that "access to the shoreline continues to be blocked by the developer."²⁵ As discussed in our earlier orders, Staff's September 7, 2004 Letter required the licensee to file a public access plan to address impacts associated with construction of the seawall at Lick Creek Cove adjacent to the Pebble Creek development. Among other things, the plan included construction of a walkway with steps or ramps at each end of the seawall to provide contiguous public access to the shoreline. Staff inspected the completed walkway on July 27, 2005, and found it unacceptable. By letter issued on September 1, 2005, staff required revisions to the walkway within 45 days. As required by that letter, the licensee filed a scale drawing and photographs of the revised walkway and steps on October 14, 2005.²⁶ Staff inspected the

²³ See Memo to files from Lorraine Yates, FERC, at 2 (filed Jan. 9, 2006).

²⁴ Request for rehearing at 4.

²⁵ Request for rehearing at 5.

²⁶ See letter from Fred Springer, Troutman Sanders LLP (on behalf of AmerenUE) to Magalie Salas, FERC, and accompanying photographs (filed Oct. 14 2005).

revised walkway on January 9, 2006, finding that the walkway had been widened, flag stones did not appear to be loose, most of the grasses and weeds had been removed, and new stone steps had been added on one end.²⁷ We considered and disposed of some of Complainants' objections to the walkway in our January 19, 2006 Order.²⁸

19. In its March 28, 2006 Letter, staff did not make any further findings regarding the walkway. Instead, staff reminded the licensee that, prior to the recreation season, the licensee must inspect the walkway to ensure that it is free of obstructions, including but not limited to outdoor furniture that may block pedestrian access. Staff also required the licensee to ensure that the walkway remain free of any obstructions and is maintained throughout the recreation season, and that the steps providing access to the walkway are safe and adequately maintained. In response, the licensee inspected the walkway and steps on April 11, 2006, and reported that it found them in good order and free of obstructions.²⁹ We fully expect the licensee to continue to inspect and maintain the walkway. In light of staff's recent inspection and the licensee's filings, however, we find that Complainants' unsupported allegations about the safety and accessibility of the walkway are insufficient to warrant further consideration.

20. In all other respects, concerning the project boundary, the park, and any other arguments on rehearing not discussed in this order, we deny rehearing on the grounds that we have already considered and disposed of these matters in our previous orders in this proceeding.

²⁷ See Memo to files from Lorance Yates, FERC, and accompanying photographs 7-12 (issued Jan. 9, 2006).

²⁸ See 114 FERC ¶ 61,038 at P10-13 (order denying rehearing of staff's letter order of Sept. 1, 2005).

²⁹ See letter from Mark Jordan, AmerenUE, to Magalie Salas, FERC, and accompanying photographs (filed May 2, 2006).

The Commission orders:

The request for rehearing filed in this proceeding on April 27, 2006, 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.