UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff

Duke Power, a division of Duke Energy Corporation — Project Nos. 2602-012, 2686-051, 2698-045

ORDER DENYING REHEARING

(Issued December 21, 2006)

1. The Friends of Lake Glenville Association, Inc. (Association) has filed a timely request for rehearing of the Commission's September 8, 2006 Notice[1] dismissing as interlocutory the Association's earlier request for rehearing of the Commission staff's final Environmental Assessment (EA) in this proceeding. For the reasons discussed below, we deny the Association's rehearing request.

Background

2. Duke Power, a division of Duke Energy Corporation (Duke Power), filed new license applications for the West Fork Project No. 2686 and the East Fork Project No. 2698 on January 26, 2004, and a surrender application for the Dillsboro Project No. 2602 on May 28, 2004. The projects are located on the Tuckasegee River in Jackson County, North Carolina. The Commission has not yet taken final action on these applications.

3. On January 8, 2004, Duke Power and sixteen other stakeholders filed with the Commission a Settlement Agreement which resolves the signatories' issues related to the pending applications. The Association, a group composed of landowners surrounding Lake Glenville, the West Fork Project's primary reservoir, participated in the process leading to the Settlement Agreement, but did not sign it.

[1] 116 FERC ¶ 61,227 (2006).

4. On July 14, 2006, Commission staff issued a final EA for the Duke Power projects which analyzed the environmental impacts of the proposed relicensing and surrender actions, as well as of alternatives to those proposals. On August 14, 2006, the Association sought rehearing of the EA. On September 8, 2006, the Commission Secretary issued a notice dismissing the request as interlocutory. On October 10, 2006, the Association filed a request for rehearing of the dismissal notice.

Discussion

5. The Association's request for rehearing of the EA was properly dismissed as interlocutory. Under Rule 713(a)(1) of the Commission's Rules of Practice and Procedure, only a final Commission decision or other final order is subject to a request for rehearing.[2] The EA is not a final Commission decision or other final order. Instead, the EA is a staff assessment that is part of the record of the proceeding. The Commission considers the assessment when determining the environmental impacts of the project and deciding whether or under what conditions to issue a license.

6. In determining whether an agency action constitutes a final Commission decision or other final order, the Commission follows an analysis similar to that set forth by courts when determining whether an agency order is final for the purposes of appellate judicial review. Courts have found that an agency order is final for purposes of appellate review when it "imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process."[3] After determining whether the order is final, courts consider whether the order would inflict irreparable injury on the party seeking review if review is denied.[4]

[2] 18 C.F.R. § 385.713(a)(1) (2006).

[3] *See Papago Tribal Utility Authority v. FERC*, 628 F.2d 235, 238-39 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 1061 (1980) (*citing Cities Service Gas Co. v. FPC*, 255 F.2d 860, 863 (10th Cir. 1958), *cert. denied*, 358 U.S. 837 (1958)); *Cities of Riverside and Colton v. FERC*, 765 F.2d 1434, 1438 (9th Cir. 1985).

[4] *See Papago Tribal Utility Authority*, 628 F.2d at 240-41.

7. The Commission has determined that issuance of an EA does not constitute a final Commission decision or other final order.[5] An EA itself does not impose any obligations, deny any rights, or fix any legal relationships and is therefore interlocutory and not final. Furthermore, the Association does not allege, nor does it seem apparent, that the EA would inflict irreparable injury on the Association if rehearing is denied at this point.

8. The Association argues that the EA constitutes a final agency action sufficient for rehearing because it has eliminated alternatives from Commission review. In particular, the Association states that because its proposed alternative to the applicant's proposed Shoreline Management Plan was not analyzed in the EA, Commission review of the proposed alternative has been foreclosed. The Association argues that the Commission is legally barred from adopting an alternative that has not been analyzed in the EA.

9. Contrary to the Association's assertions, the exclusion of an alternative from detailed consideration in the EA does not prohibit the Commission from considering and deciding to adopt that alternative, or any other suggested alternative, when it issues a license order. Likewise, the Association is incorrect in assuming that the Commission is unable to lawfully adopt an alternative that was not analyzed by staff in the EA. The Commission reviews staff's recommendations and determines whether to adopt them and sometimes reaches different conclusions in its orders. If the information and analysis in the EA are not sufficient to support the Commission's choice, the Commission can either include the necessary information in its order, or determine that a supplement to the EA should be prepared.[6]

---

[5] *California Dept. of Water Resources*, 115 FERC ¶ 61,093 at P 8 (2006) (concluding that issues regarding the adequacy of the environmental record will not be ripe for review until the environmental analysis has been completed and an order has been issued); *see also California Dept. of Water Resources*, 70 FERC ¶ 61,115 (1995) (finding that the EA's proposed environmental mitigation and the staff's decision to prepare an EA rather than an EIS are not final actions of the Commission and therefore not subject to rehearing). The Association argues that the cases cited in the dismissal notice do not support the result reached, because none of them concerned an EA that eliminates an alternative. In fact, the cases cited are examples of interlocutory actions that, like the EA here, do not impose an obligation, deny a right, or fix a legal relationship.

[6] The Association argues that the dismissal notice is contrary to the Commission's order of June 27, 2005, which stated that the EA would analyze all reasonable alternatives. This argument concerns the adequacy of the EA, and can be raised after the

(continued)

10. The Association argues that the dismissal notice erred in failing to address errors in the EA that the Association raised in its earlier rehearing request. The Association also argues that rehearing should be granted because there is no other place in the Commission's decision making process for the Commission to consider the issues it raises. This is incorrect.

11. As explained in the dismissal notice, if the Commission issues an order that the Association believes to be in error, the Association may at that time file a request for rehearing and raise any concerns it may have with regard to the decision and the information supporting it, including the EA.[7]

12. Additionally, the Association argues that because the Commission allows parties to seek rehearing of decisions regarding study plans during the integrated licensing process, it should likewise allow rehearing of an EA that excludes an alterative from consideration. The Association points out that the Commission has determined that a decision of the Director of the Office of Energy Projects to require that a study be conducted as part of the integrated licensing process is subject to immediate rehearing.

Commission issues a final decision on the license and surrender applications. Moreover, it appears that the EA does, in fact, address the Association's preferred settlement agreement and shoreline management proposals, referring to them throughout the document as the "Community Stakeholders' Agreement." See EA at 203-07. The Association will have an opportunity to seek rehearing of the EA and its treatment of various issues, including the Association's proposed shoreline management conditions, once the Commission takes final action on the license applications.

[7] The Association argues that the dismissal notice erred in condoning the use of an extra-record document. Insofar as we can determine, the Association is referring to a version of the applicant's shoreline management plan that Commission staff considered in preparing the EA and that the Association asserts has not been filed with the Commission. Duke Power filed its shoreline management plan with its application, and filed an amended version on July 1, 2003, as Appendix D to the Tuckasegee Cooperative Stakeholder Team Settlement Agreement. The December 2004 plan referenced in the EA includes the same written content as the prior version filed with the Commission. It was made available to interested parties at three separate public meetings in December of 2004, presented in a binder with some additional photographs. To avoid any possible confusion, we will require that Duke Power file a copy in the official record of the proceeding.

The Association argues that, because a staff decision to require a study does not exclude an alternative, the grounds for allowing rehearing in this case are even stronger.[8]

13. Unlike a final EA, which is simply a staff recommendation, a Director's decision to require a study is not advisory. Therefore, in those rare cases where consensus cannot be reached and dispute resolution does not resolve the controversy, the Commission has determined that license applicants may seek rehearing of these decisions. The final EA does not impose an obligation on the license applicant or any other party, and is thus interlocutory.[9]

The Commission orders:

(A) The Association's request for rehearing of the Commission's September 8, 2006 notice dismissing its prior request for rehearing is denied.

(B) Within fifteen (15) days of the issuance of this order, the licensee shall file a copy of the December 2004 version of its Shoreline Management Plan with the Commission.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

[8] Order No. 2002-A, *Hydroelectric Licensing Under the Federal Power Act*, 106 FERC ¶ 61,037 at P 16-17 (2004).

[9] The Association argues, without elaboration, that the dismissal notice erred in condoning a violation of Commission rules governing the use of compulsory arbitration, and that this tainted the public participation and comment process. This argument is not briefed, and we are therefore unable to address it. We note, however, that the Commission's rules concerning alternative means of dispute resolution are voluntary procedures. *See* 18 CFR § 385.604.