

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Power Company, LLC

Project No. 2503-107

ORDER ON REHEARING

(Issued December 21, 2006)

1. This order grants in part and rejects in part the Friends of Lake Keowee Society's (FOLKS) request for rehearing of the order issued on August 24, 2006, in this proceeding. The August 24th Order dismissed as deficient FOLKS' request for rehearing of an order that permitted Duke Power Company, LLC (Duke) to lease land in its Keowee-Toxaway Project No. 2503 to Warpath Development, Inc. (Warpath), and provided for removal from the project's boundary of the portion of the leased lands on which Warpath plans to build a commercial lodge/conference center. The Keowee-Toxaway Project is located on Keowee, Little, Whitewater, Toxaway, Thompson, and Horsepasture Rivers, in Oconee and Pickens Counties, South Carolina. The land at issue is located in Pickens County, South Carolina.

Background

2. On June 30, 2006, Commission staff issued an order permitting Duke to lease 63 acres of land in the Warpath Access Area of Duke's Keowee-Toxaway Project to Warpath to construct and maintain a public park and/or public recreation area. The order also provided for removal from the project boundary of the portion of those 63 acres on which Warpath plans to build a commercial lodge/conference center.

3. FOLKS filed a timely request for rehearing of the order, arguing that the commercial development proposed for the Warpath Access Area far exceeds the kind of recreational facilities (passive and non-passive) that the project's Exhibit R, Recreational Use Plan, contemplates. FOLKS also raised, in a general way, issues such as the possible effects of the action on water safety, overcrowding, and fish and wildlife habitat.

4. On August 24, 2006, the Commission issued an order dismissing FOLKS' rehearing request as deficient because it failed to comply with the requirement of Order

No. 663¹ that rehearing requests include a separate section entitled Statement of Issues, listing each issue presented to the Commission in a separately enumerated paragraph that includes representative Commission and court precedent on which the participant is relying.² The Commission also explained that, in any event, FOLKS' arguments on the merits were not persuasive.

5. On August 28, 2006, FOLKS filed a request for rehearing of the dismissal order, arguing that its rehearing request, though missing a statement of issues, was made in good faith, and that the Commission's dismissal was based on a procedural technicality. It requests that the Commission either rescind the dismissal and consider its rehearing request based on its merits, or that it be given an opportunity to resubmit the request in a format consistent with Order No. 663-A. FOLKS also submits additional argument and information to support its opposition to commercial development at the project's Warpath Access Area.

Discussion

6. On rehearing, FOLKS notes that it is a citizen-based organization without a legal staff. It maintains that the need for a statement of issues was never mentioned by Commission staff with whom it consulted by phone; nor was FOLKS able to locate the requirement by consulting the Commission's public website. It is unclear whether or not FOLKS communicated its need for procedural guidance or why it was unable to locate the statement of issues requirement on the Commission's public website, given that all of our regulations are linked to the website. Generally, it is the responsibility of parties to a proceeding to inform themselves of the Commission's rules, and we take seriously procedural requirements, including the requirement to provide a statement of issues. Here, however, FOLKS was not represented by counsel, was appearing before us for the first time, is a small local group, and filed a short, simple pleading which, while not

¹ See *Revision of Rules of Practice and Procedure Regarding Issue identification*, Order No. 663, 70 *Fed. Reg.* 55, 723 (September 23, 2005), *Ferc Statutes and Regulations* ¶ 31,193 (2005). Order No. 663-A, effective March 23, 2006, amends Order No. 663 to limit its applicability to rehearing requests. *Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663-A, 71 *Fed. Reg.* 14,640 (March 23, 2006), *FERC Statutes and Regulations* ¶ 31,211 (2006) (codified at 18 C.F.R. §§ 385.203(a)(7) and 385.713(c)(2)).

² See 116 FERC ¶ 61,171. The purpose of the requirement is to ensure that issues on rehearing are clearly identified before the Commission so that the filer, the Commission, and all other participants in a proceeding understand the issues raised by the filer, and the Commission can appropriately respond to the issues. *Id.* at n.4.

containing a statement of issues, made clear the limited issues raised. In these circumstances, we reverse our August 24th dismissal of FOLKS' rehearing request.³

7. Although our August 24th Order dismissed the rehearing request as deficient, the order nevertheless addressed FOLKS' rehearing arguments in the dismissal order, explaining that the lands removed from the project boundary were not needed for project purposes, that the public recreation facilities to be constructed were consistent with the project's recreation plan, and that approval of these facilities in no way lessens the licensee's obligation to provide both passive and non-passive recreation.⁴ To the extent that FOLKS' rehearing request reiterates arguments concerning this matter or makes additional arguments, it constitutes a request for rehearing of a rehearing order. While it was appropriate for FOLKS to seek rehearing of the order dismissing its initial rehearing request, it may not make additional substantive arguments which it did not previously make during the 30-day rehearing period regarding the June 30, 2006 Order.⁵ Therefore, we reject those sections of the request for rehearing that discuss the merits of the underlying order.

The Commission orders:

The request for rehearing filed in this proceeding by the Friends of Lake Keowee Society on August 28, 2006, is granted to the extent discussed in the text of the order and denied in all other respects.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

³ We note that, despite the dismissal of its rehearing request for failure to include a statement of issues, FOLKS again failed to include such a statement in this request for rehearing of the dismissal. There was no excuse for this second omission. The dismissal put FOLKS on notice of the requirement. FOLKS must include a statement of issues in any future requests for rehearing.

⁴ See 116 FERC ¶ 61,171 at P 4.

⁵ See Section 313(a) of the Federal Power Act, 16 U.S.C. § 825(a), and *South Fork Resources, Inc.*, 39 FERC ¶ 61,025 at 61,059 n.10 (1987), and cases cited therein.