

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Energy Corporation

Project No. 2232-488

ORDER DENYING REHEARING

(Issued October 20, 2005)

1. On January 4, 2005, Alan and Suzanne Smith filed a letter alleging that Duke Energy Corporation (Duke Energy), licensee for the Catawba-Wateree Project No. 2232, had violated the terms of its shoreline management plan guidelines by allowing an oversized houseboat and common-use dock to obstruct their shoreline and boat access, pose a navigational safety hazard, and interfere with their aesthetic view. The dock is located at the Peninsula subdivision on Lake Norman, one of the project's reservoirs in Mecklenburg County, North Carolina.
2. On May 13, 2005, Commission staff issued a letter order requiring the licensee to relocate or remove the common-use dock. Duke Energy filed a timely request for rehearing of that order, asserting that the dock does not violate the guidelines and that neither the dock nor the houseboat moored to it limit the Smiths' access or constitute a navigational hazard.¹ For the reasons discussed below, we deny Duke Energy's rehearing request.

Background

3. The Catawba-Wateree Project consists of thirteen hydroelectric developments with eleven reservoirs in North and South Carolina. The project boundary is generally located at the normal high water elevation contour at each of the reservoirs.² The proximity of

¹ Duke Energy proposed to resolve the matter by relocating the houseboat to the other side of the common-use dock, but it later advised the Commission that its proposal was not viable, because it could not obtain the consent needed from another landowner to relocate the houseboat. *See* Duke Energy's letter filed July 15, 2005.

² 20 FPC 360, 365-67 (1958). For this reason, where the project boundary is the normal high water elevation contour, project lands consist of those lands that lie under
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the project boundary to the water's edge means that the development of residential houses around the reservoirs typically occurs immediately adjacent to the project shoreline. Lake Norman is a highly-developed reservoir with over 592 miles of shoreline and a surface area of 31,984 acres.

A. Duke Energy's Shoreline Management Plan

4. Article 39 of the project's license gives Duke Energy 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.³ Under this article, Duke Energy may permit the construction of private boat docks on its shoreline for single family dwellings.

5. Duke Energy's consideration of requests for permission to use its project shoreline and waters is guided by its shoreline management plan (SMP), which was first approved in 1996,⁴ revised in 1998 to include shoreline management classification maps,⁵ and updated in 2001.⁶ Duke Energy's regulation of activities within the project reservoirs is governed by shoreline management guidelines, which were first issued in 1994 and filed with the SMP.⁷ In 1996, Duke Energy issued new guidelines, which superseded the 1994 guidelines. The new guidelines were submitted and approved as part of the updated

the project waters at all times and those lands that lie between the reservoirs' high water marks and minimum pool levels. 67 FERC ¶ 61,061 at 61,170 (1994).

³ See 24 FERC ¶ 61,346 (1983) (order adding the Commission's standard land use article and approving Duke Energy's requests to lease project lands and waters for private marinas and other shoreline development).

⁴ 74 FERC ¶ 62,047.

⁵ The Commission approved the classification maps in 2000. 93 FERC ¶ 62,159.

⁶ The Commission requires the licensee to update the SMP every five years. The Commission approved the updated and current SMP on October 15, 2003. 105 FERC ¶ 62,027.

⁷ The guidelines, dated October 1, 1994, were attached as Exhibit 2 of the SMP filed October 11, 1994 (hereinafter referred to as 1994 guidelines).

SMP,⁸ with the understanding that Duke Energy could make minor changes to the guidelines as necessary, without prior Commission approval.⁹ One of the primary objectives of the SMP guidelines is “to protect and enhance the scenic, environmental, and public recreational values of the reservoirs.”¹⁰

6. The 1994 guidelines set forth requirements for dock permits, including a requirement that Duke Energy must give prior approval for the construction of any docking facilities within the project boundary. The current, 1996 guidelines provide more detailed permitting procedures and criteria for Duke Energy’s permitting programs, including its Private Facilities Program,¹¹ which applies to individual and common-use docks.¹² Pursuant to the current guidelines, entities seeking to construct a common-use or shared dock facility must apply for and obtain written authorization from Duke Energy’s Lake Management¹³ prior to initiating any activity or construction within the project boundary. The permitting procedures include an on-site meeting between Lake Management and the applicant and/or contractor, an on-site review, if necessary, and a detailed review of the application by Lake Management.¹⁴

7. Upon completion of an application for authorization, Lake Management may issue a permit authorizing construction of the proposed facility, “which must be constructed

⁸ See Duke Energy’s “Final Shoreline Management Plan Update,” filed July 30, 2001, Vol. II, Appendix F (hereinafter referred to as 1996 guidelines).

⁹105 FERC at 64,078.

¹⁰ To that end, the current guidelines prohibit certain conveyances of project lands in light of environmental considerations, development patterns, and physical lake characteristics, and place restrictions on certain activities within the project reservoirs. See 1996 guidelines at 6-9 and 13.

¹¹ See 1996 guidelines at 22-29.

¹² *Id.* at 25.

¹³ Lake Management is an entity established by Duke Energy to monitor and supervise activities within the boundaries of the project reservoirs and to ensure that all activities, including those permitted under the Private Facilities Program, are consistent with license requirements and company policies.

¹⁴ See 1996 guidelines at 25-26.

from the applicant's deeded or leased waterfront lot for the purpose of providing private access for occupants of single family type dwellings."¹⁵ To qualify for a permit, no part of the proposed facility may cross the property line of the adjoining property owner, as projected (without a written release), and the property line must be projected on the reservoir in accordance with local and state regulations.¹⁶

B. Common-use Dock at Issue

8. The Peninsula subdivision consists of residential property and a series of common-use boat docks, each shared by two adjoining lot owners.¹⁷ The Smiths, owners of Lot 79 in the Peninsula subdivision, share a common-use dock located on the boundary line between their lot and Lot 78. The common-use dock at issue is located on the boundary line between adjacent Lots 80 and 81. The part of the dock that serves Lot 81 was constructed in 1995, and the part that serves Lot 80 (and is closest to Lot 79) was constructed in 1998. There is no evidence that Duke Energy authorized either the 1995 or the 1998 construction of this dock.¹⁸

9. The Smiths contend that Duke Energy has allowed the occupant of Lot 80 to moor to the outside of the common-use dock's left pier (*i.e.*, the pier closest to the Smiths' lot) a 47-foot-long, 14-foot-wide houseboat that extends beyond the projected property line for Lot 80, into the projected property line of Lot 79,¹⁹ and that the size, length, and

¹⁵ *Id.* at 25.

¹⁶ *Id.* at 26. Projecting the property line onto the reservoir means extending a theoretical line into the reservoir from the edges of each lot owner's property. The precise method for doing so is determined by state or local laws.

¹⁷ The common-use docks usually extend into the reservoir from the two lots' common property line. These docks are shaped like a football goalpost, with each "upright" consisting of a ramp leading down from a stationary pier "crossbar" and a floating pier.

¹⁸ Duke notes that the 1998 construction was approved by the Peninsula Property Owners Association (PPOA), the homeowners' association for the residents of the Peninsula subdivision, which sets rules and policies that govern, restrict, and prohibit uses of the owners' property. *See* Exhibit A of Duke Energy's January 21, 2005 filing.

¹⁹ Duke Energy's guidelines require for each lot owner a property line that is projected on the reservoir, and the guidelines provide that, without written release from the adjoining property owner, no part of a proposed private facility (including anchoring

positioning of the boat obstructs the Smiths' full access to their common-use dock and their aesthetic waterfront view. The Smiths filed survey drawings of property lines and photographs of the boat and dock showing the encroachment.²⁰ They argue that Duke Energy is in noncompliance with the 1996 SMP guidelines by allowing a non-permitted dock, which obstructs the Smiths' full access to their common-use dock. The Smiths state that for more than nine months they tried without success to have Duke Energy require the removal of the Lot 80/81 dock. The Smiths further contend that the common-use dock for Lot 80 creates a navigational hazard²¹ and that the houseboat causes damage to their boat every time the owner docks it.²²

10. In a letter filed January 21, 2005, Duke Energy responded to the Smiths' allegations. After reviewing Duke Energy's response and surveys filed by the Smiths and Duke, 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 and that, as constructed, the dock limited the Smiths' access. Commission staff therefore required that Duke Energy remove or relocate the dock to remedy the situation.

11. On June 13, 2005, Duke Energy filed its request for rehearing, objecting to the requirement that it remove or relocate the dock and arguing that its guidelines were not violated and do not provide redress for the Smiths' concerns.

systems) may cross the property line as projected. *See* 1996 guidelines at 26 and Figure 5-8 at 50.

²⁰ *See* Attachments to Smiths' letter filed January 4, 2005.

²¹ *See* Smiths' letter filed January 4, 2005. The Smiths sought relief from the Lake Norman Marine Commission (Lake Commission), which has the authority to make and enforce "regulations applicable to Lake Norman and its shoreline area concerning all matters relating to or affecting public recreation and water safety." 1969 N.C. Sess. Laws 1089. The Lake Commission sent the owner a letter, dated September 25, 2002, stating that the boat and dock pose a navigational hazard and that the owner should move the boat to a location suitable for a boat of its size. The Lake Commission's letter was submitted by Duke Energy as an attachment (Exhibit I) to its January 21, 2005 filing. The Lake Commission did not impose any sanctions against the owner.

²² The Smiths have filed a police report documenting the damage caused to their boat by the docking of the houseboat at the Lot 80 dock. *See* Attachment 4 of the Smiths' June 29, 2005 filing, which they submitted to correct information in Duke Energy's rehearing request. Duke Energy did not file any objection to the corrections.

Discussion

A. Common Dock Was Constructed without Prior Authorization

12. The part of the common-use dock for Lots 80 and 81 that serves the owner of Lot 81 was constructed by 1995. The other part of the facility, which serves Lot 80 and consists of a 4-foot-by-16-foot ramp and an 8-foot-by-20-foot float, was constructed in 1998.

13. While Duke Energy concedes that it has no record of any permit being issued for the 1995 construction, it argues that the additional construction in 1998 did not constitute a facility expansion requiring issuance of a new permit under the SMP guidelines, because the additions did not alter the “footprint” of the facility or lengthen it.²³ Duke Energy’s argument fails on several grounds. First, this argument assumes that Duke Energy issued a permit for the entire structure in 1995, which it did not. Because no permit was issued in 1995 for construction of the dock, the 1995 construction as well as any subsequent construction related to it were unauthorized. Moreover, under the 1996 guidelines, construction authorization terminates after 12 months, at which time the applicant must reapply for a new permit.²⁴ Therefore, even assuming that Duke Energy had issued a permit in 1995 for construction of the entire dock, it would have been necessary to obtain a new permit for the 1998 construction to complete the dock.²⁵

²³ The 1996 guidelines, which would apply to the 1998 additions, define facility expansion as a “modification of an existing facility that results in an increase of its lakeward extension, increased decking square footage, an increase in the number of boats it can accommodate, increases in water quantities withdrawn from or discharged to the project, or an increase in the amount of project area leased.” 1996 guidelines at 42.

²⁴ See 1996 guidelines at 28. The 1994 guidelines provided 18 months in which to complete construction of the authorized facility, with the possibility of a one-year extension. See 1994 guidelines at 2.

²⁵ Nor do we accept Duke Energy’s contention that the dock’s construction was authorized by Mecklenberg County in 1995 and 2005. Both the 1995 and 2005 applications were incomplete. They included rough, freehand drawings of the dock structure, 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. Thus, any decision on the applications was not based on complete information. See Duke Energy’s January 21, 2005 filing, Exhibit A of Attachment A.

14. Duke Energy did not issue a permit for the Lot 80 and 81 common-use dock in either 1995 or 1998. In consequence, construction of this dock did not comply with Duke Energy's guidelines, which the company is responsible for enforcing.

B. Common Dock Interferes with Adjacent Lot Owner's Access to Its Dock

15. As previously stated, Duke Energy's current guidelines provide that no part of a proposed private facility (including the anchoring system) may cross the property lines as projected, unless a written release is received from the adjoining property owner.

16. In its rehearing request, Duke Energy states that, contrary to the Smiths' assertion, the common-use dock does not extend across the projected property line between the Smiths' Lot 79 and the adjacent Lot 80. Duke Energy points out that it is the houseboat that extends over the projected boundary line, and that its SMP guidelines do not prohibit such boat projections, only dock projections.²⁶

17. We believe that Duke Energy's interpretation of the guidelines is unreasonably narrow. Although the SMP guidelines do not specifically restrict the encroachment of a boat (only the pier), a purpose of the guidelines 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. Common-use docks, which are used where either of the two adjacent lots alone may not qualify for an individual dock, provide access for waterfront lots without unduly obstructing or crowding docking facilities. Certainly, one purpose of the SMP guidelines is to provide for sufficient clearance between docks, and, in a case like this where the result is crowding and obstruction of one landowner's access, Duke has the discretion to not issue a permit.²⁷

²⁶ Duke Energy further states that it does not control, through its SMP guidelines or otherwise, the length or width of watercraft; rather, the PPOA regulates the size of watercraft, and the houseboat does not violate the PPOA's covenants, conditions, and restrictions for the peninsula.

²⁷ Duke Energy concedes that the Smiths have limited access to their waterfront lot and dock because of the houseboat's encroachment. Indeed, under today's conditions, the houseboat would be precluded by a PPOA covenant which limits boat size to the dock

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18. Had Duke Energy applied its permitting criteria, it would have also recognized that, while the dock itself may not cross the property line as extended into the reservoir, any boat moored to the left side of the dock would. In other words, if a permit application had been filed in 1995 or in 1998, Duke Energy should have questioned the dock's proximity to the property line and a boat's ability to use the dock without crossing the property line. Because the dock was built in violation of the permitting process, considerations of size, design, and other matters that should have normally entered into the review, were not considered. We do not see how Duke Energy could have permitted the dock in a manner consistent with its guidelines.

C. Issuance of an After-the-Fact Permit Is Not Appropriate

19. Duke Energy believes issuance of a permit for the common-use dock is appropriate and consistent with the SMP guidelines, and it therefore plans to proceed to issue an after-the-fact permit for the dock's prior construction. Duke Energy's plan to retroactively issue a permit does not correct the infractions that have already occurred, *i.e.*, construction of the common-use dock without the requisite permits. We find that a waiver of the guidelines in this case would render them meaningless, and that retroactive issuance of a permit for a dock, which by its dimensions, restricts access to adjacent property and fails to allow safe, unobstructed ingress and egress of boats, is not appropriate.

20. In fact, any after-the-fact permit application would have to be considered under the 1996 guidelines, which, as discussed above, would not permit construction of the dock. We accordingly affirm the Director's conclusion that the common dock for Lots

size. In May 2003, the homeowners issued an amendment to their rules, which states in pertinent part: "(t)he length of any boat moored on the inside or outside of any Dock, Common Dock, or Shared Dock may not exceed by more than thirty percent (30%) the length of the adjoining floating portion of the Deck, Common Dock or Shared Dock." *See* the Fourth Amendment to Covenants, Conditions and Restrictions for East Shore at the Peninsula, Exhibit B1 of Duke Energy's January 21, 2005 filing and Attachment 2 of the Smiths' June 29, 2005 filing. The houseboat exceeds the prescribed limit.

80 and 81 must be removed.²⁸ Because it is Duke Energy's responsibility to enforce its guidelines, which it has not done here, it must bear the responsibility for ensuring that the dock is removed.²⁹

The Commission orders:

(A) The request for rehearing filed in this proceeding by Duke Energy on June 13, 2005, is denied.

(B) Duke Energy is hereby ordered to have the common-use dock located on the boundary line between adjacent Lots 80 and 81 in the Peninsula subdivision on Lake Norman removed.

(C) Within 45 days of issuance of this order, Duke Energy shall file for Commission approval a plan and schedule for complying with this order by May 1, 2006. The plan and schedule are subject to change by the Commission.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

²⁸ As to the Smiths' contention regarding the navigational hazard posed by the oversized houseboat breaking loose from its moorings, we believe that potential hazard exists for any watercraft, and there is no evidence of any safety concern that would require remedial action.

In addition, the Smiths contend that the oversized houseboat and dock obstruct their waterfront view. *See* Attachment 4 of the Smith's June 29, 2005 filing. However, given the current level of shoreline development in the area, including the existing facilities and private docks and homes, the waterfront homeowners should not have any realistic expectation that their environs would remain undisturbed.

²⁹ *See* 1996 guidelines at 29. The guidelines 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.