

141 FERC ¶ 61,039
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Alabama Power Company

Project No. 82-026

ORDER DENYING MOTION TO INTERVENE AND REHEARING

(Issued October 18, 2012)

1. On July 16, 2012, Commission staff issued an order modifying and approving a compliance plan filed by Alabama Power Company (Alabama Power) for the Mitchell Hydroelectric Project No. 82 (Mitchell Project).¹ On July 24, 2012, Mr. Pat Kelleher filed a motion to intervene and request for rehearing of the July 16 Order. On August 10, 2012, the Commission Secretary issued a notice dismissing Mr. Kelleher's motion to intervene and rejecting his request for rehearing.² On August 23, 2012, Mr. Kelleher filed a request for rehearing of the Secretary's August 10 Notice. For the reasons discussed below, the Commission denies Mr. Kelleher's request for rehearing.

Background

2. The Mitchell Project is located on the Coosa River in Chilton and Coosa Counties, Alabama.³

¹ *Alabama Power Co.*, 140 FERC ¶ 62,048 (2012) (July 16 Order).

² *Alabama Power Co.*, 140 FERC ¶ 61,124 (2012) (August 10 Notice).

³ The original license for Project No. 82 was issued to Alabama Power effective June 27, 1921, for a 50-year term ending June 26, 1971. The Commission issued a new license to Alabama Power in November 1975, with an expiration date of July 31, 2007. *Alabama Power Co.*, 54 FPC ¶ 2452 (1975). In July 2005, Alabama Power filed an application for a new license, which is pending before the Commission. The application for a new license seeks to consolidate Alabama Power's three projects (Project Nos. 2146, 82, and 618), which consist of seven hydroelectric developments on the Coosa River, into one project under Project No. 2146.

3. Pursuant to Exhibit R of the project license (Recreation Plan), Alabama Power was required to maintain Barrett's Fish Camp as a public recreational area with a variety of amenities. As approved in the Recreation Plan, Barrett's Fish Camp was approximately 20 acres in size, and included a boat ramp, fishing pier, concession stand (providing bait, snacks, and gasoline), campsites (tents, trailers, and cabins), picnic area, and bathing area. Alabama Power leased Barrett's Fish Camp to a private individual (Mr. Edsal Hughes) to operate the area.

4. On July 11, 2007, Alabama Power filed an application to remove the Barrett's Fish Camp area from the project boundary and add other non-project lands designated for public recreation to the project boundary in a land swap. Alabama Power stated that the reasons for the proposed land swap was that the use of Barrett's Fish Camp had changed over time, so that it now accommodated permanent-type dwellings and was less available for general public recreation. Accordingly, Alabama Power proposed to remove 33.5 acres of land designated for general public recreation, and add to the project 38 acres of land to be designated for general public recreation.

5. On August 9, 2007, the Secretary issued public notice of Alabama Power's application to amend its license.⁴ The notice solicited comments, motions to intervene, and protests by September 10, 2007. No comments or motions to intervene were filed.

6. On November 25, 2008, Commission staff issued a letter denying the amendment application because Alabama Power was not in compliance with its license, due to the current, non-authorized uses of Barrett's Fish Camp.

7. In addition, the November 2008 letter stated:

Commission staff conducted a site visit of Barrett's Fish Camp and Bird Creek on September 4, 2008, and found that numerous trailers, houses of various sizes, and associated facilities (e.g., television towers, satellite dishes, decks) are currently located within the project boundary. Many of these "permanent-type dwellings" are being occupied as year-round residences pursuant to sub-leases from Mr. Hughes. This current use of project lands at Barrett's Fish Camp does not comply with the terms and conditions of the license, including its Exhibit R, and could potentially impact project resources.

The November 2008 letter explained that standard Article 5 of the license required the licensee to acquire all lands necessary for construction, maintenance, and operation of the project and to retain possession of all project property. Additionally, the licensee had

⁴ 72 Fed. Reg. 46,056 (2007).

continuing responsibility to supervise and control all uses and occupancies on project lands under Article 55(a).

8. The letter required Alabama Power to file a plan to bring the use of Barrett's Fish Camp into compliance with the license's approved Recreation Plan. At a minimum, Commission staff required the compliance plan to include: (1) an evaluation of the existing facilities and uses at Barrett's Fish Camp, including a list of occupants, structures, uses, and facilities on each leased or subleased property, and a determination of their consistency with Exhibit R; (2) a plan and schedule to address non-conforming facilities or uses, including a detailed description of any necessary mitigation measures; and (3) provisions to manage the leased lands. No objections were filed to the Commission staff's letter.

9. On February 23, 2009, Alabama Power submitted a letter to the Commission describing the steps taken in response to the November 2008 letter and the tasks required for the development of a compliance plan. Alabama Power stated that it investigated the site, evaluated the uses and facilities at Barrett's Fish Camp, and identified potential stakeholders. Its efforts resulted in the identification of seasonal and full-time sub-lessees occupying the site pursuant to sub-leases with Mr. Hughes, as well as government agencies and other parties interested in the recreation value of the site.⁵ Alabama Power proposed to further evaluate and investigate the site, to consider options and measures to bring the site back into compliance with the license, and to consult with stakeholders by providing drafts and seeking comments to ensure that the final compliance plan would address the license requirements, as well as the concerns of those affected by implementation of such a plan. On June 5, 2009, Commission staff approved Alabama Power's plan and schedule for completing the necessary tasks.

10. On November 21, 2011, Alabama Power filed its final plan to bring the use of Barrett's Fish Camp into compliance with the Recreation Plan. Alabama Power proposed, among other things, to remove all residential structures from the project boundary over time, to retain new management of Barrett's Fish Camp to oversee the recreation areas and enforce the licensee's rights under its agreements and leases, and to restore the public recreation areas and improve the recreation facilities at Barrett's Fish Camp. Alabama Power proposed a five-year transition period, where occupants would be able to remain on the site until the end of the transition period or expiration of their lease.

⁵ Potential stakeholders included state and federal agencies, Coosa County Health Department, Mitchell Homeowners Association, occupants of Barrett's Fish Camp, County officials, state representatives, congressional delegation and news media outlets.

11. On July 16, 2012, Commission staff issued an order approving Alabama Power's proposed compliance plan with modifications.⁶ The July 16 Order authorized the proposed transition period and concurred that the public would benefit from enhancements to the recreation facilities to meet current recreational needs.⁷

12. On July 23, 2012, Mr. Kelleher filed a motion to intervene and request for rehearing of the July 16 Order. Alabama Power filed an objection to Mr. Kelleher's motion on August 6, 2012, arguing that Mr. Kelleher demonstrated no interest in the proceeding or that his participation was in the public interest.⁸

13. On August 10, 2012, the Secretary issued a notice dismissing Mr. Kelleher's motion to intervene and rejecting his request for rehearing. The August 10 Notice stated that, under section 313(a) of the FPA, a request for rehearing may only be filed by a party to the proceeding.⁹ The Notice explained that in a post-licensing proceeding, like the one here, the Commission will only provide an opportunity to intervene and a request for rehearing if the Commission's order involves (1) a material change in the plan of project development or in the terms and conditions of the license, (2) an adverse effect on the rights of a property holder in a manner not contemplated by the license, or (3) an appeal by an agency or entity specifically given a consultation role with respect to the filing at issue.¹⁰ The Notice denied Mr. Kelleher's motion to intervene because he failed to meet any of these conditions. In addition, the notice observed that Mr. Kelleher did not state

⁶ July 16 Order, 140 FERC ¶ 62,048 (2012).

⁷ The order recognized that there were differences between the proposed compliance plan and the approved Recreation Plan, and thus required Alabama Power to re-evaluate the project's recreational needs and file final plans for Barrett's Fish Camp within six months of the end of the transition period, including a plan and schedule for filing any necessary applications to amend the Recreation Plan.

⁸ We note that Alabama Power stated in its answer opposing Mr. Kelleher's motion to intervene that "[t]he public interest has been represented very well in this proceeding," because in addition to fully investigating the site and completing a recreation study to aid in the preparation of its compliance plan, it also solicited comments from "a public interest group easily approaching 100 individuals and agency stakeholders." Alabama Power also provided the draft compliance plan to Barrett's Fish Camp's lessees, occupants, and various other stakeholders. No written comments were received.

⁹ 16 USC § 8251 (2006).

¹⁰ See, e.g., *City of Tacoma, Washington*, 109 FERC ¶ 61,318, at P 6-7 (2004); *Pacific Gas and Electric Co.*, 40 FERC ¶ 61,035, at 61,099 (1987).

an interest in the proceeding in sufficient factual detail to demonstrate that his participation was in the public interest.

14. On August 23, 2012, Mr. Kelleher filed a request for rehearing of the August 10, 2012 Notice.

Discussion

15. On rehearing, Mr. Kelleher contends that the Secretary acted arbitrarily and capriciously by not allowing intervention and an opportunity for rehearing of the July 16 Order.¹¹ Mr. Kelleher asserts that the July 16 Order constituted a “material change” to the license terms by authorizing “long-term residential leases at Barrett’s Fish Camp,” thus changing its use from “serving a recreational project purpose” to “residential development and occupancy.”¹²

16. Mr. Kelleher misunderstands the July 16 Order. It does not authorize long-term residential development and occupancy at Barrett’s Fish Camp. Rather, it approves Alabama Power’s request for a transition period to remove the residential occupants and structures, and affirms Alabama Power’s obligation to provide public recreational uses, consistent with the requirements of its license. This does not constitute a material change to the terms of the license. Therefore, Mr. Kelleher’s motion for intervention and request for rehearing was properly dismissed.¹³

17. Even assuming, *arguendo*, that we agreed that the July 16 Order constituted a material change to the project license, we would still deny Mr. Kelleher’s motion on the ground that he failed to sufficiently demonstrate that he has any interest in this proceeding to satisfy the standard for intervention. Mr. Kelleher asserts that he is “an apparent beneficiary” of the recreation plan and he has an interest in wildlife protection,

¹¹ Rehearing Request at 4.

¹² *Id.*

¹³ As Commission staff noted in the July 16 Order, at the end of the transition period and once the compliance plan has been fully implemented, Alabama Power is required to solicit comments from interested agencies and file final plans for Barrett’s Fish Camp. At that point, if the Recreation Plan does not reflect the current project condition, Alabama Power must file any necessary amendment applications. *See* 18 C.F.R. § 4.200 (2012) (a licensee must file an application to amend its license if the licensee seeks to make a change in the project boundary, make a change in the project plans or extend a fixed license deadline for project works).

environmental preservation and public recreation at Commission-licensed projects.¹⁴ Therefore, he argues, his participation is in the public interest.

18. Rule 214(b)(2) of the Commission's Rules of Practice and Procedures states in relevant part that a motion to intervene must show in sufficient detail that the movant's participation is in the public interest.¹⁵ As we have previously explained in orders concerning Mr. Kelleher, while the Commission prefers to liberally interpret the concept of "public interest" in the context of establishing grounds to intervene, Mr. Kelleher, a resident of Washington State, failed to identify any interest whatsoever in this specific proceeding.¹⁶ He does not claim to own or recreate at property on or near the project site, to have ever visited the project, or have any future plans to do so. Accordingly, we find that his participation is not in the public interest.

19. For all of these reasons, we deny Mr. Kelleher's motion to intervene and request for rehearing.

The Commission orders:

The motion to intervene and request for rehearing filed by Mr. Kelleher on August 23, 2012, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁴ Rehearing Request at 1-2, 5.

¹⁵ 18 C.F.R. § 385.214(b)(2)(iii) (2012).

¹⁶ See *Alabama Power Co.*, 140 FERC ¶ 61,037 (2012); *PPL Holtwood, LLC*, 140 FERC ¶ 61,038 (2012).