

144 FERC ¶ 61,213
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Energy Carolinas, LLC

Project No. 2232-598

ORDER ON REHEARING

(Issued September 19, 2013)

1. On February 19, 2013, Commission staff issued an order modifying and approving Duke Energy Carolinas, LLC's (Duke Energy) after-the-fact application to amend the layout of Stutts Marina, located on Lake Norman, one of the reservoirs of the Catawba-Wateree Project No. 2232.¹ The February 19 order found that the replaced dock structures at Stutts Marina constituted a facility expansion, rather than a facility rebuild, and imposed certain requirements to bring the facility into compliance with Duke Energy's Commission-approved Shoreline Management Plan (SMP), including relocating one entire dock structure and prohibiting the mooring of watercraft at the lakeward side of another dock structure.

2. On March 21, 2013, Duke Energy filed a timely request for rehearing of the February 19 order, arguing that modifications at Stutts Marina do not amount to a facility expansion because the replaced dock structures occupy the same footprint as the original dock structures; therefore, as a facility rebuild, the dock structures should be allowed to remain in place. As discussed below, we find that the modifications to Stutts Marina do not meet the requirements of the SMP for facility expansions or facility rebuilds, but we will in this instance waive the relevant requirements of the SMP and allow the structures to remain.

Background

3. The 294.72-megawatt Catawba-Wateree Project is located on the Catawba River in Alexander, Burke, Caldwell, Catawba, Gaston, Iredell, Lincoln, McDowell, and Mecklenburg Counties, North Carolina, and on the Catawba and Wateree Rivers in

¹ *Duke Energy Carolinas, LLC*, 142 FERC ¶ 62,112 (2013) (February 19 order).

Chester, Fairfield, Kershaw, Lancaster, and York Counties, South Carolina.² The project includes eleven developments and eleven associated reservoirs.

4. Article 39 of the license for the Catawba-Wateree Project gives Duke Energy the authority, without prior Commission approval, to grant permission for certain types of non-project uses and occupancies of project lands and waters for minor activities, as long as such uses are consistent with protecting and enhancing the scenic, recreational, and environmental values of the project.³ Duke Energy must request Commission approval before granting permission for other non-project uses not authorized by Article 39.

5. In addition to the provisions of license Article 39, Duke Energy's consideration of requests to use its project shoreline and waters is guided by its SMP, which was first approved in 1996,⁴ and revised and updated in 1998,⁵ and revised again in 2001.⁶ The SMP includes shoreline use classifications and Duke Energy's Shoreline Management Guidelines (Guidelines),⁷ which the Commission approved as part of the SMP.⁸ Duke Energy developed the Guidelines to provide project-specific permitting criteria and procedures to implement its SMP and regulate activities along the project shoreline.

² *Duke Power Company*, 20 FPC 360 (1958) (Order Issuing License (Major)).

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

⁴ *Duke Power Company*, 74 FERC ¶ 62,047 (1996).

⁵ *Duke Energy Corporation*, 93 FERC ¶ 62,159 (2000).

⁶ *Duke Energy Corporation*, 105 FERC ¶ 62,027 (2003). The 2001 SMP supersedes all earlier versions of the SMP. *Id.* P 2. References in this order to the SMP are to the current version, unless otherwise noted.

⁷ *See Duke Energy's SMP application in Project No. 2232-428, filed July 30, 2001, Appendix F (Guidelines).* Duke Energy developed the Guidelines in 1996, and they have been in effect since then. Duke Energy makes minor changes to its Guidelines without public notice or Commission approval. *See Duke Energy Corporation*, 105 FERC ¶ 62,027 at P 18.

Duke Energy filed its relicense application in 2006 and included in that application a revised and updated SMP and Guidelines (2006 SMP). The relicense application, including the 2006 SMP, is pending before the Commission.

⁸ *See Duke Energy Corporation*, 105 FERC ¶ 62,027 at P 18.

6. As relevant to this proceeding, the Guidelines set forth criteria for the construction, expansion, and rebuild of commercial/non-residential facilities.⁹ Stutts Marina qualifies as a commercial, non-residential facility. The Guidelines provide that the construction of new, or the expansion¹⁰ of existing, commercial, non-residential facilities like Stutts Marina must meet specific requirements, including, as pertinent here, they: (1) must be set back at least 200 feet from the corners of adjacent properties (200-foot setback); (2) may not extend more than one-third of the distance to the opposite shoreline, or more than 120 feet water ward of the full pond contour, whichever is more limiting (lakeward extension limitation) (in this case, 120 feet is the more limiting factor); (3) cannot be located within a half mile radius (i) of another commercial, non-residential facility or (ii) of an area where more than 50 percent of the shoreline is residentially developed; and (4) must provide sanitation facilities for pump-out and/or deposit of waste.¹¹

7. The Guidelines carve out special provisions for facilities authorized and constructed before the SMP was in place but that do not conform to the SMP (non-conforming facilities). These facilities can be maintained as non-conforming structures, but if a lessee has to replace or rebuild¹² a non-conforming structure, the new structure must comply with the Guidelines for new or expanded structures that are in effect at the time of replacement, except that Duke Energy may, as pertinent here, waive the 200-foot setback requirement.¹³ The Guidelines do not however provide for waiver of the other requirements listed above.

⁹ A “commercial/non-residential” facility is one that uses project lands and waters for structures where boats are launched, retrieved, or moored and for food services or convenience retailing (including petroleum dispensing, wet and dry storage of watercraft and other activities). Guidelines at 41.

¹⁰ A “facility expansion” is the modification of an existing facility that results in: (1) an increase of its lakeward extension, (2) an increase in decking square footage, (3) an increase in the number of boats it can accommodate, (4) an increase in water quantities withdrawn from or discharged to the project, or (5) an increase in the amount of project area leased. *Id.* at 42.

¹¹ *Id.* at 6-8.

¹² A “facility rebuild” is “the reconfiguring or repairing of existing facilities within the reservoir. (Note: Rebuilds are minor in nature compared to facility expansion and may have reduced permitting requirements).” *Id.* at 42.

¹³ *Id.* at 12.

8. In 1983, the Commission approved Duke Energy's request to lease approximately 1.2 acres of project land (consisting of three separate parcels) to Stutts Marina (lessee) for the construction and operation of marina facilities on Lake Norman (one of the project reservoirs).¹⁴ The Commission approved the construction of: (1) a new dock containing 16 slips on Tract A (0.3 acre); (2) a new dock containing 19 slips on Tract B (0.6 acre); and (3) a new boat ramp, gasoline service dock, and courtesy dock on Tract C (0.3 acre). However, as built, the lessee only constructed 12 slips on Tract A (four less than proposed) and 18 slips on Tract B (one less than proposed).

9. Stutts Marina was constructed in 1983, well before the implementation of the SMP's Guidelines in 1996. Under those Guidelines, which are still in effect today, the marina was considered a non-conforming structure in that it did not meet certain requirements of the Guidelines: (1) it is located within 200 feet of the adjacent property; (2) it appears to be located within a half mile radius of an existing commercial, non-residential facility¹⁵ and of an area where more than 50 percent of the shoreline is residentially developed;¹⁶ (3) it extends more than 179 feet into the reservoir, which is more than 59 feet over the 120-foot limit; and (4) it lacked properly permitted waste pump-out facilities.

10. In November 2005, the lessee sought permission from Duke Energy to rebuild Stutts Marina. Specifically, the lessee proposed to replace the dock structures on Tracts A and B. As rebuilt, the dock footprints in Tracts A and B would expand by an additional 328 and 1,851 square feet, respectively, though they would not extend any farther into the reservoir or create an additional encroachment on the neighbor's 200-foot setback.¹⁷

¹⁴ See *Duke Power Company*, 24 FERC ¶ 61,346.

¹⁵ The Inland Sea Marina is located within a radius of 0.39 miles from Stutts Marina.

¹⁶ Commission staff calculates that approximately 91 percent of the shoreline within a half mile radius of the marina is residentially developed.

¹⁷ The original dock in Tract A measured 100-foot-long, 50-foot-wide (5,000 square feet) with a 65-foot-long, 4-foot-wide ramp. As rebuilt, the Tract A dock measures 111-foot-long, 48-foot-wide (5,328 square feet) with a 33-foot-long, 6-foot-wide ramp. The original dock in Tract B measured 150-foot-long, 70-foot-wide (10,500 square feet) with a 70-foot-long, 6-foot-wide ramp. As rebuilt the Tract B dock measures 179-foot-long, 69-foot-wide (12,351 square feet) with a 36-foot-long, 6-foot-wide ramp. See Duke Energy's November 17, 2011 response to Commission staff's October 28, 2011 letter.

11. On March 6, 2006, Duke Energy authorized the lessee's proposal to rebuild Stutts Marina (2006 authorization).¹⁸ In 2007, the lessee completed its replacement of Stutts Marina.

12. In June 2011, some four years after the docks had been replaced, Commission staff received a filing alleging that Stutts Marina is not in compliance with the Guidelines because the facilities are within the 200-foot setback from the adjacent property, and the lessee allowed the habitation of a houseboat at the marina without the marina's required waste pump-out facilities.¹⁹

13. On August 22, 2011, Commission staff requested that Duke Energy address the allegations. In response, on October 19, 2011, Duke Energy stated that the rebuilt marina was in compliance with the 1983 authorization and the SMP's Guidelines. However, Duke Energy admitted that the lessee did not have a valid permit from the North Carolina Division of Waste Management to haul and store septage.²⁰

14. On October 28, 2011, Commission staff requested additional information from Duke Energy regarding the increased footprint of the docks in Tracts A and B and the mooring of a houseboat on the lakeward end of the dock in Tract B.

15. On November 17, 2011, Duke Energy responded that, although the dock structures have a larger footprint, the docks in Tracts A and B were moved closer to the shoreline by shortening their ramps by 21 feet and 5 feet, respectively, and as a result, the rebuilt docks do not: (1) create an additional encroachment into the adjacent property's 200-foot

¹⁸ The lessee also proposed minor changes to the gasoline and courtesy docks in Tract C. Those changes are not at issue here.

¹⁹ See June 13, 2011 filing of Ms. Penny Kerhoulas. The filing also alleged that the lessee had re-contoured and dredged the marina shoreline without Commission approval. Duke Energy subsequently provided information that, as part of the rebuild, the lessee had obtained all necessary permits to excavate accumulated sediment from Lake Norman for the purpose of a boat channel. See Duke Energy's October 19, 2011 response to Commission staff's August 22, 2011 letter. Duke Energy explained that, under North Carolina's Excavation Programmatic Agreement and General Permits, Duke Energy is permitted to authorize excavations, if the lessee notifies the appropriate agencies and obtains all necessary permits. Duke Energy issued the lessee authorization to excavate the boating channel on October 24, 2007. *Id.* Further, Duke Energy states that Iredell County Planning and Zoning Department issued permits for the work in 2007 and the U.S. Army Corps of Engineers reviewed the proposal and determined that no permits were necessary for the rebuild. Duke Energy's Request for Rehearing at 4.

²⁰ "Septage" is excrement or other waste material.

setback; or (2) extend farther into the lake. In addition, Duke Energy explained that the lessee's proposal did not change the number of approved slips or change the amount of area leased for non-project uses. In regard to the houseboat moored at the end of the Tract B dock, Duke Energy explained that the 1983 order authorized the lessee to construct 19 slips on that dock. Because the lessee only constructed 18 slips, Duke Energy stated that the mooring of the houseboat constituted the nineteenth slip, which is consistent with the 1983 authorization.

16. On February 14, 2012, Commission staff issued a letter to Duke Energy finding that, although the "marina does not represent any significant impacts beyond those anticipated by the previously approved facility," Duke Energy must file an application for after-the-fact Commission approval to reflect the current facilities as built.

17. On April 9, 2012, Duke Energy filed a letter, which Commission staff construed as an after-the-fact application for non-project uses of project lands and waters for the modified Stutts Marina facilities. In its filing, Duke Energy provided evidence that Stutts Marina had applied for, but not yet received, the required permit to haul and store septage from the North Carolina Division of Waste Management.

18. On August 9, 2012, the Commission issued notice of Duke Energy's application, establishing September 8, 2012, as the deadline for filing comments and motions to intervene.²¹ The Commission received comments from John W. Holley stating that the modified marina constituted a "facility expansion," rather than a "facility rebuild." In addition, Mr. Holley contended that the modified docks (specifically the Tract A dock) encroach within a 200-foot radius of his property, have a houseboat moored at the end of the Tract B dock and outside of Tract B's lease area, and do not have a sufficient waste disposal system for houseboats. The U.S. Department of the Interior (Interior) commented that the shoreline at Stutts Marina was degraded and recommended that the lessee install vegetative plantings and reestablish riparian buffers along the shoreline.

19. Commission staff's February 19 order concluded that Duke Energy had incorrectly characterized the modified docks as a "facility rebuild." The order explained that, because the modifications increased the decking square footage of the docks, the work was a "facility expansion" under the Guidelines, and as such required prior Commission approval. In addition, because it was a facility expansion rather than a rebuild, the Guidelines do not provide for waiver of the 200-foot setback requirement. The order accordingly concluded that, because the Tract A dock encroaches 75 feet into the 200-foot setback from Mr. Holley's property, the Tract A dock must be relocated to an area outside of the 200-foot radius. The order prohibited the mooring of any watercraft on the

²¹ 77 *Fed. Reg.* 50,092-01 (August 20, 2012).

lakeward end of the dock in Tract B, noting that such a mooring added to dock's lakeward extension and could create a navigation hazard.²²

20. Because the order required the relocation of the Tract A dock, it assumed that Duke Energy would have to execute a new lease with the lessee for the area to be occupied by the relocated dock. Therefore, the order required Duke Energy to include in such a lease provisions to ensure that: (1) the lessee's use and occupancy would not endanger health, create a nuisance, or otherwise be incompatible with the overall project's recreational use; (2) the lessee take all reasonable precautions, during construction, operation, and maintenance of the permitted facilities, to protect the scenic, recreational, and other environmental values of the project; and (3) the lessee does not unduly restrict public access to the project (public access provision). In addition, the order required that any new lease provide that if cultural resources are discovered during construction and/or maintenance, the lessee cease work and contact the licensee. Finally, the order required Duke Energy (as recommended by Interior) to file a revegetation plan for the project lands adjacent to Stutts Marina.

21. On March 21, 2013, Duke Energy filed a request for rehearing of the February 19 order. Duke Energy seeks rehearing of Commission staff's decision to: (1) characterize the modifications of Stutts Marina as a "facility expansion" rather than a "facility rebuild;" (2) require relocation of the marina's Tract B dock; and (3) prohibit the mooring of watercraft on the lakeward end of the Tract B dock. Duke also objects to the requirements to include certain provisions in any leases with Stutts Marina and to provide a plan to revegetate the adjacent shoreline.

Discussion

A. Tract A and B Docks

22. As explained above, when a non-conforming facility is expanded or rebuilt, it must comply with the current Guidelines in effect at the time of the facility's replacement. Particularly, the facility: (1) must comply with the 200-foot setback requirement; (2) must comply with the lakeward extension requirement; (3) cannot be located within a half mile radius (i) of another commercial, non-residential facility or (ii) of an area where more than 50 percent of the shoreline is residentially developed; and (4) must provide sanitation facilities for pump-out and/or deposit of waste. For a facility rebuild, the Guidelines provide that Duke Energy may waive only the 200-foot setback requirement.

²² Although the order found that the Tracts A and B docks extend farther into the lake than the 120 feet allowed by the Guidelines, it did not require compliance with this requirement because the replaced docks do not extend farther into the lake than the original docks and do not pose a threat to navigation or public safety.

23. The February 19 order concluded that the modifications to Stutts Marina should have been defined as a facility expansion and must comply with the Guidelines' requirements. Accordingly, the order required the lessee to relocate the Tract A dock out of the 200-foot setback of the adjacent property. In addition, the order mandated that the lessee cannot allow the mooring of watercraft on the lakeward side of the Tract B dock, because this practice increases the facility's lakeward extension. The order did not analyze whether the marina as modified meets the Guidelines' other requirements.

24. On rehearing, Duke Energy states that the modifications of the Tract A and B docks are a facility rebuild, not an expansion, and accordingly Duke Energy has the authority to waive the 200-foot setback requirement. Therefore, Duke Energy argues that the February 19 order erred by requiring the lessee to relocate the Tract A dock out of the 200-foot setback of the adjacent property. Further, Duke Energy contends that mooring of houseboats on the Tract B dock should be allowed because the Tract B dock does not extend farther into Lake Norman than the original dock structure and Duke Energy has not received reports of threats to navigation or safety. Duke Energy does not address whether the marina complies with the Guidelines' other requirements.

25. The February 19 order and Duke Energy's request for rehearing hinge on whether the modifications to Stutts Marina constituted a "facility expansion" or a "facility rebuild." We find this distinction immaterial. Stutts Marina does not conform to the Guidelines' requirements under either definition. Specifically, Stutts Marina: (1) encroaches into the 200-foot setback of the adjacent property;²³ (2) extends more than 120 feet water ward of the full pond contour;²⁴ and (3) is located within a half mile radius (i) of another commercial, non-residential facility²⁵ and (ii) of an area where more than 50 percent of the shoreline is residential development.²⁶ At the time of the February 19 order, the marina's sanitation facilities for pump-out and/or deposit of waste had not been

²³ As stated above, the Tract A dock encroaches 75 feet into the adjacent shoreline property.

²⁴ The Tract B dock, without the houseboat moored on its lakeward end, extends more than 179 feet into Lake Norman. (The dock itself measures 179 feet, and the ramp from the shore to the dock is 36 feet long. It is not clear how much of the ramp is on the shore and how much extends into the water from the high water contour.)

²⁵ Inland Sea Marina is located about 0.39 miles from Stutts Marina. *See Duke Power Company*, 28 FERC ¶ 62,441, at 63,772 (1984) (order authorizing the lease of project lands to Commodore Marina, Inc. d/b/a Inland Sea Marina).

²⁶ The shoreline is approximately 91 percent residential development within a half mile radius of Stutts Marina.

properly permitted, although the lessee subsequently received the necessary permit.²⁷ Even if the Stutts Marina modifications qualified as a facility rebuild, Duke Energy could waive only the 200-foot setback requirement according to its Guidelines. Duke Energy does not have the authority under its Guidelines to waive the remaining requirements.

26. Duke Energy failed to follow its SMP's Guidelines in considering whether to authorize the modifications to Stutts Marina. The Guidelines require, at a minimum, that the modifications to Stutts Marina, whether by expansion or rebuild, comply with the requirements described above, with the possible exception of the 200-foot setback requirement. Duke Energy has not been diligent in the application of its own rules.

27. However, Duke Energy authorized these modifications six years ago, and they were completed five years ago. It was not until five years after they were completed that someone raised questions about the docks' compliance with the Guidelines. Duke Energy has not reported any safety concerns at Stutts Marina since its construction in 1983 and its modification five years ago. Moreover, as noted earlier in this order, the modified docks, although their footprint is larger than before, extend no farther into the reservoir and do not increase the encroachment into the neighbor's 200-foot setback. To require the lessee to bring the facilities into compliance with the Guidelines at this time would likely require their complete removal and relocation to another area of the lake. This would be costly and result in undue hardship to the lessee, which appropriately sought authorization from Duke Energy and is not responsible for Duke Energy's failure to follow its rules. Therefore, we will waive the relevant requirements of the SMP's Guidelines and allow the Tract A and B docks to remain in place as non-conforming structures.²⁸

28. If the lessee seeks to modify Stutts Marina in the future, we fully expect Duke Energy to ensure that the docks as modified (whether by an expansion or a rebuild) comply with all of the requirements of the Guidelines in effect at that time.

²⁷ When Duke Energy authorized the Stutts Marina modifications, the lessee provided portable facilities for the pump-out and deposit of waste. However, the lessee did not have a valid permit from the North Carolina Division of Waste Management to haul and store septage until March 15, 2013.

²⁸ By allowing the facility to remain in place, we grant Duke Energy's request for rehearing and rescind the February 19 order's requirements that the Tract A dock be relocated out of the 200-foot setback and that no houseboats be moored on the lakeward side of the dock in Tract B. *See* February 19 order at ordering paragraph (B)(2) and (3). Houseboats may be moored at the lakeward end of the dock in Tract B, unless the mooring presents any safety or navigational concerns or extend outside of the existing lease area.

B. Lease Requirements

29. The February 19 order required Duke Energy to include certain conditions in any lease issued for Stutts Marina as a result of the requirement to move the Tract A dock. Duke Energy objects to one of the lease provisions.

30. The February 19 order required the lease based on the presumption that Duke Energy would have to execute a new lease for Stutts Marina due to the required relocation of the Tract A dock to an area outside of the 200-foot setback. However, we are allowing the Tract A dock to remain in place, thus the requirement for a new lease is moot. Accordingly, we will rescind the requirements of ordering paragraphs (D) and (E) of the February 19 order.

C. Revegetation Plan

31. The February 19 order requires Duke Energy to implement a revegetation plan for the project as recommended by Interior. Interior's comments found that the shoreline of Stutts Marina was degraded and the February 19 order stated that besides the presence of several trees, the Stutts Marina parcel was devoid of vegetation.

32. Duke Energy argues that neither Commission staff nor Interior provided any evidence that the degraded condition of the shoreline was caused by the construction or operation of Stutts Marina. Duke Energy explains that the lessee has an existing landscape plan to improve the aesthetic appeal of the leased area. Further, Duke Energy states that the revegetation plan does not have a reasonable nexus to the modifications of Stutts Marina.²⁹

33. We agree. The February 19 order and Interior's comments do not make clear (and provide no evidence) that the degraded condition of the shoreline was due to the replacement of the docks at Stutts Marina. Further, it is unclear whether Interior's comments referred to the degraded condition of the shoreline or the Stutts Marina parcel as a whole, which contains lands outside of the project boundary. Without a clear nexus between the facility replacement and the degraded condition of Stutts Marina, we will not require the revegetation plan. We grant Duke Energy's request for rehearing and rescind the February 19 order's requirement for Duke Energy to file a revegetation plan for the project lands adjacent to Stutts Marina.³⁰

²⁹ Duke Energy cites to *Idaho Power Co. v. FPC*, 346 F.2d 956 (9th Cir. 1965) and *Pacific Gas and Electric Co.*, 52 FERC ¶ 61,019 (1990).

³⁰ See February 19 order, 142 FERC ¶ 62,112 at ordering para. (C).

The Commission orders:

(A) The request for rehearing filed by Duke Energy Carolinas, LLC on March 21, 2013, is granted in part, as set forth in this order.

(B) Ordering paragraphs (B)(2), (B)(3), (C), (D), and (E) of Commission staff's February 19 order in this proceeding are rescinded.

(C) The following 1996 Shoreline Management Guidelines are waived for the 2007 modifications of Stutts Marina: (1) the facility must be set back at least 200 feet from the corners of adjacent properties; (2) the facility may not extend more than one-third of the distance to the opposite shoreline, or more than 120 feet water ward of the full pond contour, whichever is more limiting; and (3) the facility cannot be located within a half mile radius (i) of another commercial, non-residential facility or (ii) of an area where more than 50 percent of the shoreline is residentially developed.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.