

109 FERC ¶ 61,020
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Energy Corporation

Project No. 2232-465

ORDER DENYING LATE INTERVENTION, DISMISSING REHEARING REQUEST,
AND CLARIFYING ORDER GRANTING NON-PROJECT USE OF PROJECT LAND

(Issued October 6, 2004)

1. On February 23, 2004, Commission staff issued an order amending the license for Duke Energy Corporation's (Duke) Catawba-Wateree Project No. 2232 to permit Duke to undertake activities relating to increased water withdrawals by the Charlotte-Mecklenburg Utility District (District). 106 FERC ¶ 62,151.
2. The District now requests late intervention in order to obtain either clarification or, in the alternative, rehearing of two conditions the order placed upon the water withdrawal. The District's request for late intervention is denied and, accordingly, its rehearing request is dismissed. However, we do clarify the February 23 Order as discussed below.

Background

3. The 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 Chester, Fairfield, Kershaw, Lancaster, and York Counties, South Carolina. The project includes 11

developments¹ and 11 associated reservoirs, covering a 215-mile reach of the river.² The District's Catawba Raw Water Pumping Station is located on the project's Mountain Island Lake reservoir, and the District uses water from the project's Mountain Island Lake and Lake Norman reservoirs³ to meet demands for residential uses in Mecklenburg County, North Carolina.

4. On January 31, 2000, Duke sought the Commission's authorization to: (1) grant the District an easement increasing the District's current 0.13-acre easement for a non-project use of project lands to a total of 0.33 acres (to be used for maintenance of the District's intake and raw water pumping facilities for three of its intakes, and construction of a fourth intake and raw water pumping facilities); (2) grant the District an easement to increase the District's currently permitted water withdrawal rate from the project's Mountain Island Lake reservoir, from an instantaneous 165 million gallons per day (mgd) to 330 mgd, while maintaining an average annual withdrawal limit of 163 mgd; and (3) conduct specified associated dredging.

¹ The developments are: Bridgewater, Rhodhiss, Oxford, Lookout Shoals, Cowans Ford, Mountain Island, Wylie, Fishing Creek, Great Falls-Dearborn, Rocky Creek-Cedar Creek, and Wateree.

² The Catawba River flows southeast to Lake Wylie, which straddles the North Carolina-South Carolina state line. Below Lake Wylie, the Catawba River flows through Lake Wateree and becomes the Wateree River. The project's reservoirs, which are located on the Catawba and the Wateree include, from upstream to downstream: Lake James, Lake Rhodhiss, Lake Hickory, Lookout Shoals Lake, Lake Norman, Mountain Island Lake, Lake Wylie, Fishing Creek Lake, Great Falls Lake, Rocky Creek Lake, and Lake Wateree. These reservoirs are hydraulically related and their operations are coordinated.

³ Lake Norman, immediately upstream, discharges into the headwaters of Mountain Island Lake.

5. Commission staff's order approved the proposed non-project use of project lands and waters but, based upon consultation with the U.S. Fish and Wildlife Service (FWS),⁴ placed upon the non-project uses conditions requiring a determination of whether the federally-listed endangered Carolina Heelsplitter mussel and its habitat are present in the project-affected reach, and ensuring protection of the mussel and its habitat, if they are present.

6. First, to ensure that any possible mussels or habitat that might be present are protected, the order provides that, when the weekly average streamflow in the Catawba River is at or below a flow corresponding to the 98 percent exceedance flow,⁵ the District's instantaneous water withdrawal is not to exceed 165 mgd. *See* 106 FERC at 64,231. Second, Duke, in consultation with FWS, is to develop a mussel survey plan to determine whether or not the mussel is present in the Catawba River below the Mountain Island reservoir dam. *See, id.* at 64,231-32. Duke is to submit the plan for the survey as well as the results of the survey to the Commission, and the order reserves to the Commission the authority both to require changes to the plan, *id.* at 64,231-32, and to remove the pumping rate restriction after completion of the survey and submission of the report to the Commission. *Id.* at 64,231.

Discussion

A. Late Intervention

7. The Commission issued public notice of Duke's application on February 24, 2000, setting March 27, 2000, as the deadline for intervening in the proceeding. In support of its intervention more than four years after the deadline, the District states that it is the real party in interest concerning the water withdrawals, and argues that it reasonably relied on Duke to represent its interests at the time the amendment request was made, but that

⁴On August 26, 2002, FWS filed a letter expressing concern about possible impacts of the proposed water withdrawal on the Carolina Heelsplitter mussel and its habitat, and requested that the Commission initiate consultation to resolve its concerns. Commission staff and FWS representatives participated in a teleconference, and Commission staff subsequently sent FWS a letter stating that the proposed easements, with the staff recommended measures, would have no effect on the mussel. Staff requested FWS's concurrence within 30 days. FWS did not respond, but it also has not requested rehearing of staff's determination.

⁵ A 98 percent exceedance flow is the amount of water that, based on historical flow records, is exceeded 98 percent of the time.

passage of time and the delays encountered in obtaining approval could lead to differences in their interests, which necessitate the District representing itself in the proceeding.

8. In determining whether to grant late intervention, the Commission may consider such factors as whether the movant had good cause for filing late, whether the movant's interest is adequately represented by other parties to the proceeding, and whether granting the intervention might result in disruption to the proceeding or prejudice other parties. *See* 18 C.F.R. § 385.214(d) (2004). When intervention is sought after issuance of a dispositive order, as is the case here, the prejudice to other parties and the burden on the Commission of granting late intervention are substantial, and a movant bears a higher burden to show good cause to justify favorable action on its motion. *See International Paper Company and Turner Falls Hydro LLC*, 99 FERC ¶ 61,066 (2002). Here, the District had an opportunity to intervene and, indeed, filed comments in the proceeding. Its strategic choice to rely on Duke to represent its interests does not meet its burden to show good cause warranting post-decision intervention.

B. Mussel Survey Plan

9. The District has asked the Commission to clarify that the correct location for the mussel survey is in the area below Lake Wylie Dam and not below Mountain Island Lake Dam, as referenced in ordering paragraph (C). Although the water is withdrawn from Mountain Island Lake, we agree that the first area where any affect of the flows on mussels could occur is in the free-flowing stretch of the Catawba River between Lake Wylie and Fishing Creek,⁶ and we revise ordering paragraph (C) accordingly.⁷

⁶ Habitat for the Carolina Heelsplitter mussel requires free-flowing water. Mountain Island Lake discharges into the headwaters of Lake Wylie, and the first free-flowing section of the river below the District's water withdrawal is the approximately 25-mile long section between Lake Wylie and Fishing Creek Lake.

⁷ The District also asks that the Commission add an ordering paragraph stating that the District, as the "real party in interest" may directly provide the order's required survey plan to the Commission if the District believes that Duke is not responding promptly to provide the Commission with a satisfactory plan. While Duke may allow the District to develop the survey plan for it if it so chooses, as the licensee, Duke is ultimately responsible for fulfilling the conditions of its license, including the development and submission to the Commission of the survey plan. *See Great Northern Paper, Inc.*, 77 FERC ¶ 61,066 at pp. 61,248-49 (1996).

C. Water Withdrawal Restrictions

10. Ordering paragraph (B) states that, for the protection of potential Heelsplitter mussel habitat, the permitted daily pumping rate shall be restricted during drought conditions. Specifically, it states that when weekly average streamflow in the river, based on a U.S. Geological Survey gauge located near Rock Hill, South Carolina, is at or below a flow corresponding to the 98 percent exceedance flow, the water withdrawal shall not exceed 165 mgd.⁸

11. The District argues that conditions other than drought may cause the USGS flow gauge near Rock Hill, South Carolina to record low flows and asks that ordering paragraph (B) be revised to permit any Rock Hill gauge reading of flows below 98 percent of exceedance flows to be found inapplicable if the District can demonstrate that the flows are below that level for reasons other than drought. However, our concern is the possible effect of water withdrawals upon potential mussel habitat when the streamflow is at or below the 98 percent exceedance flows, regardless of how the flows come to be that low. We will clarify ordering paragraph (B) to make this clear.⁹

12. The District also argues that the Commission's reservation of authority to lift the daily pumping rate restriction does not sufficiently ensure timely removal of the restriction in the event that no heelsplitter mussels are found. It asks that language be added to affirmatively state that if no Carolina Heelsplitter mussel is found, the

⁸ Ordering paragraph (B) reads:

For the protection of potential habitat of the federally listed endangered Heelsplitter mussel, the permitted daily pumping rate shall be restricted during drought conditions, according to the following criteria. When the weekly average streamflow in the Catawba River, based on U.S. Geological Survey (USGS) gauge # 02146000 near Rock Hill, SC, is at or below a flow corresponding to the 98% exceedance flow, then the water withdrawal rate shall not exceed 165 mgd.

⁹ Although ordering paragraph (B) references drought, it was only so-referenced as the presumed cause of such a low flow.

Commission “shall promptly remove any pumping restrictions.” The language of ordering paragraph (B) already reserves for the Commission sufficient authority to remove the restriction if and when such removal is appropriate.¹⁰

The Commission orders:

(A) Charlotte-Mecklenburg Utility District’s request for late intervention, filed March 24, 2004, is denied.

(B) Charlotte-Mecklenburg Utility District’s request for rehearing, filed March 24, 2004, is dismissed.

(C) The order issued February 23, 2004, in this proceeding is clarified as discussed in the text of this order.

(D) The first sentence of ordering paragraph (B) of the order issued February 23, 2004, is revised to read as follows:

(B) For the protection of potential habitat of the federally listed endangered Carolina Heelsplitter mussel, the permitted daily pumping rate shall be restricted according to the following criteria.

¹⁰ The second paragraph of ordering paragraph (B) states:

The Commission reserves the right to remove this pumping rate restriction after completion of the mussel surveys and submission of the report required in paragraph (C). The licensee shall remain in compliance with this measure until the Commission orders otherwise.

(E) The third sentence of ordering paragraph (C) of the order issued February 23, 2004, is revised to read as follows:

The survey shall be designed to determine the lateral and longitudinal distribution of the Carolina Heelsplitter in the free flowing river reach between Wylie Lake and Fishing Creek.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.