

Relicensing battle moves to new arena Duke's opponents to take case to federal authorities

By Becky Johnson

What Price to Pay?

This is the first in a two-part series examining Duke Power's regional hydropower network as the company seeks federal approval for continued operations.

n This week: After three years of negotiations, some participants speak out about promised reparations.

n Next week: How much can Duke afford? A look at the company's profits and a federal accounting probe.

A loose-knit but ardent group of activists assembled around a table in Dillsboro last week, plotting strategies for a taxing environmental battle being waged against Duke Power, one of the most powerful corporations in the Southeast.

The group's premise is simple. It believes Duke Power owes the public big bucks to compensate for altering the region's rivers with its extensive hydropower network. The 11 man-made lakes and corresponding dams have forever changed the natural ecosystems of the five river basins in question. The Tuckasegee is saddled with half a dozen dams. The Nantahala is bled dry for miles where the river is diverted away from the age-old riverbed and instead funneled through pipes to powerhouses. Fish must cope with the constant ebb and flow of water levels controlled by the powerhouse gates upstream.

A narrow window exists to exact reparation from Duke Power. The company's federal hydropower permit expires next year. The Federal Energy Regulatory Commission will require Duke to provide adequate compensation to the region in exchange for harnessing its rivers. But the compensation Duke proposes falls \$30 million short of what many environmental, political and business leaders in Jackson County and elsewhere want.

"This is a once in a lifetime opportunity. We have to catch up and raise the level of stewardship," said T.J. Walker as he appealed to the group last week in Dillsboro.

Bill Lyons, a fisherman and economist, who opposes Duke's plan, mulled over the looming challenges.

"We didn't fight for our own rights until it was too late," Lyons said, citing the extensive and laborious negotiation process designed by Duke to satisfy the region with various recreational and environmental pledges. The Duke opponents gathered at the strategy session had spent the past three years bargaining with Duke, but Duke's last and final offer was a compensation package worth an estimated \$6.5 million.

"It is a micro-percentage of the revenue Duke will be getting from the rivers over the next 30 years," said David Wheeler with the Watershed Association of the Tuckasegee River.

"It does strike me as being a low number, not just compared to the profits Duke generates, but in the impact of all of those facilities," said Andrew Fahlund, a hydropower analyst with American Rivers. "We're talking about a dozen dams throughout a region. We're talking about pipes criss-crossing mountains. We're talking about dry stream beds for many miles."

The opponents who gathered in Dillsboro severed negotiations with Duke and have filed legal challenges with FERC, the federal energy commission that has final say over Duke's new permit.

"What we will be asking for is considerably more in terms of conservation and enhanced recreational opportunities," Jackson County Manager Ken Westmoreland said. "We do know what the law requires, which is that FERC give consideration to the public's needs for recreation and conservation. How it all shakes out, nobody will know until it happens. It's like going before a jury."

Tug-of-war

Fred Alexander, spokesman for Duke Power, said coming up with a compensation package to satisfy everyone has been a difficult juggling act. Demands from special interest groups are varied and often mutually exclusive, Alexander said. Kayakers want more whitewater releases. Fishermen want constant water levels. Boaters want more public docks on the lakes. But homeowners on the lake want fewer public docks.

Competing interests don't stop there. The battle over a limited pot of money was pervasive during the negotiations.

Swain County wants a put-in along the Nantahala River Gorge. Jackson County wants a public swimming beach on Lake Glenville. Dillsboro wants a town park along the Tuckasegee River. Sylva wants a greenway along its stretch of river. Hikers want trails to waterfalls. Canoeists want trails to skirt around dams when traveling down river.

Duke's plan to reach consensus: a three-year series of monthly meetings where all competing groups could hash out their differences. The goal was to have all the stakeholders agree on a compensation package and sign a legal pact to that effect. That pact would then clear the way for Duke to get a new permit with little scrutiny or probing by the federal energy commission. The process would work like a plea bargain agreement, where feuding parties draft a settlement out of court and the judge rubber stamps it.

Special interests jumped into the process with vigor. Most believed they could all walk away winners if they cooperated with both Duke and the other stakeholders. In retrospect, several stakeholders now believe differently.

"At one point, we thought the stakeholder process was a state-of-the-art volunteer process. But it turned out to be rigged and polarized," said T.J. Walker, owner of the Dillsboro Inn.

Several stakeholders believe Duke purposely pitted competing interests against each other, hoping the factions would wear themselves out fighting for their piece of the pie.

"Each resource agency was concerned with their little quadrant. No one was looking at the overall big picture," Walker said. "Duke succeeded in fractionalizing the stakeholders."

"Naiveté," said Bill Lyons, enunciating each syllable. "That was the biggest downfall of the stakeholder process. The stakeholders falsely believed this was a good-faith process. Duke was organized and knowledgeable and the stakeholders were not organized and not knowledgeable."

Strong-arm tactics

Roger Turner with the WNC Alliance environmental group said by the time he and other stakeholders caught on, it was too late. He and other stakeholders say they felt like hostages as the three-year negotiations neared an end.

They had two choices, and neither looked good. They could sign the pact signaling content with Duke's compensation package. If they signed, they would likely get the concessions Duke had agreed to during the negotiations. But by signing, they were legally barred from taking additional concerns to the Federal Energy Regulatory Commission.

The other option was not to sign. They would then be kicked out of the process and barred from future negotiations, a risky proposition as other stakeholders with competing interests would still be bargaining with Duke. Non-signers could always take their case to FERC to lobby for the compensation they wanted. But unsure of how the energy commission would rule, they also risked losing the concessions they had already won. Nonetheless, one-third of the 40 participants walked away from the three-year process without signing the pact.

"Some folks did essentially vote themselves off the island," said Fred Alexander, a spokesperson for Duke's Nantahala District.

This threat of being "either with us or against us" loomed large during the process, according to some stakeholders.

Tom Massie, a member of the Jackson County Soil and Water Conservation District Board, said the process was unfair. Jackson Soil and Water ultimately did not sign on with Duke. While the agency was happy about some of the compensation Duke proposed, Massie said Duke was not contributing nearly enough to fight the single largest water quality problem – namely sediment and erosion control.

"Forty thousand dollars to Jackson County to do sediment control over a 40-year period is not adequate," Massie said. "Sedimentation is the leading water quality problem."

Massie, who is also the executive director of the state's Clean Water Management Trust Fund, was unsatisfied with Duke's final offer. The Jackson Soil and Water Conservation District Board, along with nearly two dozen other opponents, will lobby FERC to require more out of Duke. If that fails, they'll go to court, Massie said.

Many of the two-thirds of the stakeholders who signed on to Duke's plan say they are satisfied with what Duke has offered.

Emma Wortenberger, a Dillsboro town board member and inn owner, said the town got a "good settlement" from Duke Power.

"You can always ask for the moon when you are dealing with a large corporation, but you have to come down from that perch somewhat," Wortenberger said.

Others disagree.

"Did people ask for enough? That's a very subjective call. Our conclusion is that we didn't end up with enough," said David Sligh with American Rivers.

Some stakeholders felt like they were second fiddle to groups with more clout, especially the government agencies like the North Carolina Wildlife Resources Commission and the state Department of Environment and Natural Resources. Discontent by one of those agencies posed a bigger threat to Duke's process than discontent from the town of Webster, for example.

Susan Leveille, who represented the town of Webster and is chairman of the town's planning board, said she never felt she had a seat at the table during the negotiations. In particular, she said the government agencies talked in technical terms, were always referring to reams of data and various studies, and usually dominated the stage.

"There seemed to be no desire to put the technical information in layman's terms," Leveille said. When an issue came up that was close to Leveille's heart — such as public access along the Webster stretch of the Tuckasegee River — it wasn't given enough time for discussion.

"The time factors always seemed to be a problem. It was rare for agendas to be altered, particularly for the non-technical people," Leveille said.

Another fear that permeated the process for some stakeholders was Duke's threat to end the negotiations when things weren't going the company's way. If Duke pulled out of negotiations, FERC would lead the formulation of a compensation package.

"Everyone had the basic tenant that it was better to try to work out a settlement that we had input into than to turn it over to people in Washington to decide," Turner said.

Grounding rules

Some stakeholders claim Duke established unfair rules for the process by not allowing stakeholders to record the meetings and by limiting contact with the media.

This rule caused at least one stakeholder to be removed from the negotiations. When T.J. Walker, the owner of the Dillsboro Inn, learned about plans to tear down the Dillsboro dam, he spoke to the town board at its monthly meeting to express concern about the proposal. Walker's comments to the town board appeared in the Sylva Herald newspaper the following day. Walker shortly got a phone call from a Duke Power official informing him he had violated the rules of the stakeholder process.

"It took the credibility out of the process for me," Walker said of the phone call. "I felt like my citizen's rights were being impeded, that I wasn't allowed to go to my town board. I felt the democratic process was being suppressed."

Duke's Fred Alexander defended the media gag rule.

"Consensus is unlikely to occur in an environment where team members were saying negative things about one another," Alexander said. "It's either play by the rules or not play."

So Walker quit the stakeholder process.

Others had problems with the rules as well, including Jackson County Manager Ken Westmoreland.

"The whole stakeholder process kept the proceedings out of the public's eye. As a stakeholder (representing Jackson County), there were limited things I was even able to talk about with my own board of county commissioners," Westmoreland said. "Duke controlled the flow of information and the timing of the release of information."

The media gag rule wasn't the only stipulation that bothered stakeholders. Another rule prevented the use of recording devices during meetings.

"All stakeholders were free to take notes," Alexander said. "But recording meetings might inhibit the free flow of information and openness."

Bill Lyons, an environmentalist and economist, tested the rule and attempted to tape record a stakeholder meeting. Duke officials made him turn it off and put it away. Instead, Duke kept minutes of all meetings and disseminated them to participants in the weeks following the meetings. Lyons said this gave Duke undue control.

"Decisions that were supposedly binding somehow were lost in the write-up," Lyons said. Lyons recalls an instance where Duke agreed to replace all shoreline vegetation destroyed during construction of a park at Lake Glenville at a ratio of 15 to 1. Months later, when the settlement agreement was drafted, that condition was nowhere to be found, Lyons said.

Live and learn

Turner wonders whether Duke considered the region an unorganized backwater where it could offer as little environmental reparation as it could get away with. Turner grew worried Duke would try the same strategy on other regions, specifically the Catawba River basin of North and South Carolina where negotiations over a hydropower network have just commenced. The region includes the prosperous area around Lake Norman and the heavy-hitting political might of Charlotte, home to Duke's headquarters.

Turner and others sent a warning to residents of the area just to be sure. Apparently it was heeded. The stakeholders there are on their sixth revision of the ground rules that will govern the negotiation process. Attorneys have scrutinized each draft for red flags and wording that could give Duke too much control.

"We are trying to learn from the Nantahala/Tuckasegee process," said Gerrit Jobsis, organizer of the CatawbaWataeree Relicensing Coalition.

The coalition denied Duke's attempt to limit media contact during negotiations.

"We're concerned without a properly educated public that the public's benefits would be less coming out of the process," Jobsis said.

And rather than recording devices being barred, they will be required at each meeting.