

RATH YOUNG PIGNATELLI

Jill Dinneen
Attorney at Law
jd@rathlaw.com

Please reply to: Concord Office

January 21, 2014

VIA ELECTRONIC FILING

Ms. Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426

Re: Yadkin Project (P-2197-073) New Energy Capital Partners, LLC
Supplement to Petition to Reopen Licensing Application

Dear Secretary Bose:

Enclosed, on behalf of our client, New Energy Capital Partners, LLC, is a Supplement to Petition to Reopen Licensing Application in the Commission's Docket P-2197. The Supplement has been filed today using the Commission's eFiling service. Because the Supplement has been filed electronically, no hard copies will be delivered to the Commission. Service copies are being delivered in accordance with the Commission's Rules of Practice and Procedure and by reference to the service list available in the Docket.

If you have any questions, please contact me at 603-226-2600.

Sincerely,

/s/ Jill Dinneen

Jill Dinneen
M. Curtis Whittaker
Counsel to New Energy Capital Partners, LLC

National Impact. Uniquely New Hampshire.

Rath, Young and Pignatelli, P.C.
www.rathlaw.com

One Capital Plaza
Concord, NH 03302-1500
T (603) 226-2600
F (603) 226-2700

20 Trafalgar Square
Nashua, NH 03063
T (603) 889-9952
F (603) 595-7489

54 Canal Street
Boston, MA 02114
T (617) 523-8080
F (617) 523-8855

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

RE: Alcoa Power Generating, Inc.'s)	Project No. P-2197-073
Application for License For the Yadkin)	
Project on the Yadkin River and lakes in)	Yadkin Project
Davie, Davidson, Rowan, Stanly, and)	
Montgomery Counties, North Carolina)	Supplement to
)	Petition to Reopen
)	Relicensing Process

**NEW ENERGY CAPITAL PARTNERS, LLC
SUPPLEMENT TO PETITION TO REOPEN RELICENSING APPLICATION
AND REQUEST TO CONDITION ANNUAL LICENSE**

On April 30, 2013, pursuant to Rule 207(a) of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure,¹ New Energy Capital Partners, LLC ("NEC" or "Petitioner") petitioned the Commission to reopen and restart the relicensing application process for Project No. P-2197-073 (the "Project" or the "Yadkin Project"). NEC's filing (the "Petition"), attached hereto, also alternatively requested late intervention in this docket. Since the Petition was filed, subsequent developments lend support to arguments advanced in the Petition in support of further Commission actions in this docket. NEC supplements the Petition as set forth herein.

Copies of all notices, correspondence, and pleadings related to this proceeding should be directed to:

¹ F.E.R.C. Rules of Practice and Procedure, 18 C.F.R. Part 385 (e-CFR 2014) (the "Rules").

FERC
P-2197-073
January 21, 2014

Page 2

Scott Brown
President
New Energy Capital Partners, LLC
53 South Main Street
Hanover, New Hampshire 03755
sbrown@newenergycapital.com

with copy to:

M. Curtis Whittaker
Rath, Young and Pignatelli, P.C.
One Capital Plaza
Concord, New Hampshire 03301-1500
(603) 226-2600
mcw@rathlaw.com
Counsel to New Energy Capital Partners,
LLC

SUMMARY OF PETITION

Basic Hydropower Licensing Background:

1. States generally hold title to the corpus of water in flowing rivers, holding it in a public trust along with river bed and banks, and regulating water consumption and (outside of federally licensed areas) in-stream uses.²
2. The federal government simultaneously holds a constitutional servitude to protect navigable characteristics of waterways, arising under the Commerce Clause.³
3. In the Federal Water Power Act of 1920⁴ (referred to herein as “FPA Part I”) the federal government used its ability to condition development impacts on navigable waters to create a federal hydropower licensing scheme.
4. Decades later, the federal judiciary determined that the federal licensing scheme was so pervasive as to preempt any concurrent state licensing scheme.⁵

² Tarrant Regional Water Dist. v. Herman, 569 U.S. ___, 133 S. Ct. 2120, 2132; California v. F.E.R.C., 495 U.S. 490 (1990); Shively v. Bowlby, 152 U.S. 1 (1894) (stating “title and the dominion of the tidewaters and of the lands under them vest . . . in the several States of the union within their respective borders, subject to the rights surrendered by the Constitution to the United States”).

³ Tarrant, at n.11 (2013) (stating that, “the power of States to control water within their borders may be subject to limits in certain circumstances. For example, those imposed by the Commerce Clause”); see also First Iowa Hydro-Electric Cooperative v. Fed. Power Comm’n, 328 U. S. 152, 175-176 (1946) (“*First Iowa*”).

⁴ 41 Stat. 1063 (codified as amended by the Public Utility Act of 1935 and Energy Policy Act of 2005, 16 U.S.C. §§ 791a–832d (the “FPA” or the “Act”).

⁵ *First Iowa*, 328 U.S. 152.

FERC
P-2197-073
January 21, 2014

Page 3

5. Especially in light of its preemption of direct state regulation of state watershed interests, the federal government must give great weight to state watershed plans and otherwise proactively ensure that a federally licensed project benefits the public, not just the licensee. This is the special, hydro-specific “public interest standard” of FPA Part I.⁶

Against that background, the substance of the Petition can be summarized as follows:

Asserted Facts:

1. The Yadkin River watershed is a public asset held in trust by North Carolina. Because it is also navigable in the area of the Project, it is subject to the federal hydropower licensing scheme set forth in FPA Part I and the Commission’s implementing Rules.
2. Alcoa Power Generating, Inc. (“APGI”) owns and operates the Project dams and powerhouses.
3. APGI was granted a federal license to alter and utilize the Yadkin River watershed through the construction and operation of the Project’s impoundment structures (“Original License”).⁷
4. The Commission’s express justification for the Original License was the intended use of hydropower output to power Alcoa’s manufacturing facilities in the Yadkin region – a use that resulted in local economic development, and was deemed sufficient to meet the FPA Part I public interest standard.⁸

⁶ 16 U.S.C. §§803(a)(1), 808(a)(2) (2014); *Udall v. Fed. Power Comm’n*, 387 U.S. 428, 450 (1967)(“*Udall*”); *Green Island Power Auth. v. F.E.R.C.*, 577 F. 3d 148, 167 (2d Cir 2009)(“*Green Island*”); *Scenic Hudson Preservation Conference v. Fed. Power Comm’n*, 354 F. 2d 608, 620 (2d Cir. 1965)(“*Scenic Hudson*”).

⁷ See Decision Upon Applications for Licenses Under the Provisions of the Federal Power Act, Lexsee 19 F.P.C. 704 at *54 (Feb. 11, 1958) (“1958 License Order”) (granting paragraph (A) stating that a license is granted “for a period of 50 years” from the effective date of the 1958 License Order).

⁸ 1958 License Order at *28 (concluding that the “operations of the Badin plant of [APGI] are a useful contribution to the industrial life of the Yadkin Valley and their continuation is greatly in the public interest”).

FERC
P-2197-073
January 21, 2014

Page 4

5. The Original License expired on February 11, 2008, and APGI seeks a new long-term license to use the Yadkin River watershed.
6. Since filing its new license application, and after the deadline for any competing license applications,⁹ APGI terminated its use of the Project's power at its own manufacturing facilities, and shuttered those facilities.¹⁰
7. APGI has offered no need or other justification for any future use of the Project's power output, although it apparently intends to make regional wholesale power sales only. APGI has offered no explanation as to how such wholesale power sales will meet the FPA Part I public interest standard.

Essential Petition Arguments:

1. The FPA Part I involves a basic deal: if private capital will finance new hydropower generation on public waterways, the public will contribute a long-term license to fundamentally alter and use the public's watersheds – *on the condition* that the same public realizes substantial benefits from that contribution of both state and federal public watershed interests. The licensee does not get the public watershed for free.¹¹
2. Under that same basic deal, once the initial license term is up, the balance of public/private benefits must be freshly reviewed, and if anything, public benefits generally *increased* given that the licensee had a fair opportunity to earn a return of and on capital under the initial license.¹²
3. In crafting any original or new license, the FPA Part I public interest standard, applicable only to licensed hydropower developments and no other type of power generation, requires that the Commission provide a clear justification as to how

⁹ The deadline to intervene or submit competing applications was February 26, 2007. See Notice of Application Accepted for Filing and Soliciting Motions to Intervene and Protests (Dec. 28, 2006) (available in F.E.R.C. eLibrary Docket P-2197 at <http://www.ferc.gov>).

¹⁰ See Alcoa Inc., Form 8-K (Apr. 4, 2010) (available through EDGAR on S.E.C.'s website at <http://www.sec.gov>).

¹¹ Petition at pp. 9-13 and cases cited therein.

¹² Petition at pp. 10-12 and cases cited therein.

the *public* will benefit from an applicant's proposed use of public trust watershed assets.¹³

4. Especially in considering a renewed license for a Project with a fundamentally changing purpose, the Commission cannot ignore the ongoing legacy costs of the applicant's prior watershed uses – it cannot leave others “holding the bag” of prior use impacts if the Project's justification changes. The FPA's specific requirement that the Commission investigate past actions of the license applicant includes the ongoing legacy costs of prior licensed uses.¹⁴
5. Neither can the Commission ignore an applicant's proposed future uses of hydropower generation nor the resulting allocation of benefits between the public and private parties involved in the licensed development.¹⁵
6. The Commission must assume as fact that APGI intentionally provided false information to the North Carolina Department of Environment and Natural Resources in connection with its CWA 401 application, and treat with that fact in this docket.¹⁶
7. Under its own rules, the Commission should have issued additional solicitations of interventions in this docket at several points since it last did so.¹⁷

SUBSEQUENT EVENTS

Since filing the Petition, the following relevant events have occurred:¹⁸

1. May 15, 2013: The State of North Carolina filed a request for additional time for the new North Carolina administration to consider the Petition and take a position.

¹³ Petition at pp. 9-13 and cases cited therein.

¹⁴ Petition at pp. 17-22 and cases cited therein.

¹⁵ Petition at pp. 17-22 and cases cited therein.

¹⁶ Petition at pp. 22-23.

¹⁷ Petition at pp. 24-28.

¹⁸ Except as noted, documents referencing the items in the list below are all available F.E.R.C. eLibrary Docket P-2197-073 at <http://www.ferc.gov>.

FERC
P-2197-073
January 21, 2014

Page 6

2. May 30, 2013: without addressing the substance of NEC's Petition, the Commission denied NEC's alternative motion for late intervention. The Commission did not address North Carolina's request for additional time to respond.
3. June 24, 2013: The State of North Carolina filed a request for rehearing of the Commission's order denying NEC's late intervention request. The Commission summarily rejected North Carolina's request for rehearing on July 16, 2013.
4. June 26, 2013: Yadkin Riverkeeper, Inc. filed a motion to reopen licensing application process in this docket, making arguments similar to those in NEC's Petition, and further emphasizing the inadequate scope of the Commission's final environmental impact statement and other studies directed in this docket.
5. June 27, 2013: NEC filed a request for rehearing of the Commission's order denying NEC late intervention.
6. July 2, 2013: The State of North Carolina filed a lawsuit against APGI in state court, seeking clarification as to ownership of the bed and banks of the Yadkin River watershed, and the ownership of any flowage and flooding rights ("Bed and Banks Litigation").¹⁹
7. August 2, 2013: The North Carolina Department of Energy and Natural Resources rejected APGI's application for 401 Water Quality Certificate, citing lack of sufficient demonstration of property rights over the Yadkin River watershed.²⁰
8. September 16, 2013: The North Carolina Wildlife Resources Commission filed notice of withdrawal from the February 2007 Revised Settlement Agreement filed in this docket, stating that it appears that APGI "intentionally withheld material" from the Division of Water Quality of the NC DENR when APGI submitted its application and supporting materials for Water Quality Certification No. 003173.²¹
9. September 19, 2013: In denying NEC's motion for rehearing of the Commission's Order denying intervention, the Commission stated that "Accordingly, Alcoa

¹⁹ North Carolina v. Alcoa Power Generating, Inc., 13-CVS-10477 (Wake County Superior Court).

²⁰ Yadkin Hydroelectric Project, DWC # 12-0900 (Division of Water Resources, Department of Energy and Natural Resources).

²¹ Letter, from North Carolina Wildlife Resources Commission to APGI, Sep. 16, 2013, available F.E.R.C. eLibrary Docket P-2169-020 at <http://www.ferc.gov>.

FERC
P-2197-073
January 21, 2014

Page 7

Power's decision as to where to sell project power is not a relevant issue in the relicensing proceeding and could not provide good cause for intervention at any time, let alone late." This assertion – that a licensee's proposed plan for power use is *irrelevant* to hydropower relicensing – already has been repeated by third parties as new Commission precedent²², despite being flatly contradictory to the FPA and the Commission's own Rules.²³

10. October 25, 2013: APCI notified the Commission that it had filed a petition for a contested hearing regarding denial of the 401 Water Quality Certificate before the North Carolina Office of Administrative Hearings.²⁴
11. November 7, 2013: NEC filed a petition for review of the Commission's denial of NEC's alternative late intervention request in federal district court, but essentially requested a stay pending action on the Petition, given that such action may moot the need for any appeal.²⁵

DISCUSSION

The recent actions of the various North Carolina agencies listed above in pursuing the Bed and Bank Litigation, withdrawing from the RSA and contesting the CWA 401 Certificate underscore a fundamental reality that this Commission must recognize: North Carolina has come to understand that something is wrong here. Both the Democratic Perdue and now the Republican McCrory administrations have discerned a glaring unfairness in handing over the Yadkin watershed to APCI for another forty years, not to

²² See, Objection of York Haven, Docket No. P-1888-030, filed 11/4/13 (highlighting the Commission's language regarding the irrelevance of hydropower disposition in a relicensing proceeding).

²³ See 16 U.S.C. § 808(a)(2)(D) – (F), requiring the Commission to examine both an applicant's need for the hydropower output and "the effect on communities served or to be served by the project"; 18 C.F.R. §16.9 (referencing information due under 18 C.F.R. §4.41, inclusive of (c)(5), which required an applicant to provide a statement of system and regional power needs).

²⁴ Alcoa Power Generating, Inc. v. Division of Water Quality, North Carolina Department of Environment and Natural Resources (Office of Administrative Hearings).

²⁵ New Energy Capital Partners, LLC, v. F.E.R.C., Docket 13-1277, United States Court of Appeals for the District of Columbia Circuit.

FERC
P-2197-073
January 21, 2014

Page 8

generate local jobs and economic activity, but simply to export North Carolina's renewable resources into PJM – with APCI keeping all the revenues and the North Carolina public left with all the social, economic and environmental displacements caused by the complete shutdown of Alcoa's Yadkin works.²⁶ That is, APCI is proposing to *dramatically decrease*, rather than increase, the public's return on a renewed contribution of North Carolina's watershed assets to the Yadkin Project development – the exact opposite of what FPA Part I intends at a relicensing. And this Commission, with its newfound insistence that hydropower uses, costs and benefits are *irrelevant* to its duties under the FPA, seems determined to give Alcoa what it wants – a long term license of North Carolina watershed assets that it can quickly resell for a fortune.

The catalyst for resistance to APCI's Yadkin application was Alcoa's deft handling of its 380.1 MW Tapoco hydropower assets. There, Alcoa applied to the Commission for a new 40 year license,²⁷ citing the need for power to continue powering its smelting operations in Tennessee and North Carolina – an economic development

²⁶ For example, Gov. McCrory has stated, "The Yadkin River is a North Carolina river. We should be able to use it for North Carolina water needs and to create North Carolina jobs." See "Governor McCrory Joins Fight Against Alcoa's Claim," Aug 29, 2013, The Stanley News and Press (Albemarle, NC). At a press conference on December 22, 2010, Gov. Perdue said, "I don't believe there is any derivative benefit to the people of North Carolina with Alcoa owning the rights to the water and the electricity. ... I don't know what economic sense it makes to allow a[n out of state] company to own that water." <http://yadkinriverkeeper.org/news/201012/governor-perdue-calls-out-alcoa-year-end-press-conference>.

²⁷ Application for New License, P-2169-020 (Feb. 21, 2003), available at F.E.R.C. eLibrary Docket P-2169-020 at <http://www.ferc.gov>.

FERC
P-2197-073
January 21, 2014

Page 9

justification accepted and repeated by this Commission in issuing the license.²⁸ The public signatories to the Relicensing Settlement Agreement in that docket thought they were signing onto terms that would ensure a long term share of watershed benefits to the States of North Carolina and Tennessee in the form of economic development.²⁹ But soon after the license was issued, Alcoa shut down its local smelting operations, redirected all Tapoco output to PJM, then sold the newly relicensed assets for over \$600 million to a Canadian income trust.³⁰ Result: Alcoa “monetized” and kept *the entire value of the licensed Tapoco watershed*, instead of sharing that value with the public through the economic development. Can anyone doubt that if Alcoa had proposed *that* outcome to Tennessee and North Carolina, they would never have signed onto the RSA?

The Tapoco region was stripped of the essential justification for a new license – continued economic development from Tapoco operations – with that justification

²⁸ Order Approving Settlement and Issuing New License, P-2169-020 (Jan. 5, 2005), available at F.E.R.C. eLibrary Docket P-2169-020 at <http://www.ferc.gov>. In issuing the new license, the Commission stated that “APGI is engaged in the generation of electric power for its own industrial purposes and has no regular external customers.” The Commission’s entire analyses of Alcoa’s need for power under FPA Sec. 15(a)(2)(D), and actions affecting the public under FPA Sec. 15(a)(3)(A)-(B), was premised on Alcoa’s use of all hydropower output to generate “electricity that is used by Alcoa’s Tennessee Operation”. Order at pp. 18-20 (emphasis added).

²⁹ In defending the terms of Revised Settlement Agreement filed in that docket, APGI argued that “Relicensing on the terms set forth in the RSA will allow APGI to continue to generate economical, readily-available energy for Alcoa’s Tennessee Operations, which includes an aluminum smelter and a rolling mill, and has a nearly \$400 million economic impact on the greater Knoxville, Tennessee region.” See cover letter, page 2, Offer of Settlement filed May 7, 2004 in P-2169-020.

³⁰ On January 9, 2009, APGI announced layoffs of over 450 workers at the Tapoco smelting operations. On January 5, 2012, APGI announced that it would permanently cease smelting in Alcoa, Tennessee, the site of the Tapoco Project. On July 31, 2012, APGI and Brookfield Smoky Mountain Hydropower LLC filed a joint application for a transfer of the license from APGI to Brookfield, after the anticipated closing of the sale to Brookfield. The transfer was summarily approved by Commission order on October 4, 2012. On November 15, 2012, APGI announced that the sale to Brookfield had closed.

FERC
P-2197-073
January 21, 2014

Page 10

replaced by a hydropower use that this Commission never determined was sufficient to meet FPA Part I public interest standard. It was, in hindsight, an epic “bait and switch” that flaunts the entire concept of FPA Part I – to attract private capital to hydropower developments that provide a broader and substantial public benefit over time. In justifying a new Tapoco license based on the public benefit from continued local economic activity, and then failing to even question subsequent events, this Commission abetted that bait and switch.

The Commission can ask why North Carolina did not object to the unconditional transfer of the Tapoco license, and make a case for maintaining a share of public benefits at that point. In our view North Carolina could have – but unlike the Commission, states do not have standing staffs immersed in FPA Part I, ready to identify and pursue state interests under the Commission’s processes. But even so, it was only later, when the Brookfield purchase price of \$600 million was made public well after the license transfer, that the one-sided outcome of Tapoco began to create a slow burn in North Carolina – and eyes turned to the potential for a repeat at Yadkin.³¹

Unfortunately, the relevant Tapoco facts all occurred *after* it was too late for North Carolina, NEC, the affected Yadkin region counties, or anyone else to timely compile a competing license application for the Yadkin Project – and well after the filing

³¹ We note that 16 U.S.C. §813 allows a licensee to issue securities “only for the bona fide purpose of financing and conducting the business of such licensee.” We are not aware of any Commission investigation of the securities issued by the current Tapoco licensee or its affiliates, and whether Tapoco now effectively “cross-subsidizes” other assets located in the United States or elsewhere – prevention of which is the obvious purpose behind this statute.

FERC
P-2197-073
January 21, 2014

Page 11

of a Revised Settlement Agreement in this docket.³² So to avoid another Tapoco in the Yadkin region, the State of North Carolina must look to other means to obtain just compensation for use of its public watershed – thus the North Carolina Bed and Bank Litigation and continuing CWA 401 permit litigation.

Moreover, regardless of any state's failure to effectively assert its interest in a relicensing, this Commission is charged under FPA Part I with affirmatively protecting that same public interest. To discharge that responsibility at Yadkin, it comes to this: **if Alcoa is not going to continue to use the Yadkin watershed to create local economic development/jobs, as it has in the past, then Alcoa must share the value of those watershed uses in another way with the affected public.** That is the patently obvious directive of FPA Part I – yet one as to which this Commission now seems institutionally oblivious, and even disdainful. Here is what North Carolina, and the greater hydropower/renewable energy community, can conclude from the Commission's handling of Tapoco and Yadkin to date:

1. A willingness to allow a Tapoco situation – a bait and switch involving one Commission-sanctioned justification for a new license that seemingly promises a real share of public benefits, then a prompt post-license switch by the licensee that simply eliminates those promised public benefits and arrogates their value to the licensee, with no questions and no further examinations.

³² On May 7, 2007, APGI submitted to FERC the Revised Settlement Agreement (February 2007) (“RSA”), effective as of April 22, 2007. On May 17, 2007, FERC posted notice of the RSA asking for comments no later than June 6, 2007, with reply comments due no later than June 18, 2007. As previously noted, the Tapoco divestiture, resulting ultimately in a transfer of the license from APGI to a third party, with no opportunity for the affected state or local counties to comment or intervene, occurred during 2012.

FERC
P-2197-073
January 21, 2014

Page 12

2. Even further, a Commission rejection of the notion that it must examine how hydropower uses, costs and benefits are allocated between the licensee and the affected public, whether at a relicensing or a license transfer. In this docket, the Commission has refused entreaties to examine the legacy impacts of past licensed hydropower uses (a willingness to leave the public “holding the bag”), and at the same time astonishingly declared that future hydropower uses, and their associated cost/benefit allocations, are completely irrelevant to a relicensing.

We have to ask, what is going on here? Every hydropower output application creates an allocation of associated costs and benefits to the licensee and the public – that is an inescapable fact. And if a hydropower licensee changes its usage, by definition it changes those allocations of costs and benefits – potentially leaving the public with all the costs, and keeping all the benefits. In North Carolina, the Commission is openly rejecting the notion that it must actively consider licensee actions that change those allocations to ensure a fair outcome to the public at a relicensing.³³ Why?

Our best guess is that the Commission is so focused on its salutary achievements in creating transparent, highly functioning regional wholesale power markets under FPA Part II, and in putting all power generators on a level playing field, that it has forgotten that hydropower must be treated differently – that hydropower comes with a different

³³ The Commission’s position here flatly conflicts with the FPA Part I public interest standard (16 U.S.C. §§803(a)(1), 808(a)(2) (2014)), as well as the express statutory and Rules requirement that any license applicant explain its need for power, and document the various economic impacts of the proposed power use. See, 16 U.S.C. §808(a)(2)(D)-(F), requiring the Commission to examine both an applicant’s need for the hydropower output and “the effect on communities served or to be served by the project”; 18 C.F.R. §16.9 (referencing information due under 18 C.F.R. §4.41, inclusive of (c)(5), which requires an applicant to provide a statement of system and regional power needs); Handbook for Hydroelectric Project Licensing and 5MW Exemptions from Licensing, FERC, April 2004, page 2-8. Federal courts have been adamant regarding the Commission’s broad assessment responsibilities in assessing proposed license uses and impacts on the public. See e.g., *Energie Group LLC v. F.E.R.C.*, 511 F.3d 161, 163–64 (D.C. Cir. 2007) (quoting *Udall*), *Udall* at 450, *Scenic Hudson* at 620, *Green Island* at 167.

FERC
P-2197-073
January 21, 2014

Page 13

mission precisely because it exploits public watershed resources, and therefore it must serve the public in ways that *go beyond* what other competitive whole power generators need do in wholesale markets. Hydropower developments must produce a *fair return* to the affected public in consideration for an exclusive long-term license of public resources. This Commission is tasked with ensuring that fair return and protecting the affected public – even where (and maybe especially where) the affected states/localities are slow to realize their own stake in a new license proceeding. The FPA compels the Commission to make a broad examination of all past and future costs and benefits from a development in order to craft a license that fairly balances the private and public contributions to a hydropower development like Yadkin.³⁴

It is now time for the Commission, in this docket and in other current dockets involving large, economically important hydropower projects up for relicensing,³⁵ to expressly take up and fully describe how it must implement hydropower's special mission in two contexts: (i) specific applicant proposals to fundamentally change the allocation of hydropower costs and benefits between licensees and the affected public, whether at license transfer, relicensing or at any interim point during a license term, and

³⁴ To reinforce the point, suppose North Carolina had filed a competing license application that would have sold all the power to PJM, but used net proceeds to address economic displacement legacies through worker retraining, infrastructure improvements and environmental improvements. Would a proposed allocation of future hydropower revenues to address legacy issues have relevance in comparing license applications? Of course it would – meaning the Commission is wrong to ignore such allocations at any relicensing or license transfer – indeed, at any time a licensee proposes to change the use of hydropower output, and thereby change the public-private cost/benefit allocation.

³⁵ See, e.g., Muddy Run Pumped Storage Project (P-2355-018); Conowingo Hydroelectric Project (P-405-106).

FERC
P-2197-073
January 21, 2014

Page 14

(ii) more generally, how the public can realize a fair return on its watershed contributions if a licensee proposes to simply sell licensed output into today's competitive wholesale power markets, rather than under a cost-of-service regime that would share low cost hydropower with a defined retail ratebase.³⁶ If it fails to do so, then the Tapoco and Yadkin dockets will, by default, constitute the Commission's Twenty First Century policy towards licensed hydropower plants – one that simply rejects any Commission consideration of how hydropower usage affects the public's share of benefits from a licensed project. That is certainly the easier administration path – we argue it just doesn't comply with the law.

REQUESTED ACTIONS

As of February 11, 2014, the Yadkin assets will be on their 6th annual license – in which FERC temporarily allows use of the public watershed without any justification of that use as in the public interest. Annual licenses are intended as temporary accommodations while the larger relicensing process is resolved.³⁷ But here, and

³⁶ We note that §16 U.S.C. 813 includes a stand-alone “just and reasonable” rate standard for hydropower output that, under the terms of that statutory section, must be implemented on what amounts to a cost of service basis. Without offering further argument here, we point out that this statute remains in place, applicable only to licensed hydropower output, and potentially available to ensure that the public pays for hydropower output at prices based on its cost of production – and not simply at whatever price the market will bear. One may argue that here, the public is not required to contribute renewable watershed assets, and then be forced to buy them back at a price premium set by other generating technologies.

³⁷ 18 C.F.R. §16.18(b):

“The Commission will issue an annual license to an existing licensee under the terms and conditions of the existing license upon expiration of its existing license to allow:

(1) The licensee to continue to operate the project while the Commission reviews any applications for a new license, a nonpower license, an exemption, or a surrender;

FERC
P-2197-073
January 21, 2014

Page 15

accounting for the current North Carolina litigations, the Yadkin Project could be operated for up to a decade or even more on annual licenses – the whole time lacking any finding of adequate purpose, and with APGI accruing *all* hydropower benefits by default. Such an extended period of unjustified, unsubstantiated usage of public watershed assets is patently unfair – and the Commission has the tools to prevent any such unfairness. FPA Part I provides the Commission with the power, fully separate from FPA Part II, to consider the rates and finances of a hydropower licensee in order to prevent “excessive profits.”³⁸ Here, to avoid a patent injustice and pending final action on a new license that includes a fully explicated justification of resulting hydropower benefit allocations, this Commission should condition any new annual license on an APGI requirement to place all net operating revenues in a separate escrow account, to be disbursed as finally determined by the Commission in connection with issuance of a final new license for the Yadkin Project and final resolution of any resulting appeals. That will ensure that APGI has full access to hydropower revenues to operate and maintain the Yadkin assets, but

(2) The orderly removal of a project, if the United States does not take over a project and no new power or nonpower license or exemption will be issued; or

(3) The orderly transfer of a project to:

(i) The United States, if takeover is elected; or

(ii) A new licensee, if a new power or nonpower license is issued to that licensee.”

³⁸ See 16 U.S.C.A. §803(e)(1) (authorizing annual charges designed to, among other things, “the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves...”). This provision is an interesting – if rarely used - tool for both the Commission and affected states in preventing unjust outcomes. The Yadkin docket is exactly the kind of situation in which this provision can be effectively deployed.

FERC
P-2197-073
January 21, 2014

Page 16

will not – by default – accrue what may turn out to be an unfair share of the Project’s hydropower benefits during an extended annual license period.

As a second step, we ask the Commission to direct APGI to file a full explanation of how its intended use of the Project’s output will meet the FPA Part I public interest standard. Any licensee should be required to explain to the affected public how a renewed license of public watershed assets will benefit the public – the record in this docket is devoid of any such explanation.

Third, once APGI has offered up that defense of its intended use, allow all parties to the Revised Settlement Agreement filed in this docket to either confirm or drop their RSA party status. The RSA contains some intimidating “no escape” language³⁹ that was invented by APGI lawyers, and while surely void for public policy reasons, creates concerns about potential party liability for a withdrawing party – even if years and intervening facts separate the original signature from withdrawal.

Finally, we reiterate the Petition’s request for the Commission to reopen the window for filing competing license applications for the Project. Given the delays associated with the North Carolina litigations, such a renewed window will only serve to further the goals of FPA Part I – and the prospect of informed competition for the license will undoubtedly cause APGI to reconsider its lack of any proposed public share of future hydropower benefits.

³⁹ See RSA, at §1.3.9.

FERC
P-2197-073
January 21, 2014

Page 17

We pray for such other relief as the Commission may deem proper.

CONCLUSION

At Tapoco, APGI successfully converted a new Commission license that was supposed to be used to serve the public interest into an asset that was sold at the expense of the public interest. This Commission allowed that to happen, but has never explained why that outcome is consistent with the FPA Part I public interest standard. The FPA affirmatively tasks the Commission with protecting the public against such one sided, pro-licensee outcomes – and courts have repeatedly reminded the Commission of that very difficult task. Alone among electrons entering the nation’s wholesale power markets, licensed hydropower electrons must provide a fair return to the larger public as a quid pro quo for using and altering public watersheds. The Commission cannot blind itself to hydropower uses or the resulting cost/benefits allocations, much as it would like to have the marketplace relieve it of that burden. The easy path for the Commission would be to reject any pro-active obligation to examine larger public effects of licensed hydropower usage and the allocation of hydropower benefits. But FPA Part I will not allow the Commission that easy path. That is especially true where, as here, the Commission’s past justifications for a licensed project are being put aside in favor of new justifications, creating the potential for innocent third parties “holding the bag” of past hydropower impacts, with no share in future hydropower benefits.

[The balance of this page is intentionally left blank]

FERC
P-2197-073
January 21, 2014

Page 18

Respectfully submitted this 21st day of January, 2014.

/s/ M. Curtis Whittaker

M. Curtis Whittaker
Jill Dinneen
Rath, Young and Pignatelli, P.C.
One Capital Plaza
Concord, New Hampshire 03301-1500
mcw@rathlaw.com
Counsel to New Energy Capital Partners, LLC

cc: Service list
Attachment

FERC
P-2197-073
January 21, 2014

Page 19

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Concord, New Hampshire, this 21st day of January, 2014.

/s/ Jill Dinneen

Jill Dinneen
RATH, YOUNG AND PIGNATELLI, P.C.
1 Capital Plaza
Concord, NH 03301
603-226-2600
mcw@rathlaw.com
COUNSEL TO NEW ENERGY CAPITAL, LLC

FERC
P-2197-073
January 21, 2014

Page 20

Service by Mail

Fred Adkins
270 Marion Brown Trl
Salisbury, NC 28146-5016

Clerk of Court
140 S Main St
Mocksville, NC 27028

Lou Adkins
270 Marion Brown Trl
Salisbury, NC 28146-5016

Gaither Walser
Brinkley Walser, PLLC
10 Lsb Plz
Lexington, NC 27292-3393

Gene Ellis
Alcoa Power Generating Inc.
PO Box 576
Badin, 28009-0576

Ronnie Lee Qualkenbush
156 Stratford Rd
Lexington, NC 27292-9650

Max W Laun
Alcoa Power Generating Inc.
201 Isabella St
Pittsburgh, PA 15212-5858

Mark Tyson
President
Sandhills Rod and Gun Club
340 Grey Fox Road
Ellerbe, NC 28338

Charles T Steinman, MD
Animal Care Center of Salisbury
1500 E Innes St
Salisbury, NC 281466009

Dick Christie
SCDNR
1771-C Highway 521 By-Pass South
Lancater, SC 29720

Richard Blase
177 NC Highway 42 N Ste A
Asheboro, NC 27203-7955

Jim L Shuping
755 Riverwalk Dr
Salisbury, NC 281465020

Legal Department
Carolina Power & Light Company
PO Box 1551
Raleigh, NC 27602-1551

Henry D McMaster
SC Office of Attorney Gen.
PO Box 11549
Columbia, SC 29211-1549

FERC
P-2197-073
January 21, 2014

Page 21

Service by eServe

Andy Lucas
alucas@co.stanly.nc.us

Larry Jones
hrla@bellsouth.net

Prescott Brownell
prescott.brownell@noaa.gov

Neil Robinson
nrobinson@npj.com

David Bernhart
david.bernhart@noaa.gov

Marc Bernstein
mbernstein@ncdoj.gov

Miles Croom
Miles.Croom@noaa.gov

Donald Laton
dlaton@ncdoj.gov

Gerrit Jobsis
gjobsis@americanrivers.org

Jim Mead
Jim.Mead@ncmail.net

John Seebach
jseebach@americanrivers.org

Christopher J. Goudreau
chris.goudreau@ncwildlife.org

Philip Marston
client.admin@marstonlaw.com

Todd Ewing
todd.ewing@ncwildlife.org

Linda Flounders Bell
LBell@carolina.rr.com

Paul F. Shiers
shiers@pbworld.com

Julie Gantenbein
jgantenbein@waterpowerlaw.com

Neil Robinson
nrobinson@npj.com

Richard Roos-Collins
rrcollins@waterpowerlaw.com

James Hancock
jhancock@balch.com

V. Tinsley
rtinsley@brookspierce.com

Richard Roos-Collins
rrcollins@waterpowerlaw.com

Guy Cornman
gcornman@co.davidson.nc.us

Robert Petree
pete@savehighrocklake.org

John Whittaker
jwhittaker@winston.com

Mullen Taylor
mullentaylor@earthlink.net

Jeffrey G. Lineberger
Jeff.Lineberger@duke-energy.com

Robert Edward Duncan
duncane@dnr.sc.gov

Michael Kurman
kurman.michael@arentfox.com

Julie McIntyre
mcintyjf@dhec.sc.gov

FERC
P-2197-073
January 21, 2014

Page 22

Larry Turner
turnerle@dhec.sc.gov

Hank Stallworth
hstallwo@gov.state.sc.us

Rebecca J. Baldwin
rebecca.baldwin@spiegelmc.com

Frances Francis
frances.francis@spiegelmc.com

William Huang
william.huang@spiegelmc.com

E Service
eService@spiegelmc.com

Jaison Hicks
fhicks@ncdoj.gov

Jason Walser
jason@landtrustcnc.org

Eric Krueger
ekrueger@tnc.org

Ann Brownlee
ann.brownlee1@gmail.com

Gerald Thornton
gatwildcat@aol.com

Mark D. Bowers
mark_bowers@fws.gov

David Poe
david.poe@bgllp.com

Nancy Gottovi
nancy@centralparknc.org

FERC
P-2197-073
January 21, 2014

Page 23

ATTACHMENT A: ORIGINAL PETITION

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

RE: Alcoa Power Generating Inc.’s)	Project No. P-2197-073
Application for License For the Yadkin)	
Project on the Yadkin River and lakes in)	Yadkin Project
Davie, Davidson, Rowan, Stanly, and)	
Montgomery Counties, North Carolina)	Petition to Reopen Relicensing
)	Process

**NEW ENERGY CAPITAL PARTNERS, LLC
PETITION TO REOPEN RELICENSING APPLICATION PROCESS
AND IN THE ALTERNATIVE, MOTION FOR
LATE INTERVENTIONE IN THE
YADKIN PROJECT RELICENSING**

Pursuant to Rule 207(a) of the Federal Energy Regulatory Commission’s (“Commission”) Rules of Practice and Procedure (the “Rules”),¹ New Energy Capital Partners, LLC (“NEC” or “Petitioner”) hereby petitions the Commission to reopen and restart the relicensing application process for Project No. P-2197-073 (the “Project” or the “Yadkin Project”), a hydroelectric facility that, for nearly a century, existed solely to provide power to Alcoa Inc.’s (“Alcoa”) smelting operations in Badin, North Carolina. Those operations are now permanently closed, materially changing the Project’s purpose. The Federal Power Act (the “Act”)² requires the Commission to fully investigate and determine whether Alcoa Power Generating Inc.’s (“APGI”) relicensing application is best adapted to the public interest in light of this fundamental repurposing of the Yadkin Project. The Commission has not fulfilled this mandate. If it had, the docket would

¹ F.E.R.C. Rules of Practice and Procedure, 18 C.F.R. Part 385 (e-CFR 2013) (the “Rules”).

² Federal Power Act, 16 U.S.C. §§ 791a–832d (as amended by the Energy Policy Act of 2005) (2013) (the “FPA” or the “Act”).

FERC
P-2197-073
April 30, 2013

Page 2

reflect that APGI's original license (the "Original License")³ was premised on Yadkin Project's servicing the Badin smelting works, that this purpose vanished when that facility closed, and that APGI's new application abandons Yadkin's role in catalyzing the region's economic health and development. It would further reflect APGI's historical strategy of relicensing hydroelectric plants that no longer serve Alcoa's manufacturing assets, and reselling those hydroelectric plants (and licenses) at great profit to Alcoa and at the expense of the public interest that such licenses are intended to serve. Finally, if the docket were complete, it would squarely address APGI's submission of incorrect and intentionally incomplete materials. Because the docket is materially deficient, NEC respectfully moves that the Commission reopen the relicensing application process to investigate whether granting APGI a new license under these circumstances meets the public interest standard under the Act. NEC contends that the Commission's failure to do so would render any relicensing decision invalid.

In the alternative, pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, NEC moves for late intervention in the above-captioned matter. Material amendments to APGI's application required the Commission to solicit intervenors, such as NEC, to offer alternative plans and other evidence demonstrating that APGI's proposal is not best adapted to serve the public interest. No such opportunity was offered, despite the fact that these amendments occurred after the period for intervening formally lapsed.

³ See Decision Upon Applications for Licenses Under the Provisions of the Federal Power Act, Lexsee 19 F.P.C. 704 at *3 (Feb. 11, 1958) ("1958 License Order").

FERC
P-2197-073
April 30, 2013

Page 3

As a result, competitors like NEC have been wrongly shut out of the proceeding in violation of the Commission's own Rules.

Copies of all notices, correspondence, and pleadings related to this proceeding should be directed to:

Scott Brown
President
New Energy Capital Partners, LLC
53 South Main Street
Hanover, New Hampshire 03755
sbrown@newenergycapital.com

with copy to:
M. Curtis Whittaker
Rath, Young and Pignatelli, P.C.
One Capital Plaza
Concord, New Hampshire 03301-1500
(603) 226-2600
mcw@rathlaw.com
Counsel to New Energy Capital Partners,
LLC

BACKGROUND

The Yadkin Project is a hydroelectric facility managed by APGI and operated under a license granted by the Commission. APGI is a wholly owned subsidiary of Alcoa, and was formed to generate power for use at Alcoa's smelters and production facilities. The Yadkin Project affects a 38-mile section of the Yadkin River, plus tributaries, in North Carolina, and includes four dams, powerhouses and reservoirs. The North Carolina counties of Davie, Davidson, Montgomery, Randolph, Rowan and Stanly border the Yadkin Project.

FERC
P-2197-073
April 30, 2013

Page 4

APGI's predecessors⁴ built the Yadkin Project for a single purpose: to supply electricity to its expansive aluminum smelting and production facilities centered in Badin, North Carolina ("Badin" or "Badin Works").⁵ Since 1915, prior to licensing, APGI and its predecessors owned and operated dams controlling the Yadkin Rivers.⁶ In 1958, based exclusively on the power needs of its aluminum smelting operations, APGI argued for and successfully obtained a 50-year license to continue controlling the electric generating potential of the Yadkin River basin.⁷ The rationale behind APGI's 1958 license application was its claim that granting it a license would allow it to meet the power needs of its smelting operations in Badin. The Commission conducted extensive

⁴ The history of the Yadkin Project extends back to the early 20th Century, during which time ownership changed hands multiple times. The original licensee for the Project was Carolina Aluminum Company. That license was transferred to Yadkin, Inc. (also an Alcoa subsidiary), which was later folded into APGI as part of an Alcoa corporate restructuring. The Yadkin Project license was transferred from Yadkin, Inc. to APGI in 2000.

⁵ *See generally* 1958 License Order. At the time the Yadkin Project was originally licensed, Badin Works employed approximately 1,000 people. Until 2007, when Alcoa shut it down, Badin Works was the primary employer in the area.

⁶ In approximately 1915, an APGI predecessor "acquired the facilities of a French owned company which had begun construction of an aluminum smelting plant at Badin, North Carolina, and proceeded to complete construction of a plant." 1958 License Order. Two additional dams and generating facilities were installed between 1917 and 1922. On June 6, 1937, APGI's predecessor filed a notice of intent to construct a fourth dam and generator complex, at the Tuckertown location. *See id.* at *4.

⁷ In 1957, a license for the Project was granted for a period of 50 years dating from 1947 (*i.e.*, through 1997, in effect, a 40-year license). APGI's predecessor appealed, arguing that it needed the 50-year license period to commence from the date the license was issued, rather than rolling back the clock a decade to 1947. As discussed in the 1958 License Order at *7, Badin Works had not had any major upgrades since 1937, due to the uncertainty of having access to the power supply provided by the Project. APGI argued that if it received license with a full 50-year term, it would have the security to upgrade Badin Works. APGI also argued that the natural life of the smelting equipment was approximately 25 years and that, therefore, the full 50-year term was required so that it could fully depreciate the initial upgrade, and have the security to pursue a second upgrade when it became necessary at the mid-point of the license.

FERC
P-2197-073
April 30, 2013

Page 5

investigations into the viability of Alcoa's Badin Works smelting operations when issuing that license. Ultimately, the Commission concluded that:

The operations of the Badin plant of [APGI] are a useful contribution to the industrial life of the Yadkin Valley and *their continuation is greatly in the public interest*. It is apparent that assurance of this continuation depends upon the ability of [APGI] to obtain a fifty-year license for the entire Yadkin Project (Project No. 2197).⁸

On this basis, the Commission granted APGI's predecessor a license to operate the Project.

There is no question that the "comprehensive plan" underpinning APGI's Original License was for APGI to supply power to Alcoa's Badin production facilities, which the Commission recognized as critical to the region's economic vitality. Fourteen months after the Commission closed this relicensing docket to competing applications or intervenors,⁹ Alcoa idled Badin Works, ending a century of economic activity and upsetting the decades-long rationale behind APGI's Original License. Approximately two and one-half years later, APGI and its affiliates, all subsidiaries of Alcoa, announced to shareholders that Badin Works would *permanently* close and that Alcoa would fully and finally dismantle all aluminum smelting and other manufacturing facilities in North

⁸ 1958 License Order (emphasis supplied).

⁹ The deadline to intervene or submit competing applications was February 26, 2007. Notice of Application Accepted for Filing and Soliciting Motions to Intervene and Protests (Dec. 28, 2006) (available in F.E.R.C. eLibrary Docket P-2197 at <http://www.ferc.gov>).

FERC
P-2197-073
April 30, 2013

Page 6

Carolina.¹⁰ At the time, the facilities served as the primary source of employment in the area.

Although Badin Works was shuttered *after* all dates passed for competitors to intervene and compete for a license to operate the Yadkin Project, no notice was provided to the Commission regarding the repurposing of the Project. In this respect, APGI's relicensing approach stands in stark contrast to its approach with respect to the Original License, where APGI argued strenuously for a 50-year term to better accomplish its self-generation needs and ensure the continued viability of Alcoa's smelting operations. Here, APGI has been studiously silent as to its purposes in seeking a new license for the Yadkin Project and how those purposes advance the region's economic activity.

APGI's only substantive discussion of its repurposing plans for the Yadkin Project is buried in Exhibit H.2 of its relicensing application, where APGI states that any excess power from the Project may be sold into the wholesale market to offset electricity costs incurred at *other* Alcoa plants:

Currently, the Yadkin Project provides 3 to 5 megawatts (MW) of electricity directly to Badin Works for aluminum refining and other operations that still occur at the plant, with the balance being sold into the wholesale market. Whether the energy from the Yadkin Project is sold into the wholesale market or used to directly supply Alcoa's smelting facilities, access to that source of low cost power is important to Alcoa's Primary Metals Business.¹¹

¹⁰ See Alcoa Inc., Form 8-K (Apr. 4, 2010) (available through EDGAR on S.E.C.'s website at <http://www.sec.gov>).

¹¹ Yadkin Hydroelectric Project Application for License, at Exhibit H.2 (Apr. 26, 2006) (available in F.E.R.C. eLibrary Docket P-2197 at <http://www.ferc.gov>) (the "APGI New License Application").

FERC
P-2197-073
April 30, 2013

Page 7

Alcoa no longer runs a Primary Metals Business in the region. Therefore, the Yadkin Project will no longer drive industrial activity in the Yadkin Valley, nor will it produce the extended economic multipliers that arise from such activity. Rather, it will simply produce wholesale power, ensuring that North Carolinians shoulder the burdens – and enjoy very little of the benefits – of Alcoa’s updated, federally sanctioned appropriation of public water resources.

In any case, there is good reason to believe that APGI has a substantially different plan for the use of its license than what it has revealed to the Commission. Just last year, APGI executed on the final stage of its real strategy when it sold off its its Tapoco hydroelectric generating station, Project No. 2169-020 (“Tapoco” or “Tapoco Project”) to Brookfield Renewable Energy Partners for approximately \$600 million.¹² Like the Yadkin Project assets, the Tapoco Project no longer served any aluminum production, leaving APGI to auction off what Alcoa’s own press release characterizes as a *non-core business* – wholesale power generation.¹³ APGI appears poised to replicate that profit maximization strategy here.

Because Alcoa idled its Badin facilities and announced Badin’s permanent closure *after* the date for intervention closed, and because APGI never gave notice to the

¹² See Press Release, June 29, 2012, from Alcoa Inc., announcing the sale (available on Alcoa’s website at http://www.alcoa.com/global/en/news/news_detail.asp?pageID=20120629005095en&newsYear=2012).

¹³ *Id.* See also APGI’s website at http://www.alcoa.com/alcoa_energy/en/info_page/about_overview.asp (stating that “APGI exists primarily to generate, purchase or manage electricity for Alcoa’s use in its aluminum smelters and other industrial processes”).

FERC
P-2197-073
April 30, 2013

Page 8

Commission of its intent to repurpose the license in light of these changes, the Commission has not investigated or determined whether APGI's repurposing meets the requirements of the Act. It has certainly not explored whether an approach similar to that pursued with respect to the Tapoco Project would meet the public interest requirements of the Act.

ARGUMENT

NEC petitions the Commission to reopen and restart the hydropower relicensing process for the Project for two fundamental reasons. First, in the narrow circumstances of this type of relicensing proceeding, the Commission has not solicited the information, nor conducted the type of investigation, necessary to comply with the public interest standard set forth in Sections 10(a) and 15(a) of the Act. Second, based on the record of this docket, the Commission must assume that APGI breached its obligations under Section 15(b) of the Act and 18 C.F.R. §§ 16.7–16.8 to provide information to the public. The only practical remedy that both builds the factual record and addresses APGI's breach is to vacate and restart the relicensing process.

In the alternative, NEC moves for late intervention, arguing that the Commission was required to solicit intervention motions pursuant to 18 C.F.R. § 16.9(b)(3), and it failed to do so.

FERC
P-2197-073
April 30, 2013

Page 9

1. PETITION TO REOPEN AND RESTART RELICENSING PROCESS

(a) IN THE NARROW CIRCUMSTANCES OF THIS DOCKET, THE COMMISSION HAS NOT SOLICITED INFORMATION, NOR UNDERTAKEN INVESTIGATIONS, REQUIRED TO COMPLY WITH SECTIONS 10(a) AND 15(a) OF THE FEDERAL POWER ACT

This docket involves the relicensing of hydroelectric facilities that fall into a narrow subset of facilities relicensed by the Commission: *those that would be materially repurposed under a new license*. That is, this docket addresses hydroelectric projects that, as proposed by the original licensee, would serve a materially different purpose than that which formed the basis for the Original License.¹⁴ In such circumstances, the public interest standard set forth in Sections 10(a) and 15(a) of the Act requires the Commission to conduct a broad examination of any legacy issues resulting from the operation of the original licensee and the implementation of the prior “comprehensive plan,” and then examine whether and how the new purposes proposed for the hydroelectric facilities address those legacy issues.

Prior to awarding a license, Sections 10(a) and 15(a) of the Act expressly require the Commission to find that a proposal is “best adapted” to a “comprehensive plan for improving or developing a waterway”¹⁵ and to “the public interest.”¹⁶ The “public interest” standard of the Act must be “broadly defined, keeping in mind that the license

¹⁴ Whatever APGI’s plan for the Yadkin Project, there is no doubt that it is materially different than its original purpose, which was to ensure the continued long-term operation of Alcoa’s smelting operations at Badin Works. *See* 1958 License Order at *28.

¹⁵ 16 U.S.C. § 803(a)(1) (2013).

¹⁶ 16 U.S.C. § 808(a)(2) (2013).

FERC
P-2197-073
April 30, 2013

Page 10

will allow the holder ‘to appropriate water resources from the public domain.’”¹⁷ For a private entity seeking a license for purposes of *self-generation*, the public interest standard is focused largely on the economic benefits that accrue to the public from the facilities to which it supplies power.¹⁸

The original rationale for the Yadkin Project, the powering of a new and growing industry, as originally intended by the drafters of the Act,¹⁹ no longer exists. But the long-term impacts of the unwinding of that original rationale *do exist*, and they are mainly borne by the local counties and residents in North Carolina. In seeking a new license, APGI has worked hard to steer this docket clear of that reality. The Commission has, improperly, accommodated APGI in this regard, refusing to undertake a thorough examination of the relationship between the Original License’s comprehensive plan, and APGI’s rationale for a new license. If the Commission would look, we submit that it would find that the termination of Alcoa’s massive manufacturing operations in the Yadkin River basin has resulted both in extensive economic dislocations and lasting

¹⁷ *Energie Group LLC v. F.E.R.C.*, 511 F.3d 161, 163–64 (D.C. Cir. 2007) (quoting *Udall v. F.P.C.*, 387 U.S. 428, 450 (1967)).

¹⁸ The most relevant example of this is the Commission’s decision granting the Project its original license, which relied on the employment and other economic opportunities created by Badin Works as the basis for its licensing of the Yadkin Project. *See, e.g.*, 1958 License Order at *28, *46–47.

¹⁹ “By so limiting the duration for which these licenses could be granted, Congress intended to preserve for the Nation the opportunity of reevaluating the use to which each project site should be put in light of changing conditions and national goals.” S. Rep. No. 1338, 90th Cong., 2d Sess. 2–3 (1968), quoted in Policy Statement: Project Decommissioning at Relicensing, 60 Fed. Reg. 339 (Dec. 14, 1994).

FERC
P-2197-073
April 30, 2013

Page 11

environmental impacts.²⁰ Under the Act's public interest standard, the Commission cannot simply ignore those impacts and grant a licensee a new, long-term federal appropriation of public resources aimed at entirely new purposes, acting as if the two circumstances were completely unrelated.

The Act's public interest standard has been consistently construed as a broad mandate to the Commission to investigate and determine whether granting a license will benefit the public:

The grant of authority to the Commission to alienate federal water resources does not, of course, turn simply on whether the project will be beneficial to the licensee. Nor is the test solely whether the region will be able to use the additional power. The test is *whether the project will be in the public interest*.²¹

This mandate has been reinforced since 1986 in light of the changing circumstances of the nation's economy and the realities of hydropower development over time:

When the FPA was amended in 1986, Congress recognized that “[FERC] and the courts have held the Section 10(a) standard to be [a] broad public interest standard, requiring consideration of all factors affecting the public interest.” H.R. Rep. No. 99-507, at 12 (1986), as reprinted in 1986 U.S.C.C.A.N. 2496, 2499. Further, Congress explained that it intended §10(a) to provide FERC with the flexibility to weight different public-interest factors differently on a case-by-case basis, so that “as the public interest changes over time, [FERC's] considerations under the section 10(a) standard likewise change, encompassing new criteria or reevaluating

²⁰ Compare, Bureau of Labor Statistics, Labor Force Data by County, 2006 Annual Averages (reporting 5.1% average monthly unemployment in Stanly County, North Carolina in 2006, the year the Commission closed the docket to competitors and intervenors), with Bureau of Labor Statistics, Labor Force Data by County, 2010 Annual Averages (reporting 12.7% average monthly unemployment in Stanly County, North Carolina in 2010, the year Alcoa permanently closed Badin Works).

²¹ Udall v. F.P.C., 387 U.S. 428, 450 (1967) (remanding grant of hydroelectricity license to Federal Power Commission with instructions to investigate the extent to which granting a license would impact the public interest) (emphasis supplied).

FERC
P-2197-073
April 30, 2013

Page 12

the weight given established criteria.” Id. Section 10(a) does not present “an exclusive list of values FERC must evaluate and address,” but rather “highlights the steps the Commission must take to inform itself regarding the needs and uses of the river in question.” H.R. Rep. No. 99-934, at 22 (1986)(Conf. Rep.), as reprinted in 1986 U.S.C.C.A.N. 2537, 2539. Section 15(a)(2) of the FPA mandates a similar analysis with respect to the applications for new licenses.²²

Further,

[t]he Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission. The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts.²³

If APGI were proposing to continue using the Yadkin Project to supply local industrial operations and development, the Commission’s implementation of the Act’s public interest standard would be very different – the examination might justifiably be an extension of the examination under the Original License. If this were a case in which a local utility would use the licensed assets in a cost-of-service rate base, so that the benefits of the relatively low generation costs of these assets were shared with the local public, the public interest analysis would involve different and more typical factors.

Those are not the circumstances here, however, and the Act requires the Commission to *tailor its public interest examination to the reality of the situation*. In

²² Green Island Power Auth. v. F.E.R.C., 57 F. 3d 148, 167 (2d Cir. 2009) (remanding to the Commission for failure to permit late intervenor upon material amendment to license application).

²³ Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608, 620 (2nd Cir. 1965) (remanding for failure to compile a record and sufficiently study the impact of the grant of a license to a licensee).

FERC
P-2197-073
April 30, 2013

Page 13

other words, the Commission must first determine the relevant factors affecting the public interest in the specific circumstances of the case and address with a particular sensitivity the costs to the public occasioned by a substantial repurposing of a project.²⁴

In a case like this, where there is a dramatic change in the character, function and purpose of the licensed assets, the Commission must affirmatively explore the reasons underlying the change and intercede if those reasons are not “best adapted to serve the public interest.”²⁵ Thus, in order to comply with the Act, the Commission’s approval of any new comprehensive plan of development for the Yadkin Project must, of necessity, *fully address the consequences of the collapse and dismantlement of APCI’s prior comprehensive plan of development under its Original License*. It has not done so.

The Commission owes North Carolina, and especially the Yadkin River basin, an answer to these questions: How will the new comprehensive plan proposed by APCI in this docket address the legacy of the comprehensive plan approved by the Commission under the Original License, and will that new comprehensive plan meet the multiple goals of Sections 10(a) and 15(a)(2) of the Act? In this docket, the Commission has not developed sufficient grounds to answer those questions.

In order to develop those grounds, and truly implement the Act’s public interest standard, the Commission should restart the relicensing process for the Yadkin Project,

²⁴ Thus, the Act imposes additional investigatory obligations on the Commission when considering a relicensing application from an existing licensee, including any changes or actions taken that “affect the public.” 16 U.S.C. § 808(a)(3) (2013).

²⁵ 16 U.S.C. § 808(a)(2) (2013).

FERC
P-2197-073
April 30, 2013

Page 14

with a clear statement of how the Act's public interest standard will apply in this context. It should consider the closure announcements and acts of APGI after the dates of its license application filing and the deadlines for competing licenses. The Commission should invite competitors to come forward, address these changed circumstances and offer up competing plans for the use of the public resources involved in the Yadkin Project.

NEC (and we imagine others, if the docket were reopened) submits that there is only one practical way that the Yadkin Project can be "best adapted" to a comprehensive plan meeting the requirements of the Act. That approach must direct the economic value of a new federal license issued by the Commission to the very public that has been so affected by the collapse and termination of APGI's last comprehensive development plan.

Alcoa and APGI have had their run. The 50-year Original License provided APGI ample time to recover the capital costs of the Yadkin Project, and its control of the Yadkin's public resources is no longer necessary – or even convenient – to its business. The right outcome here – one that is truly consistent with the terms and intentions of the Act – is for a new applicant to pay APGI the amounts required under Section 15(a)(1) of the Act for the existing hard generation assets, and then turn over (i) the remaining economic value of the Yadkin Project assets, and (ii) the value of a new federal license and its control over North Carolina public resources, to the very public impacted by Alcoa's withdrawal from the Uwharrie/Yadkin River region. A new applicant could be

FERC
P-2197-073
April 30, 2013

Page 15

the Uwharrie Regional Resources Commission (“URRC”), or another agency of the State of North Carolina.²⁶ In the alternative, a private entity such as NEC could offer to fund the payments owed APGI under Section 15(a)(1) of the Act in return for an opportunity to operate the Yadkin Project for a limited period of time, sharing power sales revenues with the public, and eventually turning over full ownership and control to the URRC (or another appropriate public agency determined by the State of North Carolina). If given the opportunity to compete for a new license, NEC will make that offer to the URRC and State of North Carolina.

APGI wants much more than a payment under Section 15(a)(1) of the Act. As it showed with its relicensing and disposal of its Tapoco assets, APGI knows that a new federal hydropower license holds enormous market value. A new license for the Yadkin Project represents renewed authority over a public resource that, combined with the standing generation assets, would produce for APGI a *much* higher asset sale price than a Section 15(a) payment.²⁷

²⁶ North Carolina adopted the Uwharrie Regional Resources Act, N.C. GEN. STAT. ch. 153C (2010) (“URRA”), for the purpose of comprehensively addressing the multiple impacts of Alcoa’s rapidly changing interests in the Yadkin River watershed. The Uwharrie region is defined in the URRA as the area encompassed by the counties of Davidson, Davie, Montgomery, Rowan, Randolph and Stanly – the same counties bounding the Project and Yadkin River watershed. The URRA created the Uwharrie Regional Resource Commission, charged it with investigating the multifaceted economic issues affecting the Uwharrie region, and coordinating public policies among the many overlapping state and local agencies involved in the region, with an emphasis on developing and protecting regional natural and infrastructure resources. The URRA also created the Uwharrie Regional Resources Fund (the “Fund”), to finance the URRC’s activities. The URRA was enacted after the dates allowed for competing licenses in this docket, yet it represents the most comprehensive plan for addressing the legacy of Alcoa’s Commission-backed plans under the Original License for the Project.

²⁷ *Supra*, n.13 and accompanying text.

FERC
P-2197-073
April 30, 2013

Page 16

We do not fault Alcoa for pursuing that goal – profit maximization is their business. But the Commission’s obligation is to issue licenses that best serve the public interest. As it stands, APGI appears to be on the verge of converting a license that should be used *for* the public interest into an asset to be sold at the *expense* of the public interest. In other words, APGI appears to be seeking profit primarily through acquiring a new, long-term delegation of federal power to control a large public water resource, then quickly flipping it to the marketplace. That strategy does not constitute a comprehensive plan meeting the Act’s public interest standards. Under any Section 10(a) and Section 15(a) analysis, the enormous value of that federal delegation must instead be directed to the public regions that bear the real, ongoing and local burdens of Alcoa’s industrial history in the region. It must be directed in a manner designed to compensate the region for the ongoing cost of those burdens – and particularly for the ongoing costs and dislocations caused by the unwinding of the last “comprehensive plan” approved by the Commission for the Yadkin River basin.

In sum, based both on the character of this relicensing process (a complete repurposing of assets), and changes in circumstances post license application filing deadlines (the carefully timed announcements of the total closures of Alcoa’s manufacturing facilities), the Commission should reopen this relicensing docket in order to allow competitors to offer plans better adapted to the comprehensive goals and concerns of the Act.

FERC
P-2197-073
April 30, 2013

Page 17

(b) THE COMMISSION HAS NOT EXAMINED ALL RELEVANT AND PRIOR ACTIONS OF THE ORIGINAL LICENSEE, AS MANDATED BY THE ACT

In this relicensing proceeding, the Act requires the Commission to consider not only what APGI proposes to do if awarded a new license, it must also examine all relevant *prior actions of the licensee*. This includes “actions taken by the existing licensee related to the project which affect the public,”²⁸ as well as an applicant’s actions under other licenses issued by the Commission.²⁹ Despite this mandate, the Commission has not solicited information on the most important action related to the Yadkin Project and affecting the public: closure of the Badin Works smelting operation. Through careful crafting of its relicensing application, APGI has diverted the Commission’s attention away from APGI’s fundamental repurposing of the Yadkin Project.³⁰ But the Act and the Commission’s regulations are clear: substantial changes related to the Project, and APGI’s actions at other licensed projects, are relevant and must be considered as part of the relicensing proceeding.

²⁸ 16 U.S.C. § 808(a)(3) (2013); *see also* Idaho Power Co., 108 F.E.R.C. ¶ 61,125 (2004); Appalachian Power Co., 66 F.E.R.C. ¶ 61,316 (1994).

²⁹ *See Energie Group*, 511 F.3d 161, 163–64 (D.C. Cir. 2007) (holding that the Commission may deny a license where an applicant’s performance under other licenses showed it to be unfit to receive additional licenses).

³⁰ Whereas the 1958 License Order was premised largely on APGI’s predecessor’s need to self-generate low-cost power for its smelting operations at Badin Works, and obtain a license of sufficient duration to enable it to upgrade the hydroelectric facility, APGI’s relicensing application states only that “Alcoa would require a replacement source of energy that is of equal value to that being supplied by the Project in order to retain the current economics of Alcoa’s primary aluminum operation in the U.S.” APGI New License Application at Exhibit H.2.1. Noticeably absent is any discussion of local operations, or any explanation of why the Yadkin Project is “require[d] ... to retain the current economics” of Alcoa’s smelters but Tapoco (which APGI sold) was not.

FERC
P-2197-073
April 30, 2013

Page 18

By its own public admission, APCI is not an independent entity and the Yadkin Project is not part of Alcoa's core business. As we have noted, the Yadkin Project was originally built, licensed, and expanded solely to provide power to Alcoa's Badin Works smelting operation. As discussed in detail above, APCI's Original License for the Yadkin Project – *and the public interest it served* – has always been inextricably tied to the continued operation of Badin Works.³¹

Despite the Commission's recognition that the long-term operation of Badin Works is the primary public interest served by the Original License, the relicensing docket is devoid of evidence on the deep and adverse public impacts associated with Alcoa's shutdown of Badin Works. APCI assumed the Yadkin Project license from

³¹ The 1958 License Order includes specific findings by the Commission illustrating how the Yadkin Project was in the public interest because it enabled the operation and expansion of the Badin Works plant:

Upon the facts in evidence, together with the pleadings and the briefs and arguments of counsel, it is further found and concluded that:

* * *

(20) The Applicant Carolina Aluminum Company proposes to reconstruct its smelting plant at Badin to increase both its maximum capacity and its firm or continuous smelting capacity in order to increase the usefulness and efficiency of the said smelting plant, and such proposed reconstruction is expected to afford continued employment to more than 900 persons in the Badin area.

(21) The normal usefulness of aluminum smelting facilities is approximately twenty-five years and such facilities at Badin can be reconstructed, with a reasonable expectation of full utilization thereof, twice during the period covered by a fifty-year license for the hydroelectric facilities in Project No. 2197.

(22) The economic feasibility of the proposed reconstructions by the Applicant of its smelting facilities at Badin depends upon the obtaining by the Applicant of a [*47] license for fifty years, from the present time, for Project No. 2197.

(23) The public interest requires that, when a license for Project No. 2197 is issued, the said license be effective for a period of fifty years from the date of issuance.

1958 License Order at *46–47.

FERC
P-2197-073
April 30, 2013

Page 19

another Alcoa subsidiary (Yadkin, Inc.) in 2000 following a corporate restructuring within Alcoa.³² If the Commission were to examine all relevant actions of the licensee, it would find that two years later, Alcoa began scaling back production at Badin Works. It idled the plant in August 2007, and on March 30, 2010, Alcoa “approved the permanent shutdown and demolition” of Badin Works.³³ The Commission would find that high local unemployment and widespread natural resource damage remain the primary legacies of the Badin Works shutdown.³⁴

But the Commission’s examination of APCI’s past actions, as mandated by the Act, cannot stop at the Yadkin Project. Yadkin is not the first hydroelectric project that APCI has repurposed. APCI’s strategy for Yadkin was demonstrated in APCI’s actions at its Tapoco Project. Like Yadkin, Tapoco was first licensed by the Commission in the 1950s under a 50-year license.³⁵ Its singular purpose at the time of relicensing was to support Alcoa’s smelting operations at the company’s plants in Alcoa, Tennessee (the “Tennessee Operations”).³⁶ It had no external customers. APCI applied for a new license in February 2003, which the Commission awarded on January 25, 2005.³⁷

³² See Order Granting Waiver and Approving Transfer of License, 92 F.E.R.C. ¶ 62,029 (July 17, 2000) (available in F.E.R.C. eLibrary Docket P-2197 at <http://www.ferc.gov>).

³³ See Alcoa Inc., Form 8-K (Apr. 4, 2010) (available through EDGAR on S.E.C.’s website at <http://www.sec.gov>).

³⁴ See *supra*, n.24 and accompanying text.

³⁵ See Order Approving Settlement and Issuing New License, 110 F.E.R.C. ¶ 61,056 (Jan. 25, 2005) (available in F.E.R.C. eLibrary Docket P-2169 at <http://www.ferc.gov>).

³⁶ *Id.*

³⁷ *Id.*

FERC
P-2197-073
April 30, 2013

Page 20

Yet in March 2009, Alcoa shuttered its Tennessee Operations, laying off 450 workers.³⁸ With a newly-minted 40-year Commission license, and no need for self-generation, APGI in November 2012 sold the Tapoco plant for nearly \$600 million in cash.³⁹ APGI clearly understands that the true value of a license it does not need for a hydropower facility it does not want (given its status as a “non-core business”) is the resale value that Commission license has in the open market. In the case of Tapoco, that license ensured a financial gain for Alcoa of approximately \$320 million.⁴⁰ APGI’s actions at Tapoco are very relevant in this docket because they cut through any protestations from APGI and lay bare its basic goal – to acquire a new, long-term federal license allowing control over a public resource, and to flip that license to the market for an immediate and large profit.

APGI secured a new license for Tapoco before the Tennessee Operations shut its doors. Here, however, the Commission has the advantage of knowing that APGI has done so prior to issuing its decision, and that (i) the smelting plant that Yadkin served is forever closed, (ii) power generation is, by its own public announcements, treated as a “non-core” business by Alcoa, and (iii) the Yadkin Project’s market value is substantially enhanced if APGI secures a new license prior to sale. We are not asking the Commission

³⁸ See Alcoa Inc., Form 10-K for the Fiscal Year Ended December 31, 2009 (available through EDGAR on S.E.C.’s website at <http://www.sec.gov>).

³⁹ See Alcoa Inc., Form 10-K for the Fiscal Year Ended December 31, 2012 (available through EDGAR on S.E.C.’s website at <http://www.sec.gov>).

⁴⁰ *Id.*

FERC
P-2197-073
April 30, 2013

Page 21

to pass judgment on Alcoa's decision to close Badin Works or Tennessee Operations.

However, the Act *demand*s that the Commission take those decisions into account before issuing a new license.

APGI's strategic disposal of its Tapoco assets illustrates the connection between Alcoa's smelting operations and its power generation assets, a connection that the Commission itself acknowledged when issuing the Yadkin Project's Original License. Before granting a decades-long license worth hundreds of millions to a proposal with no demonstrable ties to the public interest, the Commission must adhere to the Act's mandate to investigate APGI's past actions, both at Badin and Tapoco, *and explain to the public, in no uncertain terms, why the public interest is best served by allowing APGI to do at Yadkin what it did at Tapoco.*

The arguments here in (b) support those in (a) above regarding the Act's public interest standard. The Act's specific direction to examine the past acts of an applicant for relicensing, both at the relevant project and elsewhere, is a specific aspect of the more general public examination mandated by the Act. In both the general and specific case, the Commission has not undertaken the investigations, identified the factors, nor weighed the competing interests such that it has grounds to support any decision consistent with the Act's public interest standard.

Again, reopening the docket, and allowing a full competition among comprehensive plans that only now can take account of APGI's past actions at Badin and

FERC
P-2197-073
April 30, 2013

Page 22

Tapoco, is the only realistic means to adequately solicit the information needed to meet the public interest standard, and weigh the potential outcomes and their affect on the public interest over the next fifty years.

(c) INCORRECT INFORMATION SUBMITTED BY APGI IN THIS DOCKET, AND MADE AVAILABLE TO THE PUBLIC PURSUANT TO COMMISSION REQUIREMENTS, REQUIRES THE COMMISSION TO BEGIN THE RELICENSING PROCESS AGAIN

The Act's and the Commission's regulations requiring extensive disclosure of essential project information are predicated on an applicant submitting correct and complete documents, but the veracity of APGI's filings in this docket are at issue. This undermines the free-market competition that the Act seeks to create for hydroelectric licenses. The only practical remedy is to reopen the docket to competitive applications.

On May 9, 2009, the North Carolina Department of Environment and Natural Resources ("NC DENR") issued a 401 Water Quality Certificate (the "Certificate") for the Project. In a rare move, the agency was forced to *revoke* that Certificate on grounds that information submitted by APGI was "incorrect" and the company "intentionally withheld" material information.⁴¹ Rather than contest the NC DENR's findings, APGI moved for (and was granted) a dismissal without prejudice of its appeal of the Certificate revocation. On September 28, 2012, it filed a new Certificate application. Thus, NC

⁴¹ See Revocation Letter, from NC DENR to APGI (Dec. 1, 2010) (available in F.E.R.C. eLibrary Docket P-2197 at <http://www.ferc.gov>).

FERC
P-2197-073
April 30, 2013

Page 23

DENR's finding that APGI *intentionally withheld material information* from the agency and the public stands as a matter of public record.

NC DENR's finding calls into question all information submitted or created by APGI in connection with this docket, including information required to be made available to the public under Section 15(b) of the Act and 18 C.F.R. §§ 16.7–16.8. Given that NC DENR was forced to reopen and redo, from the beginning, its Certificate proceedings, there is a pressing need for the Commission to reopen its own docket to allow interested parties a full and fair opportunity to review and test all information provided by APGI. Moreover, upon re-evaluating APGI's revised and corrected application, the Commission must take into account APGI's history of submitting incorrect information and intentionally withholding information from government agencies.

The central purpose behind Section 15(b) of the Act and the Commission's regulations at 18 C.F.R. §§ 16.7–16.8 is to encourage an open and competitive relicensing proceeding. It is impossible to gauge the extent to which APGI's failure to disclose accurate and complete information discouraged other would-be applicants from pursuing a new license for the Yadkin Project, or persuaded potential parties not to intervene. The only remedy under these circumstances is to follow NC DENR's lead and reopen the docket.

FERC
P-2197-073
April 30, 2013

Page 24

2. GOOD CAUSE SHOWN FOR LATE INTERVENTION

NEC alternatively requests that it be permitted to intervene in this docket.

Pursuant to Rule 214, in requesting late intervention, NEC must (i) state “the position taken by the petitioner and the basis in fact and law for that position” and (ii) a sufficient interest in the proceeding.⁴² NEC also must show good cause why the time limitation for intervention should be waived.⁴³

NEC’s interest in this proceeding is as a “Competitor” to APGI pursuant to Rule 214(3)(ii)(C). NEC, through private equity funds it manages, invests in renewable energy projects and facilities. NEC’s investments can be viewed at www.newenergycapital.com.

Here, our interest is to restart the relicensing process in this docket, or advocate for docket resolution that better implements a comprehensive plan of development *that will turn over control of the Yadkin Project assets and Commission license to the Uwharrie Regional Resources Commission, or another public instrumentality designated by the State of North Carolina*. The Yadkin Project assets utilize public resources of North Carolina, and for the reasons set forth herein, in order to fully comply with Sections 10(a) and 15(a)(2) of the Act, the benefit of that use, and control over future watershed development, *must* be effectively returned to the North Carolina public. NEC’s competitive interest is in offering financing to assist in achieving that transfer.

⁴² See 18 C.F.R. § 385.214(b)(1–2) (F.E.R.C. e-CFR 2013).

⁴³ See 18 C.F.R. § 385.214(b)(3) (F.E.R.C. e-CFR 2013).

FERC
P-2197-073
April 30, 2013

Page 25

Under the facts described here, NEC's competitive interest could not have been pursued, or even cogently described, during the period originally allowed for competitive relicensing applications for this Project, which closed on June 26, 2006, the original deadline for competitors to intervene.⁴⁴ Since that time, circumstances have arisen that give the Commission cause to either (i) reopen and restart the relicensing process for the Yadkin Project, or (ii) condition any license issued to APGI in order to meet the public interest standard imposed on the Commission by the Act. NEC could not have known about APGI's repurposing of the Yadkin Project prior to March 2010, when Alcoa voted to demolish the Badin Works plant.

Similarly, NEC could not have known that the information about this Project disclosed by APGI to governmental authorities in this docket was incomplete and inaccurate prior to NC DENR's revocation of the 401 Water Quality Certificate in December 2010. Finally, and perhaps most importantly, the URRRA was enacted in 2010, after the date for timely intervention here. Only since enactment of the URRRA has the opportunity existed for proposing a full public/private partnership approach in which an entity such as NEC could formulate, with public officials, a comprehensive plan for the Yadkin River watershed designed to return the multiple values of that watershed to the very people that lent them (by order of this Commission) to Alcoa for so many years.

⁴⁴ *Supra*, n.9 and accompanying text.

FERC
P-2197-073
April 30, 2013

Page 26

All of these key events occurred well after the date for timely intervention in this docket passed and provide good cause for allowing an out of time intervention by NEC.

In addition to the late factual developments just described, material amendments to APGI's application give rise to an *obligation* to solicit motions to intervene. Most notably, no opportunity to intervene was offered following APGI's submission on May 7, 2007 of the Relicensing Settlement Agreement ("RSA"). The RSA purports to resolve nearly "all of the outstanding issues associated with relicensing the Yadkin Project."⁴⁵ Reaching this proposed resolution, however, required APGI to allocate consumptive water rights to the City of Abemarle ("Abemarle"). Specifically, Section 2.8.1 of the RSA increases Abemarle's maximum allowable withdrawals to 30 million gallons per day ("MGPD") and eliminates the surcharge for withdrawals under eleven MGPD.

APGI is certainly entitled to negotiate with stakeholders to buy their consent, but in the narrow instance of a consumptive water rights give-away, the result is a material change under 18 C.F.R. § 4.35(f)(1). Water scarcity is a well-documented challenge facing many communities in North Carolina.⁴⁶ Granting one community greater consumptive rights, outside of any comprehensive plan addressing the needs of other affected communities, has foreseeable impacts on the size and/or elevation of the downstream reservoirs, as well as "adverse environmental impacts not previously

⁴⁵ Cover letter from David Poe, counsel for APGI, accompanying Relicensing Settlement Agreement (May 7, 2007) (available in F.E.R.C. eLibrary Docket P-2197 at <http://www.ferc.gov>).

⁴⁶ See North Carolina Drought Management Advisory Council, <http://www.ncdrought.org>.

FERC
P-2197-073
April 30, 2013

Page 27

discussed in the original application.”⁴⁷ Moreover, giving away consumptive water rights under the RSA affects “irrigation, flood control, water supply, and recreational and other purposes,” which are criteria the Commission must consider under Section 10(a) of the Act when determining whether a project is “best adapted” to the public interest.⁴⁸

It also calls into question the legal ability of a federal licensee to affirmatively allocate consumptive water rights in North Carolina. This is a very significant issue, involving the relationship of the Act to state consumptive water laws, and yet it has not been taken up by the Commission in reviewing the RSA. If left unchallenged, the RSA could be understood as a precedent for overriding federal control of North Carolina’s consumptive water uses – a dramatic change in the nature of this proceeding.

The Commission’s Rules require that upon any material amendment to an application for a new license, the agency must reissue public notice and seek comments, interventions and protests.⁴⁹ Failure to do so is reversible error.⁵⁰ Although the Commission noticed the RSA and solicited comments, that notice only allowed participation by *existing* intervenors.⁵¹ It did not, as it should have, solicit *new* parties to intervene. Especially in light of the significant factual developments occurring since the

⁴⁷ 18 C.F.R. § 4.35(f)(1) (e-CFR 2013).

⁴⁸ 16 U.S.C. 803(a)(1) (2013).

⁴⁹ 18 C.F.R. § 16.9(b)(3) (e-CFR 2013).

⁵⁰ See, e.g., *Green Island Power Auth.*, 577 F.3d 148 (2d Cir. 2009).

⁵¹ See Notice of Settlement Agreement and Soliciting Comments (May 17, 2007) (available in F.E.R.C. eLibrary Docket P-2197 at <http://www.ferc.gov>).

FERC
P-2197-073
April 30, 2013

Page 28

Commission closed the docket to competing licensing applications, it would be prejudicial error to deny NEC intervention. As described, NEC's interest in this matter is as a competitor, and as such we would use our participation in the docket to present evidence regarding an alternative plan that the Commission should consider as part of its "best adapted" analysis under Sections 10(a) and 15(a) of the Act. Regardless whether the Commission reopens the docket, which NEC maintains it must, courts have found such evidence relevant to the Commission's determination and necessary to develop a complete factual record.⁵²

3. CONCLUSION

NEC represents interests not yet represented by any other party to the proceeding. NEC represent an interest which may be directly affected by the outcome of the proceeding as required by Rule 214(b)(2)(ii).⁵³

Accordingly, taking all of the above factors into consideration, NEC respectfully requests (i) late intervention be granted in this proceeding pursuant to Rule 214(d)⁵⁴; (ii) that the Commission reopen the relicensing process for the Yadkin Project, and provide the public with adequate notice and a reasonable period of time to compile and submit competing license applications that, by adapting themselves to the URRRA, address

⁵² See, e.g., *Green Island Power Auth.*, 577 F.3d 148 (2d Cir. 2009) (holding that the Commission must consider a competing feasible alternative, "even where it ultimately cannot license those alternatives"); see also *Scenic Hudson Preservation Conference v. F.P.C.*, 354 F.2d 608 (2d Cir. 1965).

⁵³ 18 C.F.R. § 385.214(b)(2)(ii) (e-CFR 2013).

⁵⁴ 18 C.F.R. § 385.214(d) (e-CFR 2013).

FERC
P-2197-073
April 30, 2013

Page 29

the legacy economic and environmental impacts left by the current licensee; and

(iii) provide such other relief as the Commission may deem proper.

Respectfully submitted this 30th day of April, 2013.

/s/ M. Curtis Whittaker

M. Curtis Whittaker
Jill Dinneen
Rath, Young and Pignatelli, P.C.
One Capital Plaza
Concord, New Hampshire 03301-1500
mcw@rathlaw.com
Counsel to New Energy Capital Partners, LLC

cc: Service list

FERC
P-2197-073
April 30, 2013

Page 30

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Concord, New Hampshire, this 30th day of April, 2013.

/s/ Jill Dinneen

Jill Dinneen
RATH, YOUNG AND PIGNATELLI, P.C.
1 Capital Plaza
Concord, NH 03301
603-226-2600
mcw@rathlaw.com
COUNSEL TO NEW ENERGY CAPITAL, LLC

FERC
P-2197-073
April 30, 2013

Page 31

Service by Mail

Fred Adkins
270 Marion Brown Trl
Salisbury, NC 28146-5016

Clerk of Court
140 S Main St
Mocksville, NC 27028

Lou Adkins
270 Marion Brown Trl
Salisbury, NC 28146-5016

Gaither Walser
Brinkley Walser, PLLC
10 Lsb Plz
Lexington, NC 27292-3393

Gene Ellis
Alcoa Power Generating Inc.
PO Box 576
Badin, 28009-0576

Ronnie Lee Qualkenbush
156 Stratford Rd
Lexington, NC 27292-9650

Max W Laun
Alcoa Power Generating Inc.
201 Isabella St
Pittsburgh, PA 15212-5858

Mark Tyson
President
Sandhills Rod and Gun Club
340 Grey Fox Road
Ellerbe, NC 28338

Charles T Steinman, MD
Animal Care Center of Salisbury
1500 E Innes St
Salisbury, NC 281466009

Dick Christie
SCDNR
1771-C Highway 521 By-Pass South
Lancater, SC 29720

Richard Blase
177 NC Highway 42 N Ste A
Asheboro, NC 27203-7955

Jim L Shuping
755 Riverwalk Dr
Salisbury, NC 281465020

Legal Department
Carolina Power & Light Company
PO Box 1551
Raleigh, NC 27602-1551

Henry D McMaster
SC Office of Attorney Gen.
PO Box 11549
Columbia, SC 29211-1549

FERC
P-2197-073
April 30, 2013

Page 32

Service by eServe

Andy Lucas
alucas@co.stanly.nc.us

Larry Jones
hrla@bellsouth.net

Prescott Brownell
prescott.brownell@noaa.gov

Neil Robinson
nrobinson@npj.com

David Bernhart
david.bernhart@noaa.gov

Marc Bernstein
mbernstein@ncdoj.gov

Miles Croom
Miles.Croom@noaa.gov

Donald Laton
dlaton@ncdoj.gov

Gerrit Jobsis
gjobsis@americanrivers.org

Jim Mead
Jim.Mead@ncmail.net

John Seebach
jseebach@americanrivers.org

Christopher J. Goudreau
chris.goudreau@ncwildlife.org

Philip Marston
client.admin@marstonlaw.com

Todd Ewing
todd.ewing@ncwildlife.org

Linda Flounders Bell
LBell@carolina.rr.com

Paul F. Shiers
shiers@pbworld.com

Julie Gantenbein
jgantenbein@waterpowerlaw.com

Neil Robinson
nrobinson@npj.com

Richard Roos-Collins
rrcollins@waterpowerlaw.com

James Hancock
jhancock@balch.com

V. Tinsley
rtinsley@brookspierce.com

Richard Roos-Collins
rrcollins@waterpowerlaw.com

Guy Cornman
gcornman@co.davidson.nc.us

Robert Petree
pete@savehighrocklake.org

John Whittaker
jwhittaker@winston.com

Mullen Taylor
mullentaylor@earthlink.net

Jeffrey G. Lineberger
Jeff.Lineberger@duke-energy.com

Robert Edward Duncan
duncane@dnr.sc.gov

Michael Kurman
kurman.michael@arentfox.com

Julie McIntyre
mcintyjf@dhec.sc.gov

FERC
P-2197-073
April 30, 2013

Page 33

Larry Turner
turnerle@dhec.sc.gov

Jason Walser
jason@landtrustcnc.org

Hank Stallworth
hstallwo@gov.state.sc.us

Eric Krueger
ekrueger@tnc.org

Rebecca J. Baldwin
rebecca.baldwin@spiegelmc.com

Ann Brownlee
ann.brownlee1@gmail.com

Frances Francis
frances.francis@spiegelmc.com

Gerald Thornton
gatwildcat@aol.com

William Huang
william.huang@spiegelmc.com

Mark D. Bowers
mark_bowers@fws.gov

E Service
eService@spiegelmc.com

David Poe
david.poe@bglp.com

Jaison Hicks
fhicks@ncdoj.gov

Nancy Gottovi
nancy@centralparknc.org

Document Content(s)

2014-01-21 cover ltr FERC supplement P-2197-073.DOC.....1-1
FOR FILING - Petition Supplement 1-21.DOCX.....2-24
ATTACHMENT - copy of final Petition 4-30-13.PDF.....25-57