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October 4, 2012

Ms. Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
Mail Code: DLC, HL-11.2  
888 First Street, N.E.  
Washington, DC 20426

Re: Yadkin Project P-2197-073

Dear Ms. Bose:

Please be advised that on September 27, 2012, upon motion by Alcoa Power Generating Inc. ("APGI"), Administrative Law Judge Webster entered the attached order dismissing without prejudice APGI's appeal of the December 1, 2010 revocation of its Water Quality Certification ("WQC") by the Division of Water Quality of the North Carolina Department of Environment and Natural Resources ("NC DWQ"). The WQC had been issued by NC DWQ on May 7, 2009, and appeals of it by APGI, Stanly County, North Carolina and the Yadkin Riverkeeper remain stayed before the North Carolina Office of Administrative Hearings. On September 28, 2012, APGI filed with DWQ a new application for a WQC for the Yadkin Project in connection with the application for a new project license that remains pending in the above-referenced docket and sub docket.

Respectfully submitted,

/s/ David R. Poe  
David R. Poe

*Counsel for Alcoa Power Generating Inc.*

STATE OF NORTH CAROLNA  
COUNTY OF WAKE

Filed

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
2012 SEP 27 PM 3:21  
IT EHR 00934

ALCOA POWER GENERATING INC  
Petitioner,

) Office of  
) Administrative Hearings

v.

) ORDER OF DISMISSAL WITHOUT  
) PREJUDICE PURSUANT  
) TO NCGS. 41(a)(2)

DIVISION OF WATER QUALITY,  
NORTH CAROLINA DEPARTMENT  
OF ENVIRONMENT AND NATURAL  
RESOURCES,

Respondent,

v.

STANLY COUNTY, NORTH CAROLINA,  
Respondent-Intervenor

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THIS MATTER came before the Honorable Administrative Law Judge Joe L. Webster during a August 21, 2012 status conference at which Petitioner Alcoa Power Generating Inc. ("APGI") was represented by Charles D. Case, Esq. and Rene P. Tatro, Esq.; Respondent Division of Water Quality, Department of Environment and Natural Resources ("DWQ") was represented by Special Deputy Attorneys General Mary L. Lucasse and Kathryn Jones Cooper and Assistant Attorney General Donald W. Laton; and Respondent-Intervenor Stanly County, North Carolina ("Stanly Co.") was represented by Thomas N Griffin, III. The Parties agreed to an expedited briefing schedule and Petitioner filed a Motion on August 28, 2012 for an order dismissing this matter without prejudice under both Rule 41(a)(2) of the N.C. Rules of Civil Procedure, G.S 150B-32(c) and 26 NCAC 03.0115(a) and 03.0101(b) . Respondent DWQ filed its Opposition to the Motion on September 4, 2012, and Respondent-Intervenor informed the Court by email on August 31, 2012 that it did not intend to file a response to APGI's motion and

took no position on the Motion. Supplemental briefing was submitted by Petitioner and Respondent on or before September 25, 2012 in response to certain questions posed by the Court in an email dated September 18, 2012.

After a thorough review of the briefs submitted and upon consideration of the arguments of counsel, the Court **HEREBY FINDS AS FOLLOWS:**

Since May 2009 Petitioner and Respondent, "DWQ" have been engaged in litigation regarding the issuance of a Water Quality Certification by Respondent Division of Water Quality ("DWQ"). The instant contested case was filed by AGPI on January 28, 2011 ("Revocation Appeal") appealing the letter issued by Respondent Division of Water Quality ("DWQ") on December 1, 2010 purporting to revoke the Water Quality Certification that DWQ had issued to APGI on May 7, 2009 based on alleged errors in the prior request for certification concerning dissolved oxygen ("DO") enhancement at the four hydroelectric dams APGI owns and operates on the Yadkin River (the "Yadkin Project")

The undersigned finds as a matter of law that the Office of Administrative Hearings is authorized to rule on the instant prehearing motion pursuant to NCGS 150B-33(b)(3)(a), which allows ALJ to rule on all prehearing motions that are authorized by G.S. 1A-1, Rules of Civil Procedure. For the forgoing reasons, the undersigned grants the Motion to Dismiss Without Prejudice pursuant to NCGS 41(a)(2).

1. The undersigned finds that the Motion has been submitted in good faith.
2. That Petitioner's concern regarding whether it will be able to re-file it's Petition after once dismissing it are legitimate based upon Respondent's "practice and policy" on procedural grounds of refusing to consider a new application while a prior

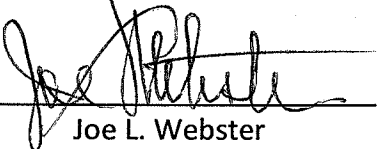
application is "pending." Respondent's practice and policy is not promulgated by Statute or Rule. The undersigned finds as a fact that just prior to the time the December 21, 2010 "Stay Order" regarding the May 2009 Petition was entered by the undersigned, the parties and undersigned contemplated and discussed in chambers the possibility that the May 2009 contested case being stayed may have to be litigated to conclusion depending on the outcome of the instant revocation appeal. The last Stay Order dated June 17, 2012 regarding the May 2009 Petition, states, "The hearing of this matter is continued, and further proceedings are stayed, until the revocation appeal is resolved."

3. The possibility that "dual track" litigation may somehow be used as a sword by Respondent to defeat justice, with the concomitant litigation costs involved in overcoming such an argument, may serve to prejudice Petitioner's rights.
4. The undersigned takes official notice and Respondent admits in its Supplemental Submission in opposition to APGI's Motion for an Order dismissing the Petition without prejudice, that attorneys representing the State of North Carolina have taken the position that provisions set forth in Rule 41(a)(1) and (a)(2) allowing Petitioner to file a new claim based on the same action within one year of dismissing the first cause without prejudice does not extend the statute of limitations contained in Section 150B023(f). OAH ALJS have routinely granted such motions to dismiss without prejudice.

5. The undersigned finds as a fact and as a matter of law that the interests of both parties are protected by this Order and the undersigned finds that Respondent has not shown that it would or could suffer harm by the Motion being granted.
6. This order is based solely upon the facts set forth in this order, and therefore there should be no confusion about the facts upon which the undersigned relied in granting the Motion.
7. Therefore, the undersigned finds for good cause shown justice requires the Court to exercise its discretion to dismiss this action without prejudice pursuant to Rule 41(a)(2).
8. The Petitioner shall have one year from the date of this Order to re-file its Petition based upon the same claim should it elect to do so. NCGS 41(a)(2).

IT IS SO ORDERED.

This the 27<sup>th</sup> day of September, 2012.

  
\_\_\_\_\_  
Joe L. Webster  
Administrative Law Judge

On this date mailed to:

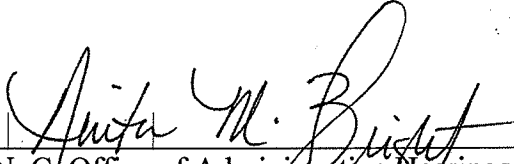
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This the 27th day of September, 2012.

  
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N. C. Office of Administrative Hearings  
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Raleigh NC 27699-6714  
919 431 3000  
Facsimile: 919 431 3100

**CERTIFICATE OF SERVICE**

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, I hereby certify that I have this day served a copy of the foregoing on all persons designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 4th day of October, 2012.

/s/ *Elisabeth M. Drabkin*

Elisabeth M. Drabkin

Document Content(s)

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