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January 28, 2011

BY ELECTRONIC FILING

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

Re: Alcoa Power Generating Inc., Project No. 2197-073

Dear Secretary Bose:

In a letter filed in the captioned proceeding on December 7, 2010, Alcoa Power Generating Inc. ("APGI") notified the Commission that APGI intended to take appropriate legal steps to contest the issuance by the Division of Water Quality of the Department of Environment and Natural Resources of the State of North Carolina of the December 1, 2010 Notice of Revocation of 401 Water Quality Certification with respect to APGI's Yadkin Project, P-2197 (the "Notice of Revocation") and to address the significant errors of fact and law contained therein. Please be advised that earlier today, APGI filed the enclosed Petition for a Contested Case Hearing with the North Carolina Office of Administrative Hearings to contest the issuance of the Notice of Revocation.

Respectfully submitted,

/s/ David R. Poe

David R. Poe

Counsel to Alcoa Power Generating Inc.

Enclosure

cc: All Parties

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PLEASE PRINT CLEARLY OR TYPE

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

COUNTY OF WAKE

Alcoa Power Generating Inc.,

PETITIONER,

v.

Division of Water Quality, North Carolina Department of
Environment and Natural Resources,

RESPONDENT.

2011 JAN 28 PM 2:00

OFFICE OF
ADMIN HEARINGS

**PETITION
FOR A
CONTESTED CASE HEARING**

I hereby ask for a contested case hearing as provided for by North Carolina General Statute § 150B-23 because the Respondent has:

Unlawfully revoked a Water Quality Certification issued to Alcoa Power Generating Inc. (APGI) pursuant to § 401 of the Clean Water Act and related rules, in violation of those rules and the Administrative Procedure Act (see attached page, which is incorporated by reference, for additional description of claims).

(5) Because of these facts, the State agency or board has: (check at least one from each column)

- ☒ deprived me of property;
☐ ordered me to pay a fine or civil penalty; or
☒ otherwise substantially prejudiced my rights;

AND

- ☒ exceeded its authority or jurisdiction;
☒ acted erroneously;
☒ failed to use proper procedure;
☒ acted arbitrarily or capriciously; or
☒ failed to act as required by law or rule.

Date: January 28, 2011

Phone number: (919) 899-3032

One Bank of America Plaza, 421 Fayetteville Street/P.O. Box 109, Raleigh, NC 27602

(street address/p.o. box)

(city)

(state)

(zip)

Print your name: Craig A. Bromby, Esq.

Your signature: Craig A. Bromby

You must mail or deliver a **COPY** of this Petition to the State agency or board named on line (3) of this form. You should contact the agency or board to determine the name of the person to be served.

CERTIFICATE OF SERVICE

I certify that this Petition has been served on the State agency or board named below by depositing a copy of it with the United States Postal Service with sufficient postage affixed **OR** by delivering it to the named agency or board:

Mary Penny Thompson, Esq.
1617 Mail Service Center
Raleigh, NC 27604

Department of Environment and Natural Resources
1617 Mail Service Center
Raleigh, NC 27604

This the 28th day of January, 2011.

Craig A. Bromby
Craig A. Bromby, Esq.

When you have completed this form, you **MUST** mail or deliver the **ORIGINAL AND ONE COPY** to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

Attachment to Petition - Additional Description of Claims

I. Background

By letter dated December 1, 2010 (Revocation Letter), Respondent Division of Water Quality, Department of Environment and Natural Resources (DWQ) purported to revoke § 401 Water Quality Certification No. 003173 (401 Certification) which DWQ had issued to Petitioner Alcoa Power Generating Inc. (APGI) pursuant to § 401 of the federal Clean Water Act and related rules, including DWQ's rules regarding such certifications, as codified at 15A NCAC 2H.0500 ("NC 401 Rules"). This revocation was arbitrary and capricious, in excess of DWQ's authority and jurisdiction, erroneous, and not in accord with proper procedure, law, or rule, and is otherwise unlawful, because, among other reasons, it violated the explicit procedural requirements of N.C.G.S. § 150B-3 and is not in compliance with the NC 401 Rules, for the reasons, among others, that the information contained in APGI's application and supporting materials was neither materially incomplete nor inaccurate, such that DWQ possessed all information it needed when it issued the 401 Certification, including the 401 Certification provisions concerning actions to enhance levels of dissolved oxygen.

APGI is the owner and operator of the Yadkin Project, a series of four reservoirs and hydroelectric dams on the Yadkin River. The Yadkin Project has been operated by APGI for decades, pursuant to licenses issued by the Federal Energy Regulatory Commission (FERC). The original FERC license expired in 2008 (but the project has operated on annual licenses since that time), and APGI has applied for another 50-year license to operate the Project. In order to receive this new FERC license, APGI was required to seek the 401 Certification from DWQ that the licensed activity will not violate the federal Clean Water Act. An order conditionally granting the 401 Certification was issued on May 7, 2009, and was immediately challenged by several petitioners. See 09 EHR 3078, 09 EHR 3179, and 09 EHR 4092 (consolidated) ("401 Certification Appeals"). Among the claims of the petitioners in the 401 Certification Appeals were claims that included whether the Project met State water quality standards for dissolved oxygen concentrations. With the issuance of the Revocation Letter, the 401 Certification Appeal has been stayed.

II. Procedural Errors

A. DWQ violated the revocation requirements of the APA

Section 150B-3(b) of the Administrative Procedure Act ("APA") requires that "[b]efore the commencement of proceedings for the suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of any license," the agency is required to "give notice to the licensee, pursuant to the provisions of G.S. 150B-23." N.C. Gen. Stat. § 150B-3(b) (emphasis added). Section 150B-2(3) of the APA defines a "license" as "any certificate, permit or other evidence, by whatever name called, of a right or privilege to engage in any activity . . ." The 401 Certificate is a "license" within the meaning of N.C. Gen. Stat. § 150B-2(3) and 150B-3(b), and, as such, DWQ in issuing the Revocation Letter was required to meet the requirements of N.C. Gen. Stat. § 150B-3(b), as well as the NC 401 Rules, but failed to do so. In issuing the Revocation Letter and revoking the 401 Certificate, DWQ acted contrary to both the APA and the NC 401 Rules.

Prior to issuing the Revocation Letter, Respondent failed, among other things, to (1) provide APGI with any notice of the commencement of any proceeding for the revocation of the 401 Certification, and (2) commence or hold any such proceeding. Instead, DWQ issued the Revocation Letter without providing APGI any proper or adequate opportunity to show compliance with all lawful requirements for retention of the 401 Certification, and why the 401 Certification should not be revoked. Because the Revocation Letter completely fails to comply with the express requirements of N.C.G.S. § 150B-3(b), the Revocation Letter is utterly void and without effect.

B. Discussions with DWQ do not rectify the agency's violation of N.C. Gen. Stat. § 150B-3(b)

After APGI was informed that DWQ was considering revoking the 401 Certification, but before the Revocation Letter was issued, APGI repeatedly requested an opportunity to meet with DWQ to provide information showing that the 401 Certification should not be revoked. However, APGI efforts were rebuffed prior to the issuance of the Revocation Letter. Only after the Revocation Letter was issued did DWQ meet with APGI representatives. This meeting met neither the letter nor the spirit of § 150B-3(b).

Because DWQ failed to conduct a hearing pursuant to section 150B-3(b), it did not have before it a complete record on which to base a revocation decision. As a result, it made an erroneous decision based on false assumptions that material information was not disclosed to DWQ prior to the issuance of the 401 Certification. The complete record discloses those erroneous assumptions and further reveals no actual problems with the technology installed to increase the levels of dissolved oxygen ("DO") in the water flowing through the dams, or with the technology yet to be installed pursuant to the 401 Certification. DWQ's action, taken without a hearing, meant that DWQ acted without properly taking into account all of the relevant facts prior to its determination. The statute is designed to avoid precipitous action by a state agency based on a misapprehension or incomplete understanding of the facts and to assure that licensees are not deprived of a substantial right and property interest without an adequate opportunity to be heard prior to revocation of a permit or certificate. The revocation, as well as the prejudicial use of quotations and language in the Revocation Letter, has deprived APGI of its right to demonstrate before the decision was made that revocation was unwarranted. In so doing, DWQ has violated the very protections § 150B-3(b) affords.

III. Substantive Errors

In the Revocation Letter, DWQ quotes excerpts from five e-mails and concludes that the 401 Certification was issued based on incomplete or inaccurate information, which DWQ claims was intentionally withheld. In so doing, the Revocation Letter does not meet the requirements of the APA or the NC 401 rules, including, without limitation, 15A NCAC 2H.0507(d). To the contrary, the e-mails make it clear that DWQ is referring to meeting DO standards during periods of low water flow through APCI's turbines at minimal electric power generation levels, especially in the tailwaters of Narrows dam. In fact, equipment that APCI has already installed increases DO levels across the entire range of operations, including specifically low-flow, minimal electric power generation operations. That the existing and upgraded technologies would operate to enhance DO across the range of operations was borne out in the information provided to DWQ and others throughout the 401 Certification application process and prior to the issuance of the 401 Certification. Moreover, APCI did not withhold material information that was needed by DWQ to protect the environment and assure DO standards will be met. By May 7, 2009, there was ample evidence – based on the actual installation and operation of the DO enhancement systems at the Narrows turbine units – that the technologies would work as expected to achieve DO standards at the Narrows tailraces. DWQ, in purporting to revoke the 401 Certification, failed to consider a complete record, and, as a consequence of that failure, assumed something to be true which never was. It then acted upon that considerable and avoidable error.

A. DO enhancement technologies at Narrows effectively enhance DO in the tailwaters at all rates of operation, including low-flow conditions

DWQ was fully involved in the process for developing a new license proposal for the Yadkin Project from FERC. During that process, all parties were provided information that showed that the DO enhancement technologies utilized in the Narrows powerhouse effectively elevated DO concentrations at a variety of operational rates, including low-flow conditions. DWQ erroneously assumed in its Revocation Letter that the DO enhancement technologies would not work at low-flow conditions.

In its application for the 401 Certification, APCI provided DWQ with the most recent DO data then available in response to DWQ's additional information requests. Those data demonstrated that DO enhancement at Narrows was effective throughout the low-DO data from May through November. These data included both high and low-flow operations.

APCI has also provided DWQ with its most recent DO data. These data further demonstrate that the DO enhancement technologies at Narrows are effective. In addition, these data specifically show that DO enhancement is effective at low-flow conditions.

Thus, any misimpressions created by the quotes from the five cited e-mails when examined out of context notwithstanding, DWQ had ample evidence as of the date that the 401 Certification was issued and thereafter that the DO enhancement technologies in operation at Narrows effectively raised DO concentrations in the Narrows tailwaters at all operational rates, including low-flow conditions. More recent data strongly support this conclusion. The actual record that existed as of the date of issuance of the 401 Certification demonstrates that (i) the conclusion reached by DWQ in its revocation decision was erroneous and (ii) the DO technologies employed by APCI work effectively across a range of operating levels.

B. APCI did not withhold any material information from its application or during the discussions leading up to the 401 Certification

DWQ concluded, based on its reading of excerpts of five e-mails written between 2006 and 2008, that information material to its decision on the 401 had been "intentionally withheld" by APCI. The complete text of the e-mails, and the context of the e-mails, cited by DWQ, as shown by e-mails to which they were responding or referencing reveal APCI employees and consultants working to understand how the enhancement technologies actually functioned and then endeavoring to clear up their own misconceptions on the operation of those technologies. Because DWQ acted with less than the full and complete record, the selected sections of the emails that were included in the body of the Revocation Letter created several misimpressions. The full record shows the premise of the Revocation Letter to be demonstrably false and misleading and the DWQ decision to be clear error. In fact, the emails – when viewed in context and with full knowledge of the long history and background of the relicensing process – demonstrate the absence of a "low flow" DO enhancement "problem," but also demonstrate APCI's commitment to meeting applicable standards, and an affirmative dedication to determining and analyzing the inevitable issues and challenges that arise in implementing even DO technology as well-documented as that deployed by APCI. Had DWQ complied with N.C. Gen. Stat. § 150B-3(b), these misimpressions could have been corrected prior to the revocation of the 401 Certification. Plainly, no material information was withheld from DWQ; instead, DWQ's reading of those e-mails is incorrect, and their conclusions erroneous and misinformed.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list in this proceeding in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Washington, D.C. this 28th day of January 2011.

/s/ Blen G. Degef

Blen Degef

Paralegal

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202-346-8093

Document Content(s)

APGI Submission of Petition.PDF.....1-5