

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Alcoa Power Generating, Inc.)	P-2197-073
)	
Yadkin Hydroelectric Project)	Application for New Major License

**MOTION TO INTERVENE OUT OF TIME BY
THE STATE OF NORTH CAROLINA, BY AND
THROUGH GOVERNOR BEVERLY EAVES PERDUE,
AND MOTION FOR AN EMERGENCY HEARING
ON THE STATE’S MOTION TO INTERVENE**

NOW COMES the State of North Carolina, by and through Governor Beverly Eaves Perdue (the “State”), and moves: (i) to intervene out of time, pursuant to Rule 214, 18 C.F.R. 385.214; and (ii) for an Order initiating and noticing a hearing at the earliest possible date on the State’s Motion to Intervene, pursuant to Rule 502, 18 C.F.R. 385.502. In support of this Motion, the State shows the following:

I. INTRODUCTION

The North Carolina Constitution declares it “the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry” N.C. Const., Art. 14, §5. Similarly, promoting the economic health of the public “is clearly the business of government” *Mitchell v. North Carolina Indus. Devel. Financing Auth.*, 273 N.C. 137, 164 (1968) (Parker, C.J., dissenting), quoted with approval in *Maready v. City of Winston-Salem*, 342 N.C. 708, 727 (1996) and in *Blinson v. State of North Carolina*, 186 N.C. App. 328, 339 (2007), *app. dismissed and disc. rev. denied*, 362 N.C. 355 (2008). The relicensing of Project 2197 to the existing licensee – Alcoa Power Generating, Inc. (“APGI”) – would reauthorize control of a vital public natural and economic resource by a private company when nearly all the major factors originally supporting that control in 1958 have since

vanished.

In 1958, the Commission granted to the Carolina Aluminum Company (“Carolina Aluminum”) – the predecessor to Alcoa Power Generating, Inc. (“APGI”) – a license based fundamentally and expressly on the relationship between the hydropower facilities and the Alcoa smelting works at Badin, North Carolina. *In re Carolina Aluminum Co. & Carolina P. & L.*, Proj. Nos. 2197 & 2206, 19 F.P.C. 704, 705 n.1, 716, 722 (1958). Indeed, North Carolina intervened in the original license proceeding in support of the licensee because the State recognized the significant public benefit provided by the symbiotic relationship between the hydropower facilities and the smelting works. North Carolina “urge[d] that the Commission issue . . . [a] fifty year license” to Carolina Aluminum “in order to permit the continuance and expansion of Carolina Aluminum Company’s activities in Stanly County to the benefit of Stanly County and in the public interest of North Carolina.” State of N.C., Pet. to Intervene (“N.C. Pet.”) at 3, *In re Carolina Aluminum Co. & Carolina P. & L.*, Proj. Nos. 2197 & 2206 (Oct. 8, 1957).

Fifty years later, the smelting works are no longer operational and the jobs and economic opportunities associated with them are gone. A skeleton crew of employees remains to look after the shuttered works and to operate the hydropower facilities. While the State and the surrounding communities have largely lost their stake in the original arrangement, APGI continues to operate the dams and generate and sell power at a significant profit. The State therefore moves to intervene to curtail APGI’s vestigial private control of this segment of the Yadkin River and to rededicate this valuable resource to significant public use.

II. THE STATE SUPPORTS THE PUBLIC DEVELOPMENT AND CONSERVATION OF THE YADKIN RIVER¹

The Yadkin River is one of North Carolina's most important water resources. It flows more than 200 miles from its headwaters in the North Carolina mountains to the confluence with the Uwharrie River in Stanly County, then continues to and through South Carolina as the Pee Dee River to the Atlantic Ocean. Together, the Yadkin and Pee Dee Rivers (hereinafter the "Yadkin River") nearly bisect the State and form North Carolina's second largest river basin. The Yadkin is a water resource of the highest significance to the State of North Carolina, as it cuts across the economic and population heart of the State and provides vital functions from power generation to local water supplies to recreational and ecotourism opportunities.

The Yadkin River forms the boundary between Stanly and Montgomery Counties in the southern piedmont region of North Carolina. Three of the four dams of Project 2197 – Tuckertown, Narrows and Falls – sit on the Stanly-Montgomery county border. Stanly County is also home to the Badin Works, the now defunct smelting plant formerly operated by the licensee. Since the endorsement of the Relicensing Settlement Agreement ("RSA") by then-Secretary William G. Ross of the North Carolina Department of Environment and Natural Resources ("DENR"), concern has mounted about the relicensing of the project and the effect of such relicensing on the long-term economic health of this region and its communities.²

¹"Any motion to intervene must state, to the extent known, the position taken by the movant and the basis in fact and law for that position." 18 C.F.R. §385.215(b)(1).

²DENR has executed several agreements with FERC licensees for projects in North Carolina in its capacity as the steward of the State's environment and natural resources. DENR also has participated in FERC proceedings

Stanly County did not sign the RSA due to unresolved economic and other concerns. After the Agreement was finalized, at least three other counties and nine towns, including at least one county and one town which are also signatories to the RSA, formally expressed concerns about the relicensing.

Upon becoming aware of the magnitude of the issues involved and the efforts of local governments to seek redress, then-Governor Michael F. Easley wrote to the Commission on April 4, 2008, raising these concerns. Governor Easley applauded the environmental benefits that would accrue from the RSA; however, he cautioned that the economic issues should be “fully vetted” before the resources were re-committed for another lengthy period, because they “reflect important questions about the use of North Carolina’s public water resources for private gain.” Ltr. from Gov. M.F. Easley, N.C., to J.M. Robinson, FERC, at 1 (April 4, 2008). Shortly thereafter, then-Lieutenant Governor and now Governor Beverly Eaves Perdue expressed similar concerns: “The issue is ultimately one of the appropriate terms under which [the] private use of a public resource should be permitted.” Ltr. from Lt. Gov. B.E. Perdue, N.C., to FERC at 2 (June 3, 2008) (“Perdue Ltr.”).

In addition to the concerns raised by the Executive Branch of North Carolina’s Government, the North Carolina General Assembly also took up this matter, directing the State’s Environmental Review Commission (the “ERC”) to “study the impacts on the State

to support licensees consistent with those agreements. The State anticipates that DENR will continue this constructive role regarding FERC projects.

Nevertheless, this case is unique. The licensee is not regulated by the State as a public utility. Nor is the State aware of any other instance in the State where a licensee has secured a license, with the State’s active support, expressly to support the local community, and then abandoned the activity that brought about that benefit. In the case of APGI, the issues involved – outside those successfully settled by DENR – are of such urgent and pressing concern that the State must make every possible effort to address them before this invaluable resource is licensed, and thus lost to the people of North Carolina, for another lengthy term.

of the potential issuance of a new fifty-year license by” the Commission to APGI and authorizing the ERC “to consider . . . [t]he socioeconomic impacts of APGI’s decision to discontinue its job-producing manufacturing activities at its Badin facility that relied on the use of low-cost power from the Yadkin Hydroelectric Project.” 2008 N.C. Sess. L. 137, §1. The bill passed with unanimous support among voting members in both the House and the Senate.

The economic concerns associated with Alcoa and APGI and their historic role in the local community cannot be separated from the proceedings regarding the relicensing of the Project. At the time of the initial licensing of the Project in 1958, Carolina Aluminum Company represented that “the sole purpose of [its] hydroelectric developments on the Yadkin River is to provide a source of power for the Company’s Badin smelting works.” Carolina Aluminum, Pet. for Reh’g at 2, *In re Carolina Aluminum Co.*, Proj. No. 2197 (April 25, 1957). Carolina Aluminum clearly reiterated this position later in that same proceeding: “Aluminum’s Project No. 2197 is designed to provide the hydroelectric power required for the operation of Aluminum’s smelting works at Badin, North Carolina.” Carolina Aluminum, Mot. for Recon. & Rescission of Order at 2, *In re Carolina Aluminum Co. & Carolina P. & L.*, Proj. Nos. 2197 & 2206 (Aug. 10, 1957). In short, according to Alcoa, the hydropower development was “essentially an adjunct” to its “industrial enterprise . . .” *Id.* Moreover, Carolina Aluminum submitted that the 50-year license term it was seeking was “necessary, as a matter of economics, for the continuance of the smelting operation at Badin, which is the principal industry serving that area of North Carolina.” *Id.* Carolina Aluminum reiterated later that year that the 50-year license was essential to fulfill the Project’s “stated

purpose of supplying electric power for Carolina Aluminum's smelting works at Badin." Br. of Carolina Aluminum Co. ("Carolina Alum. Br.") at 13, *In re Carolina Aluminum Co. & Carolina P. & L.*, Proj. Nos. 2197 & 2206 (Nov. 18, 1957).

Both the State of North Carolina and Carolina Aluminum recognized at that time the crucial role the Badin Works and the associated hydropower project played in the State and local economies. In its 1957 Petition for Rehearing, the company noted that it was the largest employer and taxpayer in the region. Pet. for Reh'g at 6. Significantly, Carolina Aluminum concluded that its continuation in business in the area was "in the public interest and a factor to be considered under Section 10(a) of the [Federal Power] Act." *Id.* at 6 (font altered). "It is a matter of public interest, properly to be considered by the Commission under its statutory mandate, that the employment of these people and the support of the community enterprises and services through taxes be continued if economically possible." *Id.* at 7.

By adopting the Presiding Examiner's Opinion, the Commission held that the "continuation [of the Yadkin developments] is greatly in the public interest" because "[t]he operations of the Badin plant of Aluminum are a useful contribution to the industrial life of the Yadkin Valley" *In re Carolina Aluminum Co.*, 19 F.P.C. at 716. More specifically, the Commission adopted the Presiding Examiner's conclusion that the issuance of a 50-year license was essential to support the upgrading of the Badin Works, and that this effort as a whole found significance in the continued employment of nearly 1,000 workers in the Badin area. *Id.* at 722. There is no question that the overriding purpose of the original 50-year license was to supply power to the Badin Works, and that the Commission recognized that need based on the public benefit in terms of economic value to the local community. That is,

the Commission implicitly agreed with the company that the socioeconomic gains of the project were important considerations under section 10(a) of the Federal Power Act. 16 U.S.C. §803(a).

It is exactly this authorization of the use of public resources for a private purpose that drives the Commission's mandate to protect the public interest. As the Supreme Court has counseled:

A license under the Act empowers the licensee to construct, for its own use and benefit, hydroelectric projects utilizing the flow of navigable waters and thus, in effect, to appropriate water resources from the public domain. 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. And that determination can be made only after an exploration of all issues relevant to the "public interest"

Udall v. Federal Power Commission, 387 U.S. 428, 450 (1967). In sum, "the need to safeguard the public interest, . . . is, of course, the agency's *raison d'être*" under the Federal Power Act. *Clark-Cowlitz Jt. Op. Agency v. FERC*, 826 F.2d 1074, 1089 (D.C. Cir. 1987) (en banc), *cert. denied*, 485 U.S. 913, 108 (1988).

This fundamental principle is manifested in section 10 of the Federal Power Act. "Under Sec. 10(a) of the Act it [is] the Commission's responsibility to protect the public interest." *Namekagon Hydro Co. v. Federal Power Commission*, 216 F.2d 509, 512 (7th Cir. 1954) (affirming denial of license based on project's downstream impairment of public trust resource). See also *Clark-Cowlitz*, 826 F.2d at 1090-91 (affirming the Commission's consideration of the economic impacts of the original licensee not retaining the license based in part on the Commission's "persuasive[] argu[ment]" regarding "the breadth of the public-

interest inquiry permitted under section 10(a)”). The Commission has repeatedly held that these “public interest factors” include “promot[ing] local employment” *E.g.*, *Northern States Power Co.*, Project No. 2056, 106 F.E.R.C. ¶62,185, at 64,320 (March 8, 2004); *Rhineland Paper Co.*, Proj. No. 2161, 104 F.E.R.C. ¶62,134, at 64,341 (Aug. 20, 2003).

As discussed above, the licensee’s use of the public waters was justified in the past in terms of the licensee’s promotion of substantial local employment. Thus, the renewable energy generated from the project benefitted the region as well as the company. This was, in large measure, the public interest that formed the basis for the previous 50-year license.

But the smelting operation no longer exists, the local workforce formerly supported by the licensee has dwindled to next to nothing and “the bulk of project power [is to] be[] sold into the wholesale market to offset the cost of electricity purchases required for Alcoa’s other domestic operations.” FERC Office of Energy Projects, Final Env’tl. Impact Statement for Hydropower Licenses Yadkin Hydroelec. Proj. - FERC Proj. No. 2197-073 and Yadkin-Pee Dee River Hydroelec. Proj. - FERC Proj. No. 2206-030 (“FEIS”) at 3 (April 2008). Thus, far from promoting the local economy, the project is now specifically using public resources in the heart of North Carolina to finance the licensee’s private interests elsewhere. This usurpation of the value of the Yadkin River is antithetical to the Commission’s mandate “to safeguard the public interest” under the Federal Power Act. *Clark-Cowlitz*, 826 F.2d at 1089.

The Commission’s staff responded to concerns expressed about this change by indicating that “[p]roviding cost-based power to local entities would simply shift the power-

related benefit to local entities and away from those who would otherwise purchase the power. There would be no net benefit overall.” EIS at 239. But that response misses the point on two counts. First, even if this were true, the test is not “solely whether the region will be able to use the additional power. The test is whether the project will be in the public interest,” which requires a far broader inquiry. *Udall*, 387 U.S. at 450. Second, the public interest test highlights the benefit from “*local* employment” (emphasis supplied) as distinguished from the maintenance of jobs outside the area. The Commission’s staff’s failure in the EIS to analyze these significant economic considerations correctly is an abdication of the Commission’s responsibilities under the Federal Power Act.

The Act allows the United States to take over any project “upon or after the expiration of any license” and following proper compensation. 16 U.S.C. §807(a). In order to effectuate this remedy, the Commission must first recommend takeover to Congress, which then considers and determines the matter. *Id.* §800(c). In the meantime, “the Commission shall not issue a new license to the original licensee” *Id.*

The State recognizes that the United States has not previously exercised this authority with regard to any project. But never has so compelling an economic case been presented. On broad economic questions, the project now provides only the most minimal public benefits, *e.g.*, payment of taxes, provision of power (albeit for private use and not for the public convenience). *See Udall*, 387 U.S. at 450. This contrasts markedly with the express purpose for the initial investment in the project, which was to maintain and enhance the local Badin Works. The licensee has long since recovered its initial investment. Going forward, a new license would allow the licensee to retain the use of an extraordinarily valuable public

resource primarily for its own financial gain. This natural resource should be returned to public control for disposition, as the Federal Power Act demands, consistent with the public interest.³

The State understands that the federal government may not be in a position to manage the project. And indeed, “no federal agency has expressed an interest in operating the Project[.]” EIS at 35. But the inquiry should not end there. The State or an appropriate agent or contractor on its behalf would be fully qualified to operate the project in order to provide benefits to the local community and preserve and protect the public trust resources of the State.

III. THE COMMISSION SHOULD ALLOW INTERVENTION OUT OF TIME BECAUSE THE STATE’S BROADER INTERESTS ARE NOT ADEQUATELY REPRESENTED AND THE STATE HAS ACTED QUICKLY TO BRING ITS ISSUES TO THE COMMISSION’S ATTENTION

A. The State Has and Represents Interests That Will Be Directly Affected by the Outcome of this Proceeding and Its Participation is in the Public Interest

Intervention is proper so long as the movant demonstrates that it “has or represents an interest which may be directly affected by the outcome of the proceeding” or that “[t]he movant's participation is in the public interest.” 18 C.F.R. §385.214(b)(2)(ii)-(iii).⁴ The

³ It is these highly notable facts that would significantly limit any precedential value of a “takeover” recommendation.

⁴ Intervention may also be founded on “a right to participate which is expressly conferred by statute or by Commission rule, order, or other action,” which includes the right to intervention granted to any “state fish and wildlife, water quality certification, or water rights agency[.]” *Id.* at 385.214(a)(2) & (b)(2)(i). The Governor appoints the Secretary of DENR, who serves strictly at the pleasure of the Governor. By rule, the State’s authority to issue a certification pursuant to section 401 of the Clean Water Act, 33 U.S.C. §1341, has been delegated to the Director of the Division of Water Quality, which is a division of DENR. Moreover, the State’s fish and wildlife commission – the Wildlife Resources Commission – operates in part as an arm of DENR. Thus, the State is imbued with interests in the nature of those recognized in Rule 214(a)(2), 18 C.F.R.

State should be allowed to intervene under either of these standards.

The State moves to intervene to protect economic interests affecting the State and its political subdivisions. The State has a direct stake in the economic health of its cities and towns. Unemployment raises the demand for financial assistance from the State in many forms, including unemployment benefits, health care reimbursement, public safety, public education and other social services. Additionally, it reduces the income to the State from income taxes and other programs. It also deters those who have lost their jobs from spending money within the community and around the State.

In the 1957 license proceeding, the State observed that “Carolina Aluminum is the largest employer of labor and the largest taxpayer in the Badin area, and its ability to continue in business is in the public interest.” Brief in Behalf of Intervenor State of N.C. (“N.C. Br.”) at 7, *In re Carolina Aluminum Co.*, Proj. No. 2197 (Nov. 14, 1957). Similarly, in its motion to intervene on Carolina Aluminum’s behalf, the State noted that Carolina Aluminum “is the principal taxpayer and employer in Stanly County, North Carolina, and it is vital to the economy of the area that Carolina Aluminum Company continue its operations on the existing or an increased scale.” N.C., Pet. at 2; *see also id.* (Modernization and continued operation of the Badin Works “would be highly beneficial to [North Carolina’s] citizens in the Badin area and to the State as a whole.”)⁵

§385.214(a)(2), as warranting intervention as of right based on a timely notice.

⁵ Carolina Aluminum agreed that its license was a significant State issue, arguing, “More important, however, is the role that the Yadkin Project plays in the economic picture of the Piedmont area of North Carolina. As a taxpayer and employer, Carolina Aluminum is vital to the economy of Stanly County and adjacent counties in North Carolina and, as indicated by the statement of the Attorney General, to the State as a whole.” Carolina Alum. Br. at 15-16 (footnote omitted). Carolina Aluminum “and its parent Alcoa, recognize that a great part of the economy of the State, and particularly this area, is dependent upon Carolina Aluminum’s continued operation.” *Id.* at 22.

But the benefit is not limited to the State's economic interests. In the initial licensing, the State affirmed the historical and continuing importance of Carolina Aluminum's operations both to the local communities and to the State:

Carolina Aluminum is an affiliate of a large organization and has been in business in Stanly County for approximately 40 years. Companies such as these take root in a State and weave themselves into the economic life and well-being of the people and their industries. These larger units become almost institutions of the State and the economic status and well-being of many families depend upon their regularity of operation and a progressive modernization of plants and installations.

N.C. Br. at 4.

By any measure, the socioeconomic ramifications of this licensing decision directly and significantly impact the State's interests, which are distinct from the local economic and other interests. The State brings a unique regional outlook to this proceeding that is not shared by the Town of Badin or any local government, or any industry, non-governmental organization, the licensee or even the Commission. Thus, the State's interests will be directly impacted by this proceeding and its participation is in the public interest. *See* 18 C.F.R. §385.214(b)(2)(ii)-(iii).

B. Intervention Out of Time is Fully Justified Under the Circumstances

The State recognizes that this motion is out of time; however, the opportunity to intervene through the normal channels predated the election of the current gubernatorial administration. Governor Perdue has moved expeditiously to prepare and file this Motion upon being sworn in as the State's chief executive. Moreover, while serving as Lieutenant Governor, Ms. Perdue formally conveyed her concerns to the Commission through comments to the docket. *See* Perdue Ltr. Then-Lt. Gov. Perdue wrote to the Commission:

The company proposes to continue operation of its hydropower facilities, but the balance of private versus public benefit associated with operation of the dams in these communities is now significantly different than it was when the dams were first licensed. And, of course, once a new license is in place, such issues will likely not be revisited for generations to come.

Id. at 1. The Governor is doing no more than implementing the will of the electorate and is deserving of deference on matters of timing where flexibility is available. The State submits that this represents “good cause for failing to file the motion within the time prescribed” 18 C.F.R. §385.214(d)(1)(i).

The State’s participation as a party will not disrupt the proceeding to any significant degree. *See id.* at §385.214(d)(1)(ii). The issues raised here by the State have been previously identified by the State and others. More specifically, the Commission’s staff has been apprized of the issues summarized above and has already considered the remedy of federal recapture. *E.g.*, Mot. to Intervene of Stanly Co. & Comments on Agreement in Principal Submitted by Alcoa Power Generating Inc. at 8-10, *Alcoa Power Generating Inc.*, Proj. No. 2197 (Sept. 18, 2006); Perdue Ltr. at 1-2; EIS at 35. For these reasons, the “prejudice to, or additional burdens upon, the existing parties” is not consequential. *See* 18 C.F.R. §385.215(d)(1)(iv). Finally, as discussed above, the State’s “interest is not adequately represented by other parties in the proceeding” *Id.* at §385.214(d)(1)(iii).⁶

For the reasons cited and discussed above supporting the State’s Motion to Intervene in this proceeding and by reason of the urgent importance to the State of North Carolina and its citizens that this Motion be considered and granted before this matter proceeds further, the State of North Carolina further moves the Commission for an Order

⁶ The Commission’s rules on late intervention also allow it to consider whether the “motion conforms to the

initiating and noticing a hearing at the earliest possible date on the State's Motion to Intervene.

The State of North Carolina will promptly file with the Commission its full comments on the pending relicensing application, as well as all other documents and information supporting its position that the relicensing application should be denied and that the United States should take over this project following the expiration of the license.

IV. CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the Commission grant its Motion to Intervene Out of Time, grant its Motion for an immediate hearing on the State's Motion to Intervene and allow such intervention pursuant to Rule 214.

requirements of paragraph (b) of 18 C.F.R. §385.214. The State submits that this Motion so conforms.

CONTACT INFORMATION

Please direct all communications to:

I. Faison Hicks
Special Deputy Attorney General
North Carolina Department of Justice
114 West Edenton Street
Office #227C
Raleigh, North Carolina 27603
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone: 919/716-6629
Cellular Telephone: 704/277-8635
Facsimile: 919/716-6757
Email Address: fhicks@ncdoj.gov

and to:

Lars F. Nance
Special Deputy Attorney General
North Carolina Department of Justice
114 West Edenton Street
Office #416A
Raleigh, North Carolina 27603
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone: 919/716-6800
Facsimile: 919/716-6755
Email Address: lfnance@ncdoj.gov

Respectfully submitted this 1st day of April 2009.

ROY COOPER
ATTORNEY GENERAL

By: /s/ I. Faison Hicks
I. Faison Hicks
North Carolina State Bar Number 10672
Attorney for the State of North Carolina

Special Deputy Attorney General
North Carolina Department of Justice
114 West Edenton Street
Office #227C
Raleigh, North Carolina 27603
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone: 919/716-6629
Cellular Telephone: 704/277-8635
Facsimile: 919/716-6757
Email Address: fhicks@ncdoj.gov

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.

This 1st day of April 2009.

/s/ I. Faison Hicks

I. Faison Hicks

North Carolina State Bar Number 10672

Attorney for the State of North Carolina

Special Deputy Attorney General

North Carolina Department of Justice

114 West Edenton Street

Office #227C

Raleigh, North Carolina 27603

Post Office Box 629

Raleigh, North Carolina 27602-0629

Telephone: 919/716-6629

Cellular Telephone: 704/277-8635

Facsimile: 919/716-6757

Email Address: fhicks@ncdoj.gov

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