

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

Alcoa Power Generating Inc.

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Project No. 2197-073

Yadkin Project

**ALCOA POWER GENERATING INC.'S RESPONSE TO
NEW ENERGY CAPITAL PARTNERS, LLC'S
REQUEST FOR COMMISSION ACTION**

Pursuant to Rules 213 and 215 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure, 18 C.F.R. §§ 385.213 and 385.215, Alcoa Power Generating Inc. ("APGI") responds to New Energy Capital Partners, LLC's ("NECP") submittal in the above-captioned docket, which was filed on December 5, 2014 ("December Request") and which requests Commission action on two prior submissions that contain substantial legal defects. As demonstrated below, NECP's December Request contains similar legal defects and provides no basis for Commission action.

I. BACKGROUND

APGI filed its application for a new license for the Yadkin Project on April 25, 2006.¹ On December 28, 2006, the Commission issued a Notice establishing February 26, 2007, as the

¹ *Alcoa Power Generating Inc.*, Application for New License, Yadkin Hydroelectric Project, Project No. P-2197-073 (Apr. 25, 2006).

deadline for filing Motions to Intervene and Protests and any related application.² NECP did not submit any filing or application in response at that time.

On April 30, 2013—more than six years after the intervention deadline in this proceeding had passed³—NECP petitioned the Commission to reopen the hydropower relicensing process for Project No. P-2197 (the “Project” or the “Yadkin Project”), and in the alternative, moved for late intervention (collectively, the “Petition”).⁴ APGI responded to NECP’s Petition, urging the Commission to reject the Petition on numerous legal grounds. On May 30, 2013, the Commission denied NECP’s years-late motion for late intervention but otherwise took no action with respect to the Petition.⁵ NECP subsequently sought rehearing, and on September 19, 2013, the Commission issued an order denying rehearing of its rejection of NECP’s motion for late intervention.⁶

On November 13, 2013, NECP filed a petition for review of the Commission’s Order Denying Rehearing with the U.S. Court of Appeals for the D.C. Circuit (“D.C. Circuit”).⁷ The only legal issue presented by that petition for review is whether the Commission was justified in rejecting NECP’s request for party status in the relicensing docket. With the consent of the FERC Solicitor’s Office, NECP subsequently moved that the court postpone proceedings on

² *Alcoa Power Generating, Inc.*, Project Nos. P-2197-073 and P-2206-030 (Dec. 28, 2006) (“Notice”) (establishing a February 26, 2007 intervention deadline).

³ *See id.*

⁴ New Energy Capital Partners, LLC Petition to Reopen Relicensing Application Process and in the Alternative, Motion for Late Intervention in the Yadkin Project Relicensing, Project No. P-2197-073 (Apr. 30, 2013).

⁵ *Alcoa Power Generating, Inc.*, “Notice Denying Motion to Intervene,” Project Nos. P-2197-073 (May 30, 2013).

⁶ *Alcoa Power Generating, Inc.*, 144 FERC ¶ 61,218 at P 15 (2013) (“*Order Denying Rehearing*”).

⁷ *See* Petition for Review of New Energy Capital Partners Inc., filed in Project No. P-2197-103 (Nov. 13, 2013); Non-Binding Statement of Issues to Be Raised, *New Energy Capital Partners, LLC v. FERC*, No. 13-1277 (D.C. Cir. Dec. 12, 2013).

NECP's appeal of the Order Denying Rehearing pending resolution by the Commission of the Petition to reopen the relicensing proceeding.⁸ The D.C. Circuit agreed, with the proviso that NECP file a status report regarding further Commission action every 90 days.⁹ Three such status reports have been filed and the next report is due in January.¹⁰

On January 21, 2014, notwithstanding its failure to gain party status after the Commission denied its intervention, NECP filed what it characterized as a supplement to its Petition ("Petition Supplement"). On February 3, 2014, APCI filed a response to NECP's Petition Supplement, urging the Commission to reject the Petition Supplement for abusing the Commission's Rules of Practice and Procedure, for collaterally attacking the Commission's prior rulings in this proceeding, and for improperly seeking relief that cannot be granted.

To date, no further action has been taken by the Commission with respect to either the Petition or the Petition Supplement.

II. APCI'S OPPOSITION TO NECP'S DECEMBER REQUEST

A. APCI has a right to respond to NECP's December Request

Though presented in the form of a letter, the December Request is NECP's latest unauthorized pleading. It is a pleading because it alleges facts and seeks affirmative relief from the Commission.¹¹ Namely, the December Request seeks Commission action on NECP's earlier Petition and Petition Supplement "no later than January 18, 2015" to facilitate NECP's

⁸ See Motion by New Energy Capital Partners, LLC to Hold Case In Abeyance, *New Energy Capital Partners, LLC v. FERC*, No. 13-1277 (filed Dec. 12, 2013).

⁹ *New Energy Capital Partners, LLC v. FERC*, No. 13-1277 (D.C. Cir. Jan. 24, 2014) (order) (granting NECP's motion to hold the case in abeyance).

¹⁰ See New Energy Capital Partners, LLC Abeyance Status Reports, *New Energy Capital Partners, LLC v. FERC*, No. 13-1277 (filed April 24, 2014; June 24, 2014; and Sept. 24, 2014).

¹¹ See 18 C.F.R. §385.202 and §385.207 (identifying petitions as the type of pleading when a person seeks discretionary action by the Commission and where the petition does not conform to other forms of pleading).

determination on how to proceed in its appeal filed with the D.C. Circuit. December Request at

3. As a presumed further inducement for Commission action, the December Request states:

Absent such action, NEC will seek a ruling from the D.C. Circuit that the Commission's failure to resolve NEC's request to reopen the relicensing docket has constructively denied NEC relief for no explained reason and therefore constitutes arbitrary and capricious agency action. NEC will further seek a ruling compelling the Commission to take actions to protect the public's interest in the Yadkin River during what amounts to a substantial extension of APGI's original license.

Id. Given that the December Request is a pleading by NECP, APGI, as the applicant and a party in this proceeding to relicense the Yadkin Project has a right to respond under Rule 213, 18 CFR §385.213.

B. NECP's December Request Lacks Any Legal Basis

As with NECP's prior petitions, the most recent December Request presents no legal basis for Commission action. As an initial matter, since NECP has been specifically denied party status in the proceeding, it has no legal right to make a submission seeking Commission action in this subdocket. Yet, the December Request, ostensibly in the form of a letter to the Commission Secretary, has a reference line listing this specific subdocket, with the obvious implication that it is asking for Commission action in this subdocket. Indeed, that is made clear in the December Request's argument in the middle of its second page to the effect that, in NECP's view, this relicensing proceeding needs to be reopened. Non-parties in an ongoing administrative proceeding have no standing to challenge an agency's decisions.¹² As the Commission stated in its Order Denying Rehearing: (1) the primary issue raised by NECP "is not a relevant issue in the relicensing proceeding and could not provide good cause for intervention

¹² See, e.g., *Investigation of Anomalous Bidding Behavior and Practices in the Western Market*, 110 FERC ¶61,369 at P 7 (2005) (dismissing pleading of non-parties and holding that "only a 'party' may seek rehearing (and ultimately, judicial review)"; see also, *Arizona Public Service Co.*, 148 FERC ¶ 61,125 at P 23 (2014) (citing to the Federal Power Act and holding that non-parties to a proceeding lack standing to seek rehearing under the Federal Power Act and the Commission's regulations).

at any time, let alone late”¹³; (2) NECP had “ample notice” but chose to “sleep on its rights”¹⁴; and (3) in any event, NECP—a private equity firm without hydropower investments—“lacks standing to raise the matter.”¹⁵

Even if NECP were a party in this proceeding, the relief that it seeks regarding reopening the relicensing proceeding would be highly disruptive and is without justification. After properly notifying the Commission of its intent to relicense, APGI filed its application for a new license for the Yadkin Project on April 25, 2006. On December 28, 2006, FERC issued its Notice establishing February 26, 2007, as the deadline for filing competing applications.¹⁶ NECP did not submit an intervention or a competing application for the Yadkin Project at that time.

Backtracking in an 11 year-old administrative proceeding would require extraordinary circumstances that would have to be judged to outweigh the need for finality in the administrative process.¹⁷ NECP’s December Request has not even attempted to make a case for that, offering only the vague, unsupported assertion that “the Commission can do a much better job of executing its duties to protect the public interest in the Yadkin River pending final resolution of this docket....” December Request at 2. NECP’s December Request, like its other petitions, is far from the “exceptionally rare case” and its vague reference to the Commission’s lack of diligence to complete the licensing process does not come anywhere near meeting the

¹³ *Order Denying Rehearing* at P 15.

¹⁴ *Id.* at P 20.

¹⁵ *Id.* at P 15.

¹⁶ Section 15 of the Federal Power Act (16 U.S.C. §808) and the Commission’s regulations under that part of the statute (18 C.F.R. §4.36(c)) establish deadlines for notifying the Commission of competing applications, which at this point in this proceeding passed more than 7 years ago. *See also* Footnote 2, *supra*.

¹⁷ *See, e.g., James Lichoulas, Jr.*, 125 FERC ¶ 61,195 (2008) and *Georgia Strait Cross Pipeline LP*, 105 FERC ¶ 61,190 (2003). *See also, In re Barr Labs. Inc.*, 930 F.2d 72, 76 (D.C.Cir.1991) (finding that courts only compel agency action in “exceptionally rare cases”).

standard of demonstrating extraordinary circumstances to justify the request for the Commission to reopen the relicensing proceeding, even if the Commission had the authority to do so.

C. There Is No Procedural Need for the Commission to Act On the Petition, the Petition Supplement or the December Request

NECP's Motion to Hold Case in Abeyance filed in the D.C. Circuit and the December Request both suggest that the Commission has a legal duty to take further action with respect to the Petition and the Petition Supplement. That is not correct, and to the extent that NECP's motion to the court implied that such Commission action would occur within a near-term temporal horizon, it would have been misleading. In 2013, NECP's Petition was filed together with an alternative motion to intervene out of time. In acting upon that submission, the Commission chose to rule upon the motion for late intervention. The fact that the Commission chose to act upon the motion for late intervention does not imply that the Commission will act upon the Petition. Nor does it imply that the Commission will act upon the Petition Supplement that was filed approximately a year later. The Commission has no legal obligation to act upon petitions submitted by non-parties that request specific actions within ongoing proceedings.¹⁸ Inherent in the decision to deny NECP party status was a determination that NECP had no standing to request other Commission actions within the proceeding. That is the logical flaw in NECP's December Request in which NECP urges action by the Commission "no later than January 18, 2015, so that [NECP] can report such action to the D.C. Circuit." December Request at 3.

NECP warns in the December Request that absent Commission action on the Petition and Petition Supplement by January 18, 2015, NECP will seek a ruling by the D.C. Circuit

¹⁸ See Footnote 12, *supra*.

“compelling the Commission to take actions to protect the public’s interest in the Yadkin River” (December Request at 3). As discussed above, the only legal issue presented on appeal is whether the Commission was justified in rejecting NECP’s request for party status in the relicensing docket. NECP has no right to a determination on its Petition and Petition Supplement. Nevertheless, NECP’s December Request seeks to link its appeal of the Order Denying Rehearing with its unreasonable expectation for a decision on its Petition and Petition Supplement, to which it has no legal right, by referencing the fact that its appeal has been held in abeyance for nearly a year. *See* December Request at 2. But the fact that NECP requested and the D.C. Circuit agreed to hold the appeal in abeyance, and the fact that NECP has not yet received an additional decision from the Commission on its Petition and Petition Supplement, are not related to one another. Just because NECP asked the court to hold its appeal in abeyance pending further Commission action does not, of itself, create either a duty or even an expectation of the court for imminent Commission action.

Moreover, even if NECP had standing to request that the Commission take certain action within the relicensing proceeding, the fact still remains that the Commission inherently has discretion to act when it chooses. There are no external events that compel Commission action at this time, nor has NECP pointed to anything that creates a duty to act on a request to reopen the proceeding to consider new license applicants, even if the Commission had the authority to do that. Any discussion by NECP in the December Request of dates and deadlines for Commission action are self-serving and self-imposed and are not operative with respect to the Commission.

The Commission has discretion to manage its dockets and address requests for action, regardless of whether they are styled as petitions such as the ones submitted by NECP, as the

Commission sees fit.¹⁹ Nor is this the first project relicensing in which the process has become protracted, requiring numerous successive annual licenses. In a relicensing case with procedural similarities (*i.e.*, the project operating under successive annual licenses while awaiting water quality certification under Section 401 of the Clean Water Act), the Commission denied a request for extraordinary action to dismiss a procedurally compliant relicensing application in order to decommission the project, explaining:

Given that neither the Federal Power Act nor our regulations impose any requirements with respect to situations such as that presented here, we have considerable discretion with respect to administering this proceeding. Indeed, “the formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress [has] confided the responsibility for substantive judgments.”²⁰

It is clear that the Commission need not change its priority, timing or administration of the instant docket to address NECP’s December Request.

D. Because the Commission is Under No Duty to Act on NECP’s Petition, There Is No Unreasonable Delay by the Commission

In its attempt to persuade the Commission to act, NECP adds a warning that, absent Commission action on the Petition and Petition Supplement by January 18, 2015, NECP will seek a ruling by the D.C. Circuit “compelling the Commission to take actions to protect the public’s interest in the Yadkin River” (December Request at 3). This is an empty threat. NECP’s ability to successfully pursue such an argument would require a demonstration that the Commission had failed to act when it had a duty to do so—a showing that cannot be made here.

¹⁹ The D.C. Circuit itself has noted that, outside of “exceptionally rare cases,” courts “have no basis for reordering agency priorities.” This is because an agency “is in a unique — and authoritative — position to view its projects as a whole ... and allocate its resources in the optimal way. Such ... flexibility as Congress has allowed the agency is not for us to hijack.” *In re Barr Labs. Inc.*, 930 F.2d 72, 76 (D.C.Cir. 1991).

²⁰ *PacifiCorp*, 149 FERC ¶61,038 at P 12 (2014) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 524-25 (1978)).

Nor does the fact that the D.C. Circuit, at NECP's request, acted to hold in abeyance NECP's appeal of the Order Denying Rehearing for nearly a year (December Request at 2) provide a further reason for the Commission to act on the Petition now. It was NECP that chose to file its appeal in the D.C. Circuit in the first instance and the only issue in that appeal is whether the Commission acted reasonably in denying NECP party status. NECP voluntarily sought to have its appeal held in abeyance, having no assurance as to when or whether the Commission would act on its other submissions. That being the case, NECP's attempt to create an issue of constructive denial out of the lack of further Commission action is a transparent bootstrap. The Commission cannot have unreasonably delayed acting if it had no duty to act in the first instance, regardless of timeframe.

"Constructive denial" cases are understandably few and far between. The D.C. Circuit has explained that "[i]n considering a charge of [an agency's] unreasonable delay, ... we must satisfy ourselves that the agency has a duty to act and that it has 'unreasonably delayed' in discharging that duty."²¹ Moreover, "mere inaction by [an agency] cannot be transmuted by petitioners into an order rejecting their petition. Administrative action is not reviewable as an order unless and until [it] impose[s] an obligation, den[ies] a right, or fix[es] some legal relationship as a consummation of the administrative process."²²

As shown above, NECP has not shown, nor can it show, that the Commission has a duty to respond to NECP's other submissions and requests for action, so the fact that the Commission has not responded to them cannot be construed as a constructive denial.

²¹ *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (citing the Administrative Procedure Act at 5 U.S.C. § 706(1)).

²² *Am. Rivers v. FERC*, 170 F.3d 896, 897 (9th Cir. 1999) (quoting *Cities of Riverside & Colton v. FERC*, 765 F.2d 1434, 1438 (9th Cir. 1985)).

E. There Are Compelling Reasons for the Commission to Refrain From Acting on NECP's Requests

In addition to NECP's failure to make a case for further Commission action with respect to its Petition and Petition Supplement, there exist good reasons for the Commission to reject—or at least wait longer before acting on—NECP's Petition and Petition Supplement. This case involves a relicensing process that began more than 11 years ago. Virtually all of the procedural complexities of this case relate to the delay in issuance of the state Section 401 certification by the State of North Carolina.²³

Given the delay in the Section 401 process, it would make no sense in this case for the Commission to reopen the relicensing proceeding at this time, even if it had legal authority and grounds to do so.²⁴ Acting now on NECP's Petition and Petition Supplement—other than to reject them—would introduce issues, uncertainty and complications to the process that could prove moot or unnecessary.

NECP's arguments criticizing the annual licensing process under the Federal Power Act are misplaced. Annual licenses are required by the statute to be issued to the existing licensee²⁵ and the courts have held the Commission's issuance of them is not discretionary.²⁶

²³ In 2013, DWQ rejected a Section 401 application for the Yadkin Project for reasons APGI believes to be unlawful, and the matter is under appeal.

²⁴ See Sections II.B. and C., *supra*.

²⁵ 16 U.S.C. §808(a)(1); *see also*, 18 C.F.R §16.18.

²⁶ *Platte River Whooping Crane v. FERC*, 876 F.2d 109, 114 (D.C. Cir. 1989) (holding that “the issuance of ... annual licenses themselves is indeed a nondiscretionary act, in that the Commission has no choice but to issue the licenses to the existing licensees” and citing 16 U.S.C. §808(a)). *See also*, *Cal. Trout, Inc. v. FERC*, 313 F.3d 1131, 1136 (9th Cir. 2002) (holding that revoking the issuance of annual licenses until after the licensee obtains water quality certification is not in the discretion of the Commission).

III. CONCLUSION

As demonstrated above, NECP lacks any legal basis for its December Request. Moreover, the Commission has discretion to control its docket and has no duty to respond to NECP's unlawful petitions. Regardless, there are good reasons for the Commission to reject NECP's most recent submittal, and it should do so summarily.

Respectfully submitted,

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Dated: December 22, 2014

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 Washington, D.C., this 22nd day of December, 2014.

/s/ Seth T. Lucia

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