

I. The State is Already a Party to This Proceeding

Although the Motion states that it is being filed on behalf of the State of North Carolina “by and through” its present Governor (the “Governor”), it asks only that the Commission allow the State to intervene. Motion at 14 (“[T]he State respectfully requests that the Commission grant *its* Motion to Intervene Out of Time, . . .”) (emphasis added). Nowhere does the Motion ask the Commission to allow the Governor to intervene as a person separate and distinct from the State. The Motion is, in short, simply a motion by the State to intervene out of time.

Yet the State already is a party to this proceeding and has participated actively in it for more than two years. The State became a party when NCDENR timely filed a Notice of Intervention as a matter of right pursuant to Rule 214(a)(2) of the Commission’s regulations, 18 C.F.R. § 385.214(a)(2). Rule 214(a)(2) provides that “any state fish and wildlife, water quality certification, or water rights agency . . . is a party to any proceeding upon filing a notice of intervention in that proceeding, if the notice is filed within the period established under Rule 210(b).” NCDENR was entitled to base its intervention on this Rule because, as the Motion explains, North Carolina’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 [NC]DENR.” Motion at 10 n.4.¹ Since NCDENR filed its Notice of Intervention on February 22, 2007, within the time provided by the Commission’s Rules for interventions, NCDENR became a party by operation of Rule 214(a)(2) on that date.²

Under North Carolina law, when an agency of the State acts (or does not act) within its official capacity, it is acting on behalf of the State. *See Fabrikant v. Currituck County*, 621

¹ NCDENR is charged with implementing the federal Clean Water Act by developing and applying water quality standards. N.C. Gen. Stat. § 143B-282, 15A N.C.A.C. 02H .0500, and 33 U.S.C. § 1341.

² NCDENR included in its Notice an Alternative Motion to Intervene. As this motion was unopposed, NCDENR also became a party by operation of Rule 214(c)(1).

S.E.2d 19, 26 (N.C. Ct. App. 2005) (citing *Mullis v. Sechrest*, 495 S.E.2d 721, 725 (N.C. 1998)) (a claim against a State official in his or her official capacity is simply a claim against the State itself). Therefore, NCDENR's party status means that the State is a party to this proceeding, at least to the extent NCDENR is acting within the scope of its authority.

The Motion never claims that NCDENR acted or is acting outside the scope of its authority and responsibility and therefore does not represent the State as that term is used in the Motion. Nor does the Motion explicitly argue that North Carolina has interests with respect to this proceeding that are not encompassed within the scope of NCDENR's authority and responsibility such that the State, as that term is used in the Motion, is separate and distinct from NCDENR.

But the Motion at least hints at the latter argument. It does so in footnote 2 on page 3. There, the Motion explains that NCDENR represents the State "in its capacity as the steward of the State's environment and natural resources" but the issues in this proceeding transcend those under NCDENR's authority. This suggests an argument to the effect that the Governor's intervention is needed to represent North Carolina's interests other than its interests in its environment and natural resources. The Motion describes these additional issues as "the socioeconomic ramifications of this licensing decision." Motion at 12. These issues include both economic and cultural issues, such as employment, tax basis, and the strength and development of communities. *Id.* at 11-12.

The problem with this suggestion as a basis for distinguishing the State as used in the Motion from NCDENR is that legislature of North Carolina apparently did not circumscribe NCDENR's authority and responsibility as the Motion suggests. At least according to

NCDENR's Notice of Intervention, the legislature, in addition to stewardship of North Carolina's environment and natural resources, gave NCDENR authority and responsibility:

to encourage the expansion of employment opportunities, to provide a permanent foundation for healthy industrial development and to secure for the people of North Carolina, now and in the future, the beneficial uses of these great natural resources.

NCDENR Notice of Intervention at 3 (quoting N.C. Gen. Stat. § 143-211(c)). These responsibilities—expanding employment opportunities and providing a permanent foundation for healthy industrial development—are certainly broad enough to encompass the State's “socioeconomic ramifications of licensing decisions.” The Motion nowhere contradicts NCDENR's representation of its authority and responsibility.

It therefore appears that under the North Carolina law discussed earlier, NCDENR represents North Carolina with respect to all the interests the Motion identifies as supporting the State's instant attempted untimely intervention. Thus, the Motion is nothing more than a redundant and unnecessary pleading to intervene from a person that is already a party to the proceeding.³ Under the Commission's decisions, it follows that the Motion is a nullity that does not warrant Commission consideration. *See, e.g., La. Pub. Serv. Comm'n and the Council of the City of New Orleans v. Entergy Corp.*, 112 FERC ¶ 61,192, at P 8 (2005) (“As LPSC is already a party to this proceeding, LPSC's notice of intervention will be dismissed as moot.”); *Cal. Indep. Sys. Operator Corp.*, 90 FERC ¶ 61,315, at 62,041 n.4 (2000) (Commission did not address entity's motion to intervene as it already had party status in the proceeding by virtue of its previously filed timely and unopposed motion to intervene); *Cent. Me. Power Co.*, 61 FERC

³ The North Carolina Wildlife Resources Commission (“NCWRC”), an agency of the State of North Carolina, also filed a motion to intervene on February 21, 2007. That motion similarly was unopposed and therefore granted by operation of 18 C.F.R. § 385.214(c)(1). However, as an independent agency of the State, rather than part of the executive branch of State government, NCWRC has separate standing as a party.

¶ 61,095, at 61,384 n.2 (1992) (“American Rivers filed a second, and redundant, motion to intervene, which we dismiss as moot.”).

II. The Motion Does Not Meet the Standards For Late Intervention Set Forth in Rule 214(d)

Even if one assumes, *arguendo*, that the State, as represented by the Governor, is a separate entity distinct from NCDENR and that the Motion therefore is not moot, the Motion still must be denied because it fails to justify the extraordinary relief that it requests. The Motion was unmistakably filed after the deadline established by the Commission’s notice in this case for motions to intervene. That deadline was February 26, 2007.⁴ The Motion was filed on April 1, 2009, over 25 months past the Commission’s deadline. The Commission considers a motion to intervene after the deadline for submitting such motions a form of extraordinary relief, requiring the person seeking it to justify why the Commission should allow a departure from the orderly procedures its Regulations establish for deciding cases. What the Commission will consider in deciding whether the person seeking late intervention has justified that form of extraordinary relief is well-established and easily stated. It will consider:

whether the movant had good cause for not filing timely; any disruption of the proceeding that might result from permitting intervention; whether the movant’s interest is adequately represented by other parties; and whether any prejudice to, or additional burden on, existing parties might result from permitting the intervention.

Erie Boulevard Hydropower, L.P., 117 FERC ¶ 61,189, at P 30 (2006) (citing 18 C.F.R. § 385.214(d) (2006)).

With respect to each of these factors, the Motion is lacking.

⁴ Notice of Application Accepted for Filing and Soliciting Motions to Intervene and Protests, *Alcoa Power Generating Inc.*, Docket No. P-2197-073 (December 28, 2006).

(i) The Governor does not have good cause for having failed to file the Motion within the time prescribed by Rule 210(b)

The Motion cites as “good cause” for failing to file within the Rule 210(b) period the fact that “the opportunity to intervene through the normal channels predated the election of the current gubernatorial administration.”⁵ What the Motion overlooks, however, is the fact that the issues and positions in this proceeding are not new, and the State therefore has long been on notice as to the issues of this proceeding, regardless of the individual serving as governor. In her letter to the Commission of June 3, 2008, then-Lieutenant Governor (now current Governor) Perdue referred to the different circumstances that exist presently as compared to those present at the time the initial license was granted.⁶ Yet these circumstances to which the Governor referred (*i.e.*, the closing of the Alcoa Inc. (“Alcoa”) smelting operations in Badin, North Carolina) did not develop after the Rule 210(b) deadline in February 2007. Rather, Alcoa curtailed its smelting operations in 2002.

Furthermore, the previous gubernatorial administration, of which the current Governor was an integral and senior member, was responsible for the successful intervention in this proceeding of two of its instrumentalities—NCDENR and NCWRC. If those two State entities had the opportunity to intervene in this proceeding on a timely basis, then so too did the Governor’s office, assuming *arguendo* that the Governor’s office has separate standing to appear as a party. The fact that the individual serving as Governor changed is irrelevant. The present Governor is of the same political party as her predecessor, but even if that were not the case, the fact that the occupant of the office changes would not of itself indicate a change in State policy. In fact, although the Motion references the pending Relicensing Settlement Agreement

⁵ Motion at 12.

⁶ Letter from Lt. Gov. Beverly Eaves Perdue to the Commission, *Alcoa Power Generating Inc.*, Docket No. P-2197-073 (dated June 3, 2008).

(“RSA”),⁷ the Motion does not repudiate the State’s endorsement of the RSA, which, if approved, would result in the issuance of a new permanent license to APGI.⁸ Nor does the Motion explain why, if there is a disagreement arising under the RSA, the State has not proceeded with dispute resolution pursuant to the terms of that agreement.

Of course, Governor Perdue, when she was Lieutenant Governor, could have personally sought to intervene or could have sought intervention on behalf of the Office of the Lieutenant Governor. She did neither. Her subsequent election as Governor does not provide a sufficient basis for her to now file an untimely motion to intervene in a matter that the State has participated in fully since it intervened two years ago.

Accordingly, the Governor does not have good cause for failing to file the Motion within the Rule 210(b) period.

(ii) *Granting the motion to intervene will disrupt the proceeding*

The Motion states that the Governor’s participation as a party will not disrupt the proceeding “to any significant degree.”⁹ In support of this argument, the Motion notes that “[t]he issues raised here by the State have been previously identified by the State and others.”¹⁰

However, the Commission’s standard is whether granting late intervention might cause “[a]ny disruption of the proceeding”¹¹ The Motion’s claim of no disruption “to any

⁷ Motion at 3.

⁸ Nor could the State, consistent with Commission precedent, repudiate the RSA at this late stage of the instant proceeding. The RSA was duly filed as a settlement pursuant to Rule 602, 18 C.F.R. § 385.602. FERC does not allow a settlement supporter to withdraw from the settlement without good cause prior to FERC’s final action with respect to that settlement. As the Commission stated in *Columbia Gas Transmission Corp.*, 31 FERC ¶ 61,307, at 61,677 (1985):

It would be extremely disruptive to the settlement process—indeed to any decision-making process—if the parties were permitted to take one position and then, long after filings are completed, to simply change their minds and refile taking an opposite position.

⁹ Motion at 13.

¹⁰ *Id.*

significant degree” necessarily concedes that there will be *some* disruption if late intervention is granted.

Second, it is apparent from the Motion’s attempts to revisit issues already considered and request a hearing that granting the Motion at this late stage will inevitably disrupt the proceeding. APCI submitted its application for a license renewal in April 2006, and since that time the Commission and interested parties have gone through all of the processes required for relicensing short of the issuance of a Section 401 water quality certification and the final relicensing order itself. These processes have included negotiation and submission of the RSA as comprehensive settlement of most of the issues in relicensing and to which 23 parties, including the NCDENR and NCWRC, are signatories.¹²

The case, in short, is ripe for decision.

Yet the Motion nowhere indicates that the State is willing to accept the record as it is. Indeed, the Motion is explicit that the State intends to follow procedures of its own making and submit some time in the near future “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.” Motion at 13-14. The significant disruption that would occur if the Motion were to be granted could not be clearer.

This is wholly unwarranted. There are numerous reason why this is so. Three merit discussion here. First, if allowed to intervene, the State, as represented by the Governor, must necessarily oppose the RSA since it provides for an outcome—the issuance of new license to APCI—that is opposite to the outcome the Motion seeks. Yet the State, as represented by the

¹¹ 18 C.F.R. § 385.214(d)(ii) (2008) (emphasis added).

¹² Relicensing Settlement Agreement, *Alcoa Power Generating Inc.*, Docket No. P-2197-073 (May 7, 2007).

Governor, has waived any objection to the RSA. The RSA was submitted nearly two years ago pursuant to Rule 602 of the Commission's regulations, 18 C.F.R. § 385.602. The Commission gave notice of the submission of the RSA and established June 6, 2007 and June 18, 2007 as the deadlines for submission of comments and reply comments on the RSA, respectively.¹³ Under Rule 602, failure to submit a comment constitutes a waiver of all objections to a settlement agreement.¹⁴ The State, as an entity separate and distinct from NCDENR, did not file comments on the RSA by June 6, 2007. It therefore waived any objection to Commission approval of the RSA.¹⁵

Second, the Motion argues that there will be little disruption to the proceeding because the "[t]he issues raised here by the State have been previously identified by the State and others," and the Staff has already been informed of the issues and considered (in the Environmental Impact Statement at 35) the remedy the Motion seeks.¹⁶ These facts actually undermine the argument for late intervention. They demonstrate that the Governor's intervention is not needed to bring any issue to the Commission's attention; the issues the Governor wants to pursue have already been aired on the record.

Third, the Motion says that the Governor wants to argue not only that APGI's license application should be denied but also that the Federal government should take over the Project and turn it over to the State.¹⁷ This also undermines the Governor's argument for late

¹³ Notice of Settlement Agreement and Soliciting Comments, *Alcoa Power Generating Inc.*, Docket No. P-2197-073 (May 17, 2007).

¹⁴ 18 C.F.R. § 385.602(f)(3).

¹⁵ Furthermore, the State could not, consistent with Commission precedent, repudiate the RSA at this late stage of the instant proceeding. *See supra* note 8. In fact, one effect of granting the Motion would be for the State to effectively do an end run around that precedent.

¹⁶ Motion at 13.

¹⁷ *Id.*

intervention. The simple fact is that the time for considering federal takeover options expired on June 25, 2006, more than two years ago. 18 C.F.R. § 16.14(a)(1)(ii); 16 U.S.C. § 807. No useful purpose would be served by disrupting this case so that the Governor can present arguments for an action the Commission is now barred from taking by virtue of both the Commission's regulations and the Federal Power Act itself.

Thus, permitting late intervention would be highly disruptive of the existing proceeding.

(iii) The Governor's interests are adequately represented by other parties in the proceeding

In the Motion, the Governor argues that her interests in this proceeding “are distinct from the local economic and other interests,” stating that her “regional outlook . . . is not shared by the Town of Badin or any local government, or any industry, non-governmental organization, the licensee or even the Commission.”¹⁸ Conspicuously absent from this list of entities that do not share the Governor’s unique perspective are the NCDENR and the NCWRC, both of which are existing parties to this proceeding.

In apparent contradiction of its statement regarding the distinctiveness of the Governor’s perspective, however, the Motion also acknowledges that “[t]he issues raised here by the State have been previously identified by the State and others.”¹⁹ That being the case, the issues that the Motion seeks to advance are already before the Commission and are not unique to the Governor’s separate participation.

Accordingly, the Governor’s stated interests in this proceeding are already adequately represented by other parties, and there is no need from that perspective to permit late intervention.

¹⁸ Motion at 12.

¹⁹ Motion at 13.

(iv) Allowing the Governor to intervene will result in additional burdens upon existing parties

The Motion argues that “the ‘prejudice to, or additional burdens upon, the existing parties’ [of late intervention] is not consequential” because the issues the Governor raises have been previously identified during this proceeding.²⁰

It is without dispute that the stated issues of importance to the Governor in this proceeding are already well-represented by existing parties, particularly NCDENR. The fact that the issues are already developed in the record is precisely why the Governor’s attempt to intervene at this late stage of the proceeding specifically in order to rehash these same issues is burdensome and prejudicial. Intervention by the Governor at this late stage would result in an additional burden to the existing parties, especially the 23 signatories to the RSA, by reopening for discussion countless issues that have already been resolved and for which accommodations have been made.

III. No Justification Has Been Offered For the Motion for Emergency Hearing

The entire Motion for Emergency Hearing, including the justification offered for such Motion, is contained in a single sentence on pages 13 and 14 of the document filed by the Governor:

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

This cryptic sentence does not contain any specific offer of reasons or justifications, but instead refers to the Motion generally. The Motion does contain statements about the

²⁰ *Id.* (quoting 18 C.F.R. § 385.214(d)(1)(iv)).

Governor's concerns, most of which are contained in a section of that document under the heading, "The State Supports the Public Development and Conservation of the Yadkin River." Motion at 3-10. The statements referenced in those pages allege facts relating to the development of the Project, *e.g.*, the issuance of an initial project license in 1958, the relationship between that 1958 license and Alcoa's industrial operations in Stanly County, and the curtailment of those industrial operations in 2002.²¹ The essence of the Governor's argument is that Alcoa's cessation of industrial operations in Stanly County removed any justification for APGI to be granted a new license for the Yadkin Project.

These arguments are broad and sweeping, and they quote isolated, generic public interest expressions from the statute and past cases, none of which have any bearing on the particular circumstances of this proceeding. Such arguments are therefore irrelevant as they articulate no basis under the Federal Power Act for the Commission to refuse to issue a new project license to APGI. They certainly offer no justification for the Commission to convene an emergency hearing to consider the Motion or any other issue. Hearings are for contested issues of material fact,²² and no such issues have been alleged here.

For these reasons, the Motion's request for a hearing is completely unjustified and therefore must fail.

²¹ The Commission has already developed a record regarding the socioeconomic effects of project relicensing (see Exhibit H of APGI's license application, which addresses the requirements of 18 C.F.R. § 16.10), and, even if it were appropriate to do so, the Governor's Motion offers no additional evidence in that regard.

²² *See, e.g., Bradwood Landing LLC*, 124 FERC ¶ 61,257, at P 15 (2008) (citing *S. Union Gas Co. v. FERC*, 840 F.2d 964, 970 (D.C. Cir. 1988); *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124 (D.C. Cir. 1982); *Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125, 1128 (D.C. Cir. 1969)).

CONCLUSION

Its dramatic language and self-righteous claims to present issues of public importance and legal significance notwithstanding, the Motion lacks justification and legal merit. It should be denied expeditiously.

Respectfully submitted,

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Dated: April 15, 2009

CERTIFICATE OF SERVICE

I hereby certify that, I have this day caused to be served by First Class Mail or electronic mail the foregoing documents upon the parties to the official service list compiled by the Secretary for this proceeding. Additionally, this Response has been served by First Class Mail and electronic mail to the North Carolina Department of Justice.

Dated at Washington, DC this 15th day of April 2009.

/s/ Claire M. Brennan

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