

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Alcoa Power Generating, Inc.) Project No. 2197-109
Cube Yadkin Generation LLC)

**COMMENTS AND PROTEST OF THE STATE
OF NORTH CAROLINA IN OPPOSITION TO
THE APPLICATION FOR COMMISSION
APPROVAL OF TRANSFER OF PROJECT
LICENSE, SUBSTITUTION OF PROJECT
LICENSE APPLICANT AND REQUEST FOR
EXPEDITED CONSIDERATION FILED BY
ALCOA POWER GENERATING, INC. AND
CUBE YADKIN GENERATION LLC**

NOW COMES the State of North Carolina (hereinafter sometimes referred to as the “State”), by and through its undersigned counsel, pursuant to Rules 202, 211 and 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”), 18 C.F.R. §§385.202, 385.211 and 385.212 (2016), as well as the Commission’s August 1, 2016 Notice of Application for Transfer of License and Solicitation of Comments, Motions to Intervene and Protests,¹ and moves the Commission to receive the State’s Comments and Protest in support of its request that the Commission deny Alcoa Power Generating, Inc.’s (“Alcoa”) and Cube Yadkin Generating LLC’s (“Cube”) July 25, 2016 Application for Transfer of Project License, Substitution of Project License Applicant and Request for Expedited Consideration² in its entirety.

On July 12, 2016, Alcoa filed an Application for Authorization Under Section 203 of the Federal Power Act and Request for Waivers and Expedited Action. *Alcoa Inc., Alcoa Power*

¹ Notice of Application for Transfer of License and Soliciting Comments, Motions to Intervene, and Protests, Project No. 2197-109 (Aug. 1, 2016), *available at* eLibrary Accession No. 20160801-3029.

² Application for Transfer of License, Substitution of License Applicant and Request for Expedited Consideration, Project No. 2197-109 (July 25, 2016), *available at* eLibrary Accession No. 20160725-5243.

Generating, Inc., Docket No. EC16-____-000. By this filing, Alcoa sought the Commission's approval of Alcoa's plan to "flip" the Yadkin Hydroelectric Project to another company (a company that has no presence or history in the State of North Carolina) and to thereby extract from the people of the State of North Carolina the very last bit of profit it can before finally leaving the State entirely.

Alcoa's and Cube's July 25, 2016 Application for Transfer of Project License and Substitution of Project License Applicant (the "Application") is the legal and logical follow-up to Alcoa's July 12, 2016 Application. For the reasons summarized below, Alcoa's and Cube's July 25, 2016 Application should be denied in its entirety.

Alcoa's and Cube's Application is Premature

In paragraph 6 of Section I of Alcoa's and Cube's Application (entitled "Information Required by Part 9 of the Regulations), Cube purports to certify to the Commission that, if and when the Commission approves the license transfer requested by Alcoa and Cube and after Alcoa has transferred to Cube all of the Project properties owned by Alcoa, Cube will submit to the Commission certified copies of all instruments of conveyance of title to the Project properties. Similarly, in paragraph 8 of Section I of Alcoa's and Cube's Application, Alcoa purports to certify to the Commission that it is currently in compliance with all the terms and conditions of its Project license, which include the requirement that Alcoa hold lawful title to all the real property that is necessary to operate the Project as licensed by the Commission.

Neither Alcoa nor Cube can possibly make these certifications, at least at the present time. The question whether Alcoa or the people of the State of North Carolina own and hold lawful title to the Project properties is disputed and is currently being litigated between the State and Alcoa in the federal courts. *See State of North Carolina v. Alcoa Power Generating, Inc.*,

No. 15-2225 (4th Cir. filed Oct. 13, 2015). Oral argument in this case has been scheduled by the United States Court of Appeals for the Fourth Circuit for the week of October 25-28, 2016 and it seems very unlikely to the State that the Court of Appeals will render a ruling in this dispute until sometime in the spring of 2017, or even later. The Court of Appeals' ruling could result in the case being remanded to the district court for further proceedings to determine who owns the Project properties. No one can accurately predict when any such remanded proceedings might come to a conclusion. It could take years. Therefore, at this time, it is unclear when the dispute between the State and Alcoa over the ownership of the Project properties will be resolved – or how the federal courts will ultimately rule on this fundamental issue.

Under these circumstances, Cube cannot possibly certify that it will be able to submit to the Commission certified copies of all instruments of conveyance of title to the Project properties. And Alcoa cannot possibly certify to the Commission that it owns all real property that is necessary to operate the Project as licensed. Until this fundamental issue of who owns the Project properties has been fully and finally resolved, any substantive action by the Commission on Alcoa's re-licensing application, including any ruling at this time on Alcoa's and Cube's Application, would be premature. The Commission should deny Alcoa's and Cube's Application for this reason alone.

**Alcoa's and Cube's Application is Also Contrary
to the Public Interest in a Host of Important
Ways**

In the State's September 2009 opposition to Alcoa's re-licensing application and request that the Commission recommend federal recapture of the Project, as comprehensively supported

by the State of North Carolina's 21st Century Plan for the Use of the Yadkin River Resources,³ the State demonstrated, among other things, why Alcoa's re-licensing application should be denied and why the Commission should recommend federal recapture of the Project. In summary, the State pointed out that Alcoa's initial license in 1958 was premised on an agreement among Alcoa, the State and the Commission. Alcoa told the State and the Commission that, in exchange for a full, prospective 50-year license, it would use the flows of the Yadkin River to create a significant benefit for the people of North Carolina by creating and maintaining nearly 1,000 very high-paying jobs near the Project site. The State supported Alcoa's license application on *this* basis and the Commission awarded Alcoa a 50-year license that was predicated on the significant public interest in the creation and maintenance of these jobs.

The State further pointed out in its 2009 recapture filing that Alcoa did not keep its commitment. It has not provided 1,000 jobs, or anything even close to that number, to the people of the Yadkin River Basin for decades. In 2007, Alcoa permanently shut down the Aluminum smelting plant in Badin that was the source of these jobs and it presently employs only a small handful of people in the State. Its 2006 re-licensing application and proposal make clear that it does not contemplate using the flows of the Yadkin River to restore these jobs or to create any other comparable or even significant benefit for the people of North Carolina –

³ Motion of the State of North Carolina to Present Evidence in Support of its Request That the Commission Recommend Federal Recapture, Comments and Evidence of the State in Support of its Opposition to the Issuance of a New License to Alcoa, Motion of the State to Supplement Final Environmental Impact Statement, Request of the State for Waivers of Commission Regulations, if Necessary, and Motion of the State for Oral Argument Before the Full Commission and Exhibit 1 thereto, The State of North Carolina's 21st Century Plan for the Use of the Yadkin River Resources [Sept. 8, 2009], Project No. 2197-073 (Sept. 18, 2009), *available at* eLibrary Accession No. 20090918-5115. The State hereby incorporates its September 18, 2009 Recapture Request (as fully identified and described above in this footnote) into this Motion, Comments and Protest as if fully set forth herein.

including those people who live in the Project area and who have been devastated economically and otherwise by Alcoa's shuttering of its Aluminum smelting facilities there.

Put another way, the State pointed out in its 2009 recapture filing that Alcoa should not be given a Government-sponsored monopoly license to use – free of charge – a publicly-owned natural resource of immense value for enormous private profit where its proposed use of that resource offers the public virtually nothing of value in return.

Nothing has happened since the State filed its September 2009 opposition to Alcoa's re-licensing application and recapture request to alter this basic truth. Alcoa still offers no meaningful public benefit in exchange for its proposed free use of a significant part of the State's second-largest river system in order to earn enormous private profits.

Now, in its Application, Cube follows Alcoa's lead. It says *nothing* about how its proposed use of this public resource would benefit the public in any meaningful way or how it proposes to fulfill Alcoa's broken promise to the Commission and the State. Like Alcoa, Cube offers nothing to the people of North Carolina in return for its proposed free monopoly use of the Yadkin River. Until Cube has fully addressed this issue and has disclosed to the Commission and the people of North Carolina exactly what public benefit will result from its planned use of the Yadkin River, its and Alcoa's Application is contrary to the public interest and should be denied.

The State's September 2009 opposition to Alcoa's re-licensing application and request that the Commission recommend federal recapture of the Project also presented evidence that Alcoa has failed in its statutory duty to be a good steward and trustee of the Yadkin River, Badin Lake and the health and safety of the people who live nearby. Specifically, the State identified recently-discovered evidence pointing to conduct by Alcoa that substantially polluted and

damaged the land, the Yadkin River and Badin Lake. Most importantly, the State pointed out that Alcoa has shown little interest, if any, in expediting the actual clean-up of its pollution.

Cube follows Alcoa's lead on this issue as well. It says nothing in its and Alcoa's Application about what, if anything, Cube will do – and when – to address, remediate and resolve this pollution problem. And Alcoa says nothing on this subject in its and Cube's Application. Has Cube agreed to assume Alcoa's duty to clean up this pollution? Does Cube have a plan for doing so? If so, what is the plan? Does Cube possess the financial resources for doing so? None of these vitally important questions is even addressed by Cube (or Alcoa) in the Application, much less answered. Under these circumstances, it is impossible for the Commission to conduct a rigorous and comprehensive public interest analysis of Alcoa's and Cube's Application or of their plan for the future use of the Yadkin River, as is required by Section 10(a) of the Federal Power Act, 16 U.S.C. §803(a) (2016). *See, e.g.*, H.R. Rep. No. 99-507 at 12 (1986), *reprinted in* U.S.C.C.A.N. 2496, 2499 (When the Federal Power Act was amended in 1986, Congress recognized that “[t]he Commission and the courts have held the Section 10(a) standard to be [a] *broad public interest* standard of *all* factors affecting the public interest.”). Accordingly, Alcoa's and Cube's Application should be denied.

In addition, since it filed its 2006 re-licensing application, Alcoa has entered into agreements with a number of communities in the Project area which will be profoundly affected by the Commission's re-licensing decision. Two examples are Alcoa's agreements with the City of Albemarle and Stanly County. In these private, side agreements with these communities, Alcoa promised that, in exchange for their reciprocal promise of support for Alcoa's re-licensing application, Alcoa would provide these communities with various benefits, including post-licensing special water withdrawal privileges and financial payments.

Cube and Alcoa do not address or even mention these side agreements in their Application. Importantly, Alcoa's and Cube's Application does not confirm and certify that Cube has agreed to assume all of Alcoa's obligations under any, some or all of these side agreements. If the Commission allows Alcoa to transfer and assign its hydropower license to Cube without a legally binding assumption by Cube of Alcoa's contractual obligations to these North Carolina communities, Cube will have no obligation to fulfill Alcoa's obligations to these communities under these side agreements and Alcoa, as a non-licensee, will not be in a position to fulfill certain of its most important promises to these communities under these side agreements – *i.e.*, its water withdrawal promises.

The status of this matter directly affects the public interest. Given that Alcoa and Cube did not even address this matter in their Application, it is impossible for the Commission to conduct a meaningful public interest analysis of Alcoa's and Cube's Application or of their plan for the future use of the Yadkin River. For this additional reason, Alcoa's and Cube's Application should be denied.

So Many Important Facts and Circumstances Bearing Directly Upon Alcoa's 2006 Re-Licensing Application Have Changed Significantly Since That Time That the Only Way to Ensure That the Public Interest Will Be Served Is For the Commission to Reopen the Licensing Process and Begin It Anew.

Alcoa's re-licensing application is now over a decade old. The State's 21st Century Plan for the Use of the Yadkin River Resources and the State's recapture proposal are almost seven years old. Since the filing of these documents with the Commission, the facts on the ground have dramatically changed. The most obvious such change is that Alcoa no longer even wishes to be licensed to operate the Project. In addition, the essential facts and figures contained in

Alcoa's 2006 re-licensing application have become outdated and have been superseded by the passage of time. The same is true of the State's 21st Century Plan, on which its recapture request is based. The same can also be said of the environmental studies and reports underlying Alcoa's re-licensing application and the State's 21st Century Plan. And the same is true of the February 2007 Relicensing Settlement Agreement (the "RSA"). Indeed, one important signatory to the RSA, the North Carolina Wildlife Resources Commission, has rescinded its agreement to that document and no longer supports Alcoa's re-licensing application. A decision to grant Alcoa's (or Cube's) re-licensing application based upon such outdated and superseded information would seriously undermine public trust and confidence in the entire licensing process – a process by which a decision is made to award an entity a Government-sponsored monopoly license to use a public waterway for up to 50 years free of charge. A matter this important which affects so many significant public interests requires a process that is likely to assure sound, objective decision-making. For these reasons, the Commission should reopen the licensing process and begin it anew.

Even more importantly, when Alcoa filed its re-licensing application over a decade ago, there were no other companies or political entities that filed a competing license application or expressed any interest in doing so. In the ensuing decade, however, three such entities have expressed the desire to be licensed to operate the Project, the State of North Carolina, New Energy Capital Partners, LLC and, most recently, Cube. Under the circumstances that now exist, and which did not exist when Alcoa filed its re-licensing application, it is clear that there are multiple entities which might want to *compete* for the Project's license. This process of open and transparent competition would undoubtedly result in the public receiving a far greater benefit in exchange for allowing one of these entities to use the Yadkin River than a process involving

only Alcoa (or Cube) as a re-licensing applicant. Thus, the passage of time and the changed circumstances occurring during that period make clear that the entire licensing process should be reopened and started anew. Nothing short of this can ensure that the public interest will be served by the Commission's licensing decision.

**Alcoa's and Cube's Request for Expedited
Consideration Is Contrary to the Public Interest
and Should Be Denied.**

Alcoa and Cube filed their Application at a time when, among other things, no one even knows who the true owner of the Project properties is. As noted above, this absolutely fundamental issue will not be resolved by the federal courts until at least some time next year – or possibly much later.

In addition, as demonstrated above, Alcoa's and Cube's Application fails to supply the Commission with the answers to a host of vitally important questions which go directly to the Commission's practical ability to conduct the rigorous and comprehensive public interest evaluation of Alcoa's and Cube's proposal and plans that is required by Section 10(a) of the Federal Power Act.

Furthermore, Alcoa and Cube ask the Commission to give its blessing to their proposal and plans – plans which dramatically affect the public interest – at a time when the Commission is functioning without a fifth Commissioner. The public has a right to expect that a matter as important as this will be carefully scrutinized by the full Commission.

Finally, Alcoa's and Cube's Application does not provide the Commission with sufficient information about Cube, its related companies and its key owners and investors for the State to know anything at this point about whether Cube qualifies for the critical infrastructure transfer that it and Alcoa contemplate under the Foreign Investment and National Security Act of 2007,

Pub. L. 110-49, 121 Stat. 246 (enacted July 26, 2007). In view of the degree of damage and potential injury to the public in North Carolina that could be caused by the improper operation of the Yadkin Hydroelectric Project, the State asks that the Commission not even consider Alcoa's and Cube's Application until, at a bare minimum, the Committee on Foreign Investment in the United States has carefully and fully vetted Cube, its related companies and its owners and investors in accordance with that Committee's regulations (found at 31 C.F.R. Part 800).

For all of these reasons, Alcoa's and Cube's Request for Expedited Consideration should be denied.

The State's Additional Motion For Any Necessary Waivers

The State believes that its Motion, Comments and Protest are all well within the Commission's authority under the Federal Power Act and the Commission's regulations; however, to the extent that the Commission believes that the State's requests for relief are inconsistent with the Commission's regulations, the State seeks any and all waivers necessary so that the Commission can accept, consider and grant the relief requested by the State in its Motion, Comments and Protest.

Conclusion

Alcoa's and Cube's Application is premature and materially incomplete. The relief it seeks is decidedly contrary to the public interest. The same is true of Alcoa's and Cube's Request for Expedited Consideration. Therefore, Alcoa's and Cube's Application and their Request for Expedited Consideration should be denied in their entirety.

Respectfully submitted this 31st day of August 2016.

Signature of counsel appears on the following page

THE STATE OF NORTH CAROLINA

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CERTIFICATE OF SERVICE

This is to certify pursuant to Rule 2010 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission that, on the 31st day of August 2016, I caused a copy of the foregoing to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

I. Faison Hicks

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