

The DEIS contains a number of environmental measures recommended by APGI, Commission staff, resource agencies and stakeholders. One such measure, Environmental Measure #19, is a staff recommendation that would impose significant and unwarranted costs on APGI. It would require APGI to develop and implement a sedimentation and flood protection plan.¹ Environmental Measure #19 is based on information submitted by Salisbury and its consultant, Mobile Boundary Hydraulics, PLLC ("MBH"). See DEIS at 267-70. Specifically, on May 14, 2007, Salisbury submitted information and comments purporting to support the imposition of a flood mitigation condition, which included three exhibits titled *Large Flood Relief Channel*, Dr. Ronald R. Copeland (May 10, 2007); *Response to 'Consolidated Answer of Alcoa Power Generating, Inc., Dr. Ronald R. Copeland (May 8, 2007); and Response to APGI Comments*, Dr. Martin Doyle (May 9, 2007). These submissions by Salisbury purported to be modifications of earlier studies that had been submitted by Salisbury on February 26, 2007 and which were heavily criticized as lacking scientific and engineering substance in an affidavit by Dr. David T. Williams, Ph.D., P.E., that was submitted on March 27, 2007. On June 25, 2007, APGI filed an answer and reply comments demonstrating to the Commission that the May 14, 2007 materials were also flawed in significant respects, and included another affidavit by Dr. Williams in which he noted that Salisbury's May submission contained study claims that could not be verified from the information presented. Affidavit of David T. Williams, Ph.D., P.E. dated June 22, 2007, at page 5.

¹ Environmental Measure #19 would require APGI to "[d]evelop and implement a sedimentation and flood protection plan that includes (a) specific measures to ensure dredging of sufficient volume and frequency such that the city of Salisbury's water intake remains clear of sediments, and (b) an assessment of the feasibility of implementing measures proposed by the city of Salisbury or comparable measures that would achieve the same objective to protect the pump station and Grant Creek wastewater treatment facility from flooding" Staff assigned Environmental Measure #19 Capital Costs of \$16,798,670 or a Total Annualized Cost of \$1,612,350. DEIS at 233.

In an apparent response to the criticisms set forth in APGI's June 25 filing, Salisbury submitted further materials on August 29, 2007, which included two documents titled *Equilibrium Analysis of Yadkin and South Yadkin Rivers*, Dr. Martin Doyle (Aug. 21, 2007) and *Effects of Bridges over Yadkin River on Water Surface Elevation Profiles*, Dr. Martin Doyle (Aug. 2007). In response, APGI informed the Commission by letter dated September 13, 2007 that the information submitted by Salisbury and MBH is suspect as to its conclusions, accuracy and scientific validity, and that Salisbury had refused to provide sufficient information regarding its studies that would permit any outside expert to evaluate them as their assumptions, methodologies, accuracy or conclusions. Nevertheless, the Commission Staff recommendation, Environmental Measure # 19,² set forth in the DEIS accepted Salisbury's claims and studies as presented without acknowledging either the weaknesses of those materials or the lack of supporting documentation and workpapers.

In order for the Commission to reach an informed and reasoned decision in the public interest, it is necessary for APGI to examine, test and comment on the Environmental Measure #19 and the underlying materials upon which that measure is based.³ APGI cannot do that without the materials that Salisbury has refused to disclose, despite requests for them that Salisbury has not acknowledged.

² There is no indication in the DEIS of the extent to which the Commission Staff, in formulating Environmental Measure #19, either evaluated the Salisbury studies or conducted its own studies.

³ The Salisbury submissions, including the MBH materials cited in the DEIS, unlike the other studies in the relicensing record, were developed by Salisbury on its own initiative outside of the enhanced three stage relicensing process. Thus, unlike the other studies in the relicensing record, including one relating to sedimentation, they have never been vetted by or been subject to question by the parties through the process.

II. DISCOVERY REQUESTED

APGI seeks two forms of discovery under the Commission's Rules, data requests, interrogatories, and requests for production of documents or things under Rule 406 and depositions under Rule 404.

APGI has attached a set of data requests to this motion. The data requests seek, with respect to the documents submitted by Salisbury on February 26, May 14 and August 29, (1) copies of all model runs (including those discarded or otherwise not relied upon), (2) specific lists of all assumptions and input data, (3) statements of scientific and/or engineering justification for choices made regarding the working of the model and all assumptions/data inputs, (4) sufficient information regarding the model structure to permit an independent evaluation of how it functions, (5) copies of all tests and other analyses of the model that were conducted in order to evaluate and verify its performance, and, finally, (6) copies of all sensitivity analyses conducted with respect to the model as used. APGI requires full and complete responses to these data requests on an expedited basis in order to prepare its comments on the DEIS.

In addition, APGI requests permission to conduct depositions of individuals with knowledge of the materials submitted by Salisbury and MBH and the underlying support for those materials. Discovery of this information is relevant to the issues presented for comment by the DEIS, and is reasonably calculated to lead to the discovery of admissible evidence.

III. IT IS PROPER UNDER THESE CIRCUMSTANCES TO PERMIT DISCOVERY AND TO APPOINT A DISCOVERY MASTER

Where, as here, a proceeding cannot go forward without the production of certain information, it is appropriate to order discovery even though the proceeding has not been set for hearing. Rule 401(a) provides that Subpart D of the Commission's Rules applies to "discovery in proceedings set for hearing under subpart E of this part, *and to such other proceedings as the*

Commission may order." 18 C.F.R. § 385.401(a) (emphasis supplied). "Thus, the Commission has indicated that its discovery rules can be used to obtain information even if a proceeding has not been set for a trial-type hearing." *Niagara Mohawk Power Corp.*, 43 FERC ¶ 61,015, at 61,049 n.13 (1988); *see also Process Gas Consumers Group v. FERC*, 930 F.2d 926, 929 (D.C. Cir. 1991) ("[T]he use of discovery outside the hearing context lies within the discretion of the Commission.").

The Commission has ordered discovery where "it would be helpful to have more information . . . [i]n order to determine how to proceed" *Pub. Util. Comm'n of Calif. v. El Paso Natural Gas Co.*, 91 FERC ¶ 61,312, at 62,083 (2000), *reh'g denied*, 94 FERC ¶ 61,021 (2001). In that case, the CPUC had filed a complaint alleging affiliate abuse and other anticompetitive acts. In order to more fully develop the facts, which were in the possession of the respondents, the complaint included discovery requests. The Commission required the respondents to respond to the majority of the requests, in order to "facilitate the CPUC's and the Commission's determination of whether further action is required." *Id.* Similarly, in *Amer. Municipal Power-Ohio v. Dayton Power & Light Co.*, 67 FERC ¶ 61,373 (1994), *reh'g denied in relevant part*, 68 FERC ¶ 61,133 (1994) ("*AMP*"), the Commission ordered discovery outside of the hearing context, where the requesting party had "invested substantial time and effort in the proposed project [but] cannot finalize its proposal, and the Commission is unable to fully evaluate the merits of [the] application, without the benefit of the requested information." *Id.* at 62,274.

In *AMP*, the Commission ordered the party to undertake new interconnection studies, *i.e.*, to create materials not then in existence. By contrast, APCI is only seeking information that Salisbury already has in its possession. Salisbury and its consultant, MBH, have already

performed the studies, and therefore must have the materials underlying those studies. In fact, the DEIS has already cited the studies approvingly and followed their recommendations. But neither APGI nor the Commission has evaluated or can evaluate the basis for those studies until Salisbury produces those underlying materials. In order for APGI to provide meaningful comment and for the Commission to make an informed decision, the Commission should order Salisbury to respond to APGI's data requests and permit APGI to depose any and all persons with knowledge of the information requested.

It is also appropriate to appoint a Discovery Master in circumstances such as these. Although APGI is hopeful that Salisbury will produce the information requested and that any deponent or deponents will be cooperative, it is possible that disputes could arise that will require quick resolution. Because this proceeding has not been set for hearing, there is no presiding judge to resolve those disputes. Where it is inefficient for the decisional authority to rule on discovery disputes, the Commission has appointed a Discovery Master. *See San Diego Gas & Elec. Co. v. Sellers*, 101 FERC ¶ 61,186 at P 26 & n.4 (2002). The Commission should do so here in order to provide for a definitive and efficient process to resolve any disputes and facilitate the production of the information APGI requires to comment on the DEIS.

IV. REQUEST FOR EXPEDITED TREATMENT AND SHORTENED ANSWER PERIOD

APGI has only sixty days from the publication in the Federal Register of the notice of availability of the DEIS to submit its comments. APGI strongly believes that Environmental Measure #19 is unwarranted by factual circumstances and will show that to be the case, given sufficient information to evaluate the studies on which it is based. In order to allow APGI a reasonable amount of time in which to undertake its own analysis of the Salisbury studies, APGI must receive the materials as soon as possible.

Accordingly, APCI respectfully requests that the Commission shorten the ordinary answer period under Rule 213 and grant this motion on an expedited basis. Specifically, APCI respectfully requests that the Commission issue a notice in this docket requiring answers, if any, to be filed in two business days, by Wednesday, October 10, 2007, and issue an order on this motion by Friday, October 12, 2007.

V. CONCLUSION

WHEREFORE, APCI respectfully requests that the Commission:

- (i) Order Salisbury and MBH to produce full and complete responses to the attached data requests;
- (ii) Order Salisbury and MBH to make available for deposition any and all persons with knowledge of the subjects of the data requests;
- (iii) Appoint a Discovery Master;
- (iv) Issue a notice in this docket requiring answers, if any, to be filed within two business days, by Wednesday, October 10, 2007; and
- (v) Issue an order on this motion by Friday, October 12, 2007.

Respectfully submitted,

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Dated: October 5, 2007

3. In answering these Data Requests, respondent is requested to furnish such information as is available to respondent, including information that respondent is able to obtain by due diligence from respondent's present or former employees, accountants, investigators, consultants, witnesses, agents or other persons acting on respondent's behalf.
4. Where a Data Request has a number of separate subdivisions or related parts or portions, a complete response is required to each such subdivision, part or portion. Any objection to a Data Request should clearly indicate the subdivision, part or portion of the Data Request to which it is directed.
5. If a Data Request specifically requests an answer in response rather than the production of documents alone, an answer is required. The production of documents alone will not suffice. These Data Requests are continuing in nature and require supplemental responses when further or different information with respect to the same is obtained.
6. Each response should be furnished on a separate page headed by the individual Data Request being answered. Individual responses of more than one page should be stapled or bound and each page consecutively numbered.
7. For each document produced or identified in a response to a Data Request that is computer generated, state separately: (a) what types of data, files or tapes are included in the input and the source thereof; (b) the form of the data that constitutes machine input (*e.g.*, punch cards, tapes); (c) a description of the recordation system employed (including program descriptions, flow charts, etc.); and (d) the identity of the person who was in charge of the collection of input materials, the processing of input materials, the databases utilized and the programming to obtain the output.
8. If a Data Request can be answered in whole or in part by reference to the response to another Data Request served in this proceeding, it is sufficient to so indicate by specifying the other Data Request by participant and number, by specifying the parts of the other response that are responsive and by specifying whether the response to the other Data Request is a full or partial response to the instant Data Request. If it constitutes a partial response, the balance of the instant Data Request must be answered.
9. If you cannot answer a Data Request in full after exercising due diligence to secure the information necessary to do so, state the answer to the extent possible, state why you cannot answer the Data Request in full and state what information or knowledge you have concerning the unanswered portions.
10. If, in answering any of these Data Requests, you feel that any Data Request or definition or instruction applicable thereto is ambiguous, set forth the language you feel is ambiguous and the interpretation you are using in responding to the Data Request.
11. If a document requested is unavailable, identify the document, describe in detail the reasons the document is unavailable, state where the document can be obtained and specify the number of pages it contains.

12. If you assert that any document has been destroyed, state when and why it was destroyed and identify the person who directed the destruction. If the document was destroyed pursuant to your document destruction program, identify and produce a copy of the guideline, policy or company manual describing such document destruction program.
13. If you refuse to respond to any Data Request by reason of a claim of privilege or for any other reason, state in writing the type of privilege claimed and the facts and circumstances you rely upon to support the claim of privilege or the reason for refusing to respond. With respect to requests for documents to which you refuse to respond, identify each such document and specify the number of pages it contains.
14. You must produce all documents, even if they are publicly available, unless such responsive documents are easily accessible on and downloadable from a publicly available Internet website. In such a case, you must provide the exact website address where the responsive document is located as well as the file name.
15. Each document produced shall be verified under oath in writing as being an authentic original document or a true duplicate of an authentic original document.
16. Identify the person from whom the information and documents supplied in response to each Data Request were obtained, the person who prepared each response, the person who reviewed each response, and the person who will bear ultimate responsibility for the truth of each response.
17. If no document is responsive to a Data Request that calls for a document, then so state.
18. Responses to the Data Requests should be submitted as they become available by electronic mail if possible, or if electronic mail is not possible due to the size of the responses, by next-day delivery to:

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DEFINITIONS

- A. The terms “and” and “or” shall be construed either disjunctively or conjunctively whenever appropriate in order to bring within the scope of each Data Request any information or DOCUMENT that might otherwise be considered to be beyond its scope.
- B. The singular form of a word shall be interpreted as plural, and the plural form of a word shall be interpreted as singular whenever appropriate in order to bring within the scope of each

Data Request any and all information and DOCUMENTS that might otherwise be considered beyond its scope.

C. The word EACH shall be construed to include the word EVERY, and EVERY shall be construed to include the word EACH. Similarly, the word ANY shall be construed to include ALL and the word ALL shall be construed to include ANY.

D. The word “IDENTIFY”, when used with respect to a person, requires you to state his or her full name; his or her most recently known home and business addresses and telephone numbers; his or her present title and position; his or her present employer.

E. RELATES TO, RELATING TO or RELATED means discussing, referring to, discussing, mentioning, evaluating, critiquing, explaining, evidencing, analyzing, accounting for, associated with or bearing any relationship to the subject matter of the Data Request.

DATA REQUESTS

APG-SAL-1:

Please provide copies of all model runs (including those discarded or otherwise not relied upon), relating to any of *Numerical Sedimentation Investigation*, Dr. Ronald R. Copeland (Feb. 20, 2007); *Technical Report: High Rock Dam and High Rock Lake Sedimentation Flooding Effects as Estimated Using HEC-RAS Modeling*, Salisbury-Rowan Utilities (Jan. 2006); *High Rock Dam and Sediment Delta Flooding and Sedimentation Effects (1927-2058) on City Of Salisbury Critical Infrastructure*, Dr. Martin Doyle (Feb. 2007); *Large Flood Relief Channel*, Dr. Ronald R. Copeland (May 10, 2007); *Response to 'Consolidated Answer of Alcoa Power Generating, Inc., Dr. Ronald R. Copeland (May 8, 2007); and Response to APGI Comments*, Dr. Martin Doyle (May 9, 2007); *Equilibrium Analysis of Yadkin and South Yadkin Rivers*, Dr. Martin Doyle (Aug. 21, 2007); and *Effects of Bridges over Yadkin River on Water Surface Elevation Profiles*, Dr. Martin Doyle (Aug. 2007).

APG-SAL-2:

Please provide specific lists of all assumptions and input data relating to any of *Numerical Sedimentation Investigation*, Dr. Ronald R. Copeland (Feb. 20, 2007); *Technical Report: High Rock Dam and High Rock Lake Sedimentation Flooding Effects as Estimated Using HEC-RAS Modeling*, Salisbury-Rowan Utilities (Jan. 2006); *High Rock Dam and Sediment Delta Flooding and Sedimentation Effects (1927-2058) on City Of Salisbury Critical Infrastructure*, Dr. Martin Doyle (Feb. 2007); *Large Flood Relief Channel*, Dr. Ronald R. Copeland (May 10, 2007); *Response to 'Consolidated Answer of Alcoa Power Generating, Inc., Dr. Ronald R. Copeland (May 8, 2007); and Response to APGI Comments*, Dr. Martin Doyle (May 9, 2007); *Equilibrium Analysis of Yadkin and South Yadkin Rivers*, Dr. Martin Doyle (Aug. 21, 2007); and *Effects of Bridges over Yadkin River on Water Surface Elevation Profiles*, Dr. Martin Doyle (Aug. 2007).

APG-SAL-3:

Please provide statements of scientific and/or engineering justification for choices made regarding the working of the model and all assumptions/data inputs relating to any of *Numerical Sedimentation Investigation*, Dr. Ronald R. Copeland (Feb. 20, 2007); *Technical Report: High Rock Dam and High Rock Lake Sedimentation Flooding Effects as Estimated Using HEC-RAS Modeling*, Salisbury-Rowan Utilities (Jan. 2006); *High Rock Dam and Sediment Delta Flooding and Sedimentation Effects (1927-2058) on City Of Salisbury Critical Infrastructure*, Dr. Martin Doyle (Feb. 2007); *Large Flood Relief Channel*, Dr. Ronald R. Copeland (May 10, 2007); *Response to 'Consolidated Answer of Alcoa Power Generating, Inc.'*, Dr. Ronald R. Copeland (May 8, 2007); and *Response to APGI Comments*, Dr. Martin Doyle (May 9, 2007); *Equilibrium Analysis of Yadkin and South Yadkin Rivers*, Dr. Martin Doyle (Aug. 21, 2007); and *Effects of Bridges over Yadkin River on Water Surface Elevation Profiles*, Dr. Martin Doyle (Aug. 2007).

APG-SAL-4:

Please provide sufficient information regarding the structure of the model(s) used in the creation of any of *Numerical Sedimentation Investigation*, Dr. Ronald R. Copeland (Feb. 20, 2007); *Technical Report: High Rock Dam and High Rock Lake Sedimentation Flooding Effects as Estimated Using HEC-RAS Modeling*, Salisbury-Rowan Utilities (Jan. 2006); *High Rock Dam and Sediment Delta Flooding and Sedimentation Effects (1927-2058) on City Of Salisbury Critical Infrastructure*, Dr. Martin Doyle (Feb. 2007); *Large Flood Relief Channel*, Dr. Ronald R. Copeland (May 10, 2007); *Response to 'Consolidated Answer of Alcoa Power Generating, Inc.'*, Dr. Ronald R. Copeland (May 8, 2007); and *Response to APGI Comments*, Dr. Martin Doyle (May 9, 2007); *Equilibrium Analysis of Yadkin and South Yadkin Rivers*, Dr. Martin Doyle (Aug. 21, 2007); and *Effects of Bridges over Yadkin River on Water Surface Elevation Profiles*, Dr. Martin Doyle (Aug. 2007) to permit an independent evaluation of how the model structure functions.

APG-SAL-5:

Please provide copies of all tests and other analyses of the model(s) used in the creation of any of *Numerical Sedimentation Investigation*, Dr. Ronald R. Copeland (Feb. 20, 2007); *Technical Report: High Rock Dam and High Rock Lake Sedimentation Flooding Effects as Estimated Using HEC-RAS Modeling*, Salisbury-Rowan Utilities (Jan. 2006); *High Rock Dam and Sediment Delta Flooding and Sedimentation Effects (1927-2058) on City Of Salisbury Critical Infrastructure*, Dr. Martin Doyle (Feb. 2007); *Large Flood Relief Channel*, Dr. Ronald R. Copeland (May 10, 2007); *Response to 'Consolidated Answer of Alcoa Power Generating, Inc.'*, Dr. Ronald R. Copeland (May 8, 2007); and *Response to APGI Comments*, Dr. Martin Doyle (May 9, 2007); *Equilibrium Analysis of Yadkin and South Yadkin Rivers*, Dr. Martin Doyle (Aug. 21, 2007); and *Effects of Bridges over Yadkin River on Water Surface Elevation Profiles*, Dr. Martin Doyle (Aug. 2007) that were conducted in order to evaluate and verify the performance of the model.

APG-SAL-6:

Please provide copies of all sensitivity analyses conducted with respect to the model(s) used in the creation of any of *Numerical Sedimentation Investigation*, Dr. Ronald R. Copeland (Feb. 20, 2007); *Technical Report: High Rock Dam and High Rock Lake Sedimentation Flooding Effects as Estimated Using HEC-RAS Modeling*, Salisbury-Rowan Utilities (Jan. 2006); *High Rock Dam and Sediment Delta Flooding and Sedimentation Effects (1927-2058) on City Of Salisbury Critical Infrastructure*, Dr. Martin Doyle (Feb. 2007); *Large Flood Relief Channel*, Dr. Ronald R. Copeland (May 10, 2007); *Response to 'Consolidated Answer of Alcoa Power Generating, Inc.'*, Dr. Ronald R. Copeland (May 8, 2007); and *Response to APGI Comments*, Dr. Martin Doyle (May 9, 2007); *Equilibrium Analysis of Yadkin and South Yadkin Rivers*, Dr. Martin Doyle (Aug. 21, 2007); and *Effects of Bridges over Yadkin River on Water Surface Elevation Profiles*, Dr. Martin Doyle (Aug. 2007).

APG-SAL-7:

Please identify all persons with knowledge of the model, assumptions, input data, tests and analyses relating to any of *Numerical Sedimentation Investigation*, Dr. Ronald R. Copeland (Feb. 20, 2007); *Technical Report: High Rock Dam and High Rock Lake Sedimentation Flooding Effects as Estimated Using HEC-RAS Modeling*, Salisbury-Rowan Utilities (Jan. 2006); *High Rock Dam and Sediment Delta Flooding and Sedimentation Effects (1927-2058) on City Of Salisbury Critical Infrastructure*, Dr. Martin Doyle (Feb. 2007); *Large Flood Relief Channel*, Dr. Ronald R. Copeland (May 10, 2007); *Response to 'Consolidated Answer of Alcoa Power Generating, Inc.'*, Dr. Ronald R. Copeland (May 8, 2007); and *Response to APGI Comments*, Dr. Martin Doyle (May 9, 2007); *Equilibrium Analysis of Yadkin and South Yadkin Rivers*, Dr. Martin Doyle (Aug. 21, 2007); and *Effects of Bridges over Yadkin River on Water Surface Elevation Profiles*, Dr. Martin Doyle (Aug. 2007).

CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of October, 2007, served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. §385.2010), and served a copy by electronic mail and facsimile to counsel for the City of Salisbury.

/s/ Gregory S. Wagner

Gregory S. Wagner