

144 FERC ¶ 61,218  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
Cheryl A. LaFleur, and Tony Clark.

Alcoa Power Generating Inc.

Project No. 2197-103

ORDER DENYING REHEARING

(Issued September 19, 2013)

1. On June 27, 2013, New Energy Capital Partners, LLC (New Energy) filed a request for rehearing of the Commission's May 30, 2013 notice denying its motion for late intervention in the relicense proceeding for the 210-megawatt Yadkin Hydroelectric Project No. 2197 (Yadkin Project). The project is located on the Yadkin River in Davidson, Davie, Montgomery, Rowan, and Stanly Counties, North Carolina. For the reasons discussed below, we deny rehearing.

**Background**

2. On September 23, 2002, Alcoa Power Generating Inc. (Alcoa Power) filed its Initial Consultation Document for the relicensing of the Yadkin Project, beginning its pre-filing license application process. On March 27, 2003, Alcoa Power filed its Notice of Intent to file an application for a new license. Roughly three years later, on April 25, 2006, Alcoa Power filed its new license application with the Commission.

3. On December 28, 2006, the Commission's Secretary issued a public notice of Alcoa Power's Yadkin Project relicense application. The notice established February 26, 2007, as the deadline for filing protests, comments, and motions to intervene in the proceeding.

4. On May 7, 2007, Alcoa Power filed a Relicensing Settlement Agreement on behalf of itself and twenty-four other entities. The Commission's Secretary issued a public notice soliciting comments on the settlement agreement on May 17, 2007.

5. On September 28, 2007, Commission staff issued the draft environmental impact statement (EIS). The deadline for comments on the draft EIS was November 27, 2007. Under the Commission's regulations, if an entity files a motion to intervene within the

comment period for a draft EIS, it will be considered timely.<sup>1</sup> Commission staff issued the final EIS on April 18, 2008. The Commission has not been able to act on the relicense application because the State of North Carolina has declined to issue water quality certification for the project under the Clean Water Act, a prerequisite to Commission action.<sup>2</sup>

6. New Energy did not file any comments in response to the notices of the application, settlement agreement, or draft EIS.

7. On April 30, 2013, almost six years after the last deadline for filing motions to intervene, New Energy filed a request to reopen the record or, in the alternative, intervene late in the relicensing proceeding. New Energy argued that it had good cause to intervene late because its interest did not arise until the occurrence of certain events between March and December 2010. New Energy alleged that these events provided evidence that Alcoa Power was going to sell the project's power in the wholesale market rather than using it to supply local businesses.

8. On May 30, 2013, the Commission's Secretary denied New Energy's motion for late intervention, finding that the events identified by New Energy were not sufficient to show good cause for intervening late.<sup>3</sup> In addition, the notice explained that, even assuming the events cited by New Energy could demonstrate good cause, New Energy had offered no credible reason for waiting over two years from the last of those events to file its motion for late intervention.

9. On June 27, 2013, New Energy filed a request for rehearing of the notice denying its late motion to intervene.

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<sup>1</sup> 18 C.F.R. § 380.10(a) (2013).

<sup>2</sup> See 33 U.S.C. §1341(a)(1) (2006). By letter dated August 2, 2013, the North Carolina Department of Environmental and Natural Resources denied Alcoa Power's September 28, 2012 water quality certification application because of a pending lawsuit regarding the ownership of the streambed located beneath the project. See North Carolina Department of Environmental and Natural Resources August 16, 2013 Supplemental Information at 3-4.

<sup>3</sup> The notice did not address New Energy's request to reopen or restart the license application proceeding. On June 5, 2013, New Energy sought clarification as to the status of its request. The Commission has not yet acted on New Energy's request.

## **Discussion**

10. Section 313(a) of the Federal Power Act (FPA) requires an application for rehearing to “set forth specifically the ground or grounds upon which such application is based.”<sup>4</sup> While New Energy provides a statement of issues generally identifying its grounds, it seeks to incorporate by reference arguments and supporting facts contained in its previous filing.<sup>5</sup> The Commission, however, expects all grounds to be set forth in the rehearing request and will dismiss any ground only incorporated by reference. Entities cannot expect the Commission to review their past filings or the filings of other entities and attempt to discern what issues they might be raising now or what arguments they might be making now on those issues.<sup>6</sup> Thus, this order addresses only those of New Energy’s arguments that are set forth in its request for rehearing.

### **A. Late Motion to Intervene**

11. As noted above, Commission staff issued a public notice of the Yadkin Project relicensing application, and established February 26, 2007, as the deadline for motions to intervene in the proceeding. Subsequently, with the issuance of the draft EIS, interested entities were given an additional opportunity to intervene with a deadline of November 27, 2007. Any motions to intervene filed after the November 27, 2007 deadline are late.

12. Our regulations dealing with motions for late intervention state that the movant must, among other things, demonstrate good cause why the time limit should be waived.<sup>7</sup> In acting on such a motion, the decisional authority may consider: whether the movant had good cause for filing late; whether any disruption of the proceeding 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.<sup>8</sup>

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<sup>4</sup> 16 U.S.C. § 825l(a) (2012).

<sup>5</sup> Request for Rehearing at 12.

<sup>6</sup> See *Turlock Irrigation District & Modesto Irrigation District*, 140 FERC ¶ 61,207, at P 9 (2012); *El Dorado Irrigation District*, 94 FERC ¶ 61,031, at n.2 (2001). See also *Allegheny Power v. FERC*, 437 F.3d 1215, 1220 (D.C. Cir. 2006) (rejecting petitioner’s arguments that it raised on rehearing merely by incorporating by reference sections of its prior pleading).

<sup>7</sup> 18 C.F.R. § 385.214(b)(3) (2013).

<sup>8</sup> 18 C.F.R. § 385.214(d) (2013).

13. We have denied late interventions where the movant failed to provide adequate justification to support its motion.<sup>9</sup> For example, in *Summit Hydropower*, we denied a motion to intervene a year out of time, explaining that:

[a] key purpose of the intervention deadlines is to determine, early on, who the interested parties are and what information and arguments they can bring to bear. Interested parties are not entitled to hold back awaiting the outcome of the proceeding, or to intervene only when events take a turn not to their liking.<sup>10</sup>

The Commission expects entities to intervene in a timely manner based on reasonably foreseeable issues arising from the applicant's filings and the Commission's notice of the proceeding.

14. New Energy asserts that it has good cause to intervene late and had not "slept on its rights" citing to four "unreported and uninvestigated" events that occurred after the intervention deadline: (1) in August 2007, Alcoa Inc., the parent company of Alcoa Power, idled its Badin Works smelting operation<sup>11</sup>; (2) in March 2009, Alcoa Inc. closed its Tapoco Smelting Operations in Tennessee; (3) in March 2010, Alcoa Inc. resolved to shutter its Badin Works smelting operation; and (4) in November 2012, Alcoa Power sold its Tapoco Hydroelectric Project in Tennessee (FERC Project No. 2169) to Brookfield Renewable Energy Group.<sup>12</sup> New Energy cites each event to demonstrate "Alcoa

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<sup>9</sup> See, e.g., *Erie Boulevard Hydropower, L.P.*, 134 FERC ¶ 61,205 (2011); *California Department of Water Resources & the City of Los Angeles*, 122 FERC ¶ 61,150 (2008); *California Department of Water Resources and the City of Los Angeles*, 120 FERC ¶ 61,057 (2007), *aff'd*, *California Trout v. FERC*, 572 F.3d 1003 (9th Cir. 2009).

<sup>10</sup> *Summit Hydropower*, 58 FERC ¶ 61,360, at 62,200 (1992).

<sup>11</sup> At the time of its original license, the Yadkin Project solely powered the Badin Works smelting plant, which employed hundreds of people. See April 18, 2008 Final Environmental Impact Statement at 232-33. Based on the closure of the Badin Works plant, New Energy claims that Alcoa Power is "repurposing" its project by selling power on the open market instead of using it to supply power solely to Badin Works or other local entities. See New Energy April 30, 2013 Filing at 6.

<sup>12</sup> Request for rehearing at 5. See *Alcoa Power Generating Inc.*, 141 FERC ¶ 62,010 (2012) (approving Alcoa Power's transfer of its Tapoco Hydroelectric Project license to Brookfield Smoky Mountain Hydropower LLC).

Power's profit-driven blueprint for the Yadkin Project.”<sup>13</sup> New Energy claims that, since these events occurred after the intervention deadline, it has good cause to intervene late because it could not have known the extent of the project's so-called “repurposing” before Alcoa Inc. resolved to permanently close the Badin Works plant in March 2010.<sup>14</sup> In other words, New Energy is claiming that it could not have known that Alcoa Power planned to sell the Yadkin Project's power into the open market rather than use it to supply power to Badin Works or other local entities as it had when the project was originally licensed. We disagree.

15. First, it has been the Commission's practice since the issuance of licenses began in 1920 to leave disposition of project power in the hands of the licensee unless Congress has made a legislative directive to the contrary,<sup>15</sup> which has not occurred here. Accordingly, Alcoa Power's decision as to where to sell project power is not a relevant issue in the relicensing proceeding and could not provide good cause for intervention at any time, let alone late. Further, New Energy has not shown that it has any cognizable interest in Alcoa Power's sale of project power, and it accordingly lacks standing to raise the matter.<sup>16</sup>

16. In any case, Alcoa Power made known that it might sell power from the Yadkin Project into the open market as early as 2002. To start its pre-filing license application process, on September 23, 2002, Alcoa Power filed its Initial Consultation Document noting that it curtailed operations at Badin Works and would either use the Yadkin Project's excess power to support its other aluminum operations or sell the power on the open market.<sup>17</sup>

17. On March 1, 2004, Alcoa Power filed a letter with the Commission, noting that it curtailed production of primary aluminum at Badin Works and had been selling the Yadkin Project's surplus power into the market at market-based rates.<sup>18</sup>

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<sup>13</sup> Request for Rehearing at 2.

<sup>14</sup> *Id.* at 6.

<sup>15</sup> *City of Seattle*, 143 FERC ¶ 61,247, at P 13 (2013).

<sup>16</sup> New Energy states it is a private equity firm that invests in renewable energy projects and facilities. New Energy's website, [www.newenergycapital.com](http://www.newenergycapital.com), lists its renewable energy investments, none of which are related to hydropower. See New Energy April 30, 2013 Filing at 24.

<sup>17</sup> See Alcoa Power September 23, 2002 Initial Consultation Document at 1.

<sup>18</sup> See Alcoa Power March 1, 2004 Letter to Secretary Salas at 1-2.

18. New Energy itself notes that Alcoa Power stated in its 2006 relicense application that it might sell excess power from the project into the wholesale market.<sup>19</sup>

19. On May 4, 2007, Commission staff issued its second scoping document, noting Alcoa Power's plan to close the Badin Works plant.<sup>20</sup>

20. Thus, New Energy had ample notice prior to the November 27, 2007 deadline for intervening that Alcoa Power was considering closing the Badin Works plant and selling its power into the wholesale market. Yet, New Energy chose to "sleep on its rights," waiting some six years before seeking untimely intervention.<sup>21</sup>

21. For the reasons discussed above, we find that New Energy has not demonstrated good cause why the time limit should be waived. We accordingly deny rehearing on this issue.<sup>22</sup>

### **B. Changes to the Relicense Application**

22. New Energy argues in the alternative that its motion to intervene should be considered timely because the Commission should have solicited motions to intervene following the filing of what it alleges were material amendments to Alcoa Power's relicense application: (1) Alcoa Power's May 7, 2007 filing of its Relicensing Settlement Agreement (2007 Settlement Agreement); (2) Alcoa Power's water withdrawal agreement with the City of Albemarle, incorporated within the 2007 Settlement

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<sup>19</sup> See New Energy April 30, 2013 Filing at 6. See also Alcoa Power April 25, 2006 Application for License for Major Project, Volume 1, Exhibit H.2 at H-2.

<sup>20</sup> See FERC May 4, 2007 Scoping Document 2 at 13-14.

<sup>21</sup> See, e.g., *Palisade Irrigation District*, 34 FERC ¶ 61,377 (1986). We note in any event that New Energy offers no credible reason that it waited almost six months after the most recent event to which it cites before seeking intervention.

<sup>22</sup> New Energy's concern that Alcoa Power's sale of the Tapoco Project means that Alcoa Power might in the future sell the Yadkin Project and transfer its license to another entity is misplaced. If in the future Alcoa Power wishes to sell the Yadkin Project and transfer its license, section 8 of the FPA, 16 U.S.C. § 801 (2012), requires prior Commission approval for such a transfer. Moreover, before the Commission would take action on such an application, it would issue public notice and provide an opportunity for comments, protests, and interventions.

Agreement; and (3) Stanly County's May 20, 2013 Filing of a water withdrawal agreement with Alcoa Power.<sup>23</sup> We disagree.

23. Under section 16.9(b)(3) of the Commission's regulations, the Commission will reissue a public notice of the application and provide an opportunity for intervention if an applicant materially amends its application.<sup>24</sup> Section 4.35(f) of the Commission's regulations defines a material amendment as one that results in "any fundamental and significant change" to an applicant's plans of development.<sup>25</sup> Such a fundamental and significant change includes, but is not limited to: (1) a change in installed capacity, or the number or location of any generating units, if the change would significantly modify the flow regime associated with the project; (2) a material change to the location, size, or composition of the dam, the location of the powerhouse, or the size and elevation of the reservoir if the change would enlarge, reduce, or relocate the area of the body of water that would lie between the upper end of the proposed impoundment and the point of discharge from the powerhouse or cause adverse environmental impacts not previously addressed in the application; (3) a change of the number of discrete units of development to be included in the project boundary.<sup>26</sup> As the Commission explained in *Erie Boulevard Hydropower, L.P.*, changes that would be considered material are those that "are of such a fundamental nature as to constitute the proposal of a different project."<sup>27</sup>

24. The 2007 Settlement Agreement is not a material amendment to the relicense application. It does not make specified changes to the project's generating capacity, dam, powerhouse, reservoir, or units of development. Rather, it makes minor alterations that are ordinary and expected changes routinely occurring in hydroelectric licensing

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<sup>23</sup> New Energy also claims that the new license application would be materially amended if the Commission confirmed the likely sale of the Yadkin Project. *See* Request for Rehearing at 13. We dismiss this argument because the sale of the Yadkin Project and transfer of its license are speculative.

<sup>24</sup> 18 C.F.R. § 16.9(b)(3) (2013).

<sup>25</sup> 18 C.F.R. § 4.35(f) (2013).

<sup>26</sup> 18 C.F.R. § 16.9(b)(3) (2013).

<sup>27</sup> *Erie Boulevard Hydropower, L.P.*, 131 FERC ¶ 61,036, at P 13 (2010), *aff'd*, *Green Island Power Authority v. FERC*, No. 11-1960 (2d. Cir. Sept. 25, 2012) (*Erie Boulevard* April 15, 2010 Order on remand).

proceedings.<sup>28</sup> Thus, the Commission was not required to invite motions to intervene. However, even if the settlement had constituted a material amendment, the failure to invite interventions would have been harmless error since there was a subsequent opportunity to intervene during the comment period on the draft EIS, which ended on November 27, 2007.

25. We also find that Alcoa Power's water withdrawal agreements with the City of Albemarle and Stanly County do not constitute material amendments. Under the water withdrawal agreements,<sup>29</sup> Alcoa Power has only promised the local governments that it would, in the future following the issuance of a new license, file with the Commission applications for approval of the municipal water withdrawals, which are non-project uses of project lands and waters and would be governed by a standard license article.<sup>30</sup> Alcoa Power has not filed either non-project use application with the Commission. If and when Alcoa Power files such an application, the Commission would issue public notice and

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<sup>28</sup> The settlement agreement proposes: (1) revising the operating rule curve for one of the project's reservoirs; (2) stabilizing water levels at the project's four reservoirs to enhance fish spawning; (3) increasing minimum flow releases from the project; (4) implementing plans to monitor project effects; (5) improving recreational facilities; and (6) implementing procedures for project maintenance and emergencies.

<sup>29</sup> See Alcoa Power May 7, 2007 Offer of Settlement at 2-12; Stanly County May 20, 2013 Certification from Stanly Board of Commissioners at 8-9.

<sup>30</sup> For example, in L-Form 3, which is applicable to major projects affecting navigable waters, Standard Article 13 provides, in pertinent part, that:

On the application of any person, association, corporation, Federal agency, State or municipality, the Licensee shall permit such reasonable use of its reservoir or other project properties, including works, lands and water rights, or parts thereof, as may be ordered by the Commission, after notice and opportunity for hearing, in the interests of comprehensive development of the waterway or waterways involved and the conservation and utilization of the water resources of the region for water supply or for . . . municipal or similar uses. . . . Applications shall contain information in sufficient detail to afford a full understanding of the proposed use, including satisfactory evidence that the applicant possesses necessary water rights pursuant to applicable State law, or a showing of cause why such evidence cannot concurrently be submitted . . . .

provide an opportunity for interventions, comments, and protests, in considering whether the non-project use is consistent with the project purposes and should be approved.<sup>31</sup>

26. For the reasons discussed above, we find that Alcoa Power has not materially amended its relicense application and that the Commission thus was not required to provide additional opportunities to intervene in the relicensing proceeding.

The Commission orders:

The request for rehearing filed by New Energy Capital Partners, LLC on June 27, 2013, in this proceeding is denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>31</sup> Even assuming that Alcoa Power had sought Commission approval of the water withdrawal as part of this relicensing proceeding, the water withdrawal agreements would not constitute material amendments to the relicense application, i.e., they would not result in a change “of such a fundamental nature as to constitute the proposal of a different project.” *See supra* note 26.