

130 FERC ¶ 61,037  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
and John R. Norris.

Alcoa Power Generating Inc.

Project No. 2197-097

ORDER DENYING REHEARING

(Issued January 21, 2010)

1. By order issued October 15, 2009,<sup>1</sup> the Commission denied a petition for declaratory order filed by Alcoa Power Generating Inc. (Alcoa), in which Alcoa asked the Commission to find that the State of North Carolina had waived its authority under section 401 of the Clean Water Act (CWA)<sup>2</sup> to issue water quality certification with respect to the relicensing of the Yadkin Hydroelectric Project No. 2197. On November 13, 2009, Alcoa filed a request for rehearing of that order. For the reasons discussed below, we deny rehearing.

**Background**

2. On April 25, 2006, Alcoa filed an application for a new license for the existing Yadkin Project, located on the Yadkin River, in Stanly, Montgomery, Davidson, and Rowan Counties, North Carolina. In connection with that application, and pursuant to section 401(a)(1) of the CWA, Alcoa, on May 8, 2008, filed a request for water quality certification with the North Carolina Department of Environmental and Natural Resources (North Carolina DENR). Section 401(a)(1) provides that:

[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . . . If the State . . . fails or refuses to act on a

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<sup>1</sup> *Alcoa Power Generating Inc.*, 129 FERC ¶ 61,028 (2009).

<sup>2</sup> 33 U.S.C. § 1341 (2006).

request for certification within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the proceeding sentence.

3. On May 7, 2009, North Carolina DENR, through its Division of Water Quality (Division), issued the requested certification. The certification contained a number of conditions, one of which required Alcoa, within 90 days of receipt of the certification, to provide a surety bond or equivalent instrument in favor of the State of North Carolina, executed by a surety approved by the Commissioner of Insurance, in the amount of \$240 million, to cover the cost of water quality improvements at the project. The certification stated that “[t]his certification is only effective once the required performance/surety bond is in place.”<sup>3</sup>

4. On September 17, 2009, Alcoa filed a petition for declaratory order, asking the Commission to conclude that, because North Carolina had conditioned the effectiveness of the certification on the company obtaining the bond, the state had failed to issue certification within one year of Alcoa’s certification request and had thus waived its authority to issue water quality certification. Alcoa argued that, because the certification was issued on the 365<sup>th</sup> day after the state received the application, and because obtaining the bond could only take place after the expiration of the Clean Water Act’s one-year deadline, North Carolina’s action was “inherently incomplete,” with the result that the state had waived certification.

5. In our order denying the petition (October 15 Order), we noted that, in order to avoid waiver, a state must “act” on a request for certification in one year. We found that North Carolina had acted by issuing, within the one-year period, its “APPROVAL of 401 Water Quality Certification with Additional Conditions,” a certification that North Carolina provided would be “final and binding” unless Alcoa requested an adjudicatory hearing. We concluded that the bond condition did not vitiate the issuance of the certification, because, when the certification was issued, the state had completed its action, and that if Alcoa elected to satisfy the bond condition, an event that was solely up to Alcoa, the certification would have been fully effective.

6. On rehearing, Alcoa argues that we erred in holding that the state did not waive its authority under section 401 when it failed to issue an effective water quality certification within one year of the request for certification. Alcoa contends that we erred in finding

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<sup>3</sup> See North Carolina water quality certification at 5-6 (Attachment A to Alcoa’s petition for declaratory order).

that the state had completed its action when it issued the May 7 certification and that whether or not the certification ever became effective was solely up to Alcoa. Alcoa asserts that our findings were not consistent with the purpose and intent of section 401, our own regulations, or Commission precedent. In addition, Alcoa argues that our order does not represent reasoned decision-making.

### **Preliminary Matter**

7. Following issuance of our October 15 Order, Stanly County, North Carolina DENR, and the State of North Carolina moved to intervene in the proceeding. Alcoa opposes the motions to intervene.

8. All three of these entities are intervenors in the relicensing proceeding. However, the declaratory order proceeding is a different proceeding, and intervention in the former does not confer intervention in the latter. Nevertheless, it is the Commission's policy to allow intervention after the issuance of an initial order where, as here, we have not previously provided notice of a petition for declaratory order or opportunity to seek intervention. Therefore, we will grant the motions to intervene.

### **Discussion**

9. Section 401(a)(1) provides that certification is waived if a state "fails or refuses to act" on a request within one year. Alcoa asserts that, in its petition, it demonstrated that the May 7 certification was not an "act" under section 401(a)(1) because the outcome of the certification -- whether the Division granted or denied the request -- was not determinable on its face but instead was to be determined by future events that would inevitably occur after the statutory one-year deadline had passed. Moreover, Alcoa argues, whether certification was ultimately approved or denied was dependent on the future actions of persons other than Alcoa.

10. Alcoa points out that the May 7 certification was issued on the last day of the statutory period. Thus, by its own terms, the certification could not become effective on that date, since the condition -- posting of a surety bond within 90 days of receipt of the certification -- could not be met before expiration of the deadline. In addition, in order to make the certification effective, Alcoa would have to rely on the existence of a surety approved by the Commissioner of Insurance who would have to be capable of issuing the bond contemplated by the certification condition and willing and able to negotiate reasonable terms of the bond within 90 days. Alcoa argues that, given the state of the credit market, there is no assurance that a surety would or could issue such a bond within that timeframe and under the conditions established in the May 7 certification.

11. In fact, under present financial and economic conditions, Alcoa asserts, it would not be at all certain that the May 7 certification would ever become effective, even if Alcoa were to agree to post a bond, because certain crucial aspects of the bond

requirement were not defined in the certification. In support of this assertion, Alcoa attaches an affidavit of a bond department manager stating that the performance bond requirement of the certification is “basically unfinished and needs a great deal of work before it would be acceptable to a surety” and that, as the condition is written, it would be “extremely difficult, if not impossible, to place a bond with those requirements and of that magnitude in the marketplace.”<sup>4</sup> Moreover, because the condition fails to provide details typically required by a surety to complete the underwriting process, the Division would have to agree to additional, specific elements and language for the bond contract before any surety would agree to enter into a performance bond as contemplated by the May 7 certification.

12. Therefore, Alcoa argues, the issuance of the certification immediately before expiration of the statutory one-year period ensured that the certification could have no legal effect within the time frame contemplated by Congress or without further decisions by the Division on issues that would have to be resolved as part of any surety’s underwriting process. Accordingly, North Carolina’s action was not complete, and, contrary to the conclusion in our order, the effectiveness of the certification was not solely dependent on actions of Alcoa. Rather, the ultimate determination of whether the certification could ever be made effective was left to market factors and third party actors beyond its control.

13. Alcoa argues that the conclusion in our October 15 Order assumes that a certification issued by a state need not become “effective” according to its own terms within the statutory one-year period in order for a state to have “acted” for purposes of section 401. Alcoa argues that this assumption is contrary to the purpose of the section 401 deadline, which is to prevent a state from blocking or delaying a federal license or permit by stalling issuance of certification. In Alcoa’s view, if section 401 is not interpreted to require “effective” certification to be issued within the one-year deadline, states would have the ability to delay Commission action on relicensing indefinitely. Thus, a state could issue certification and indefinitely withhold its legal effectiveness beyond the one-year deadline without being deemed to have waived its rights under section 401, thereby blocking the issuance of a license by cloaking a denial of certification as an “approval” whose effectiveness is subject to conditions that might never be met.

14. We do not agree that certification issued within the one-year statutory period must be considered waived because it provides for an “effectiveness” date that circumstances would cause to occur after the one-year deadline. Section 401(a) provides only that a state must “act” on a request for certification. In issuing the May 7 certification, the

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<sup>4</sup> Affidavit of Charles R. Croyle, Bond Department Manager for E.R. Munro and Company, Appendix A to request for rehearing, at 3.

Division clearly acted. That the certification is to be effective only if and when the surety bond is posted does not change the fact that the state has acted and certification has been issued. We are not troubled by the prospect that, once an approved surety is located, additional decisions may be required by the Division in order to finalize the terms of the surety bond. The controlling point is that no additional decision will be required from the Division on the certification request itself. In issuing certification, the Division has already acted on the request.

15. Alcoa's concerns about the ability of such "effectiveness" language to delay a Commission licensing proceeding are misplaced. Section 401(a)(1) provides that "[n]o license or permit shall be granted until the certification required by this section has been obtained or has been waived . . . ." Issuance of certification here means that certification has been "obtained," and, consequently, the Commission would be free to issue a license, regardless of whether the certification provided that it was not yet effective. While it could not be known upon issuance of the certification whether Alcoa would post the surety bond within 90 days, Alcoa's failure to post it might be a failure to meet a condition of the certification, but it would not require a delay in Commission action. As we noted in our October 15 Order,<sup>5</sup> a North Carolina administrative law judge has stayed the certification pending administrative appeal. It is the Commission's policy not to issue a license when water quality certification has been stayed pending appeal within a state process, but it is the existence of this stay, not the "effectiveness" provision of the certification, that restrains the Commission from issuing a license at this time.<sup>6</sup>

16. Alcoa places too much weight on the Division's delay of the certification's "effectiveness," a term that does not appear in section 401(a)(1) and has no bearing, under that section, on whether a state has acted on a certification request. In any event, if the Division had not included the effectiveness language but had retained the requirement to post a surety bond within 90 days of the issuance of certification, Alcoa would still have faced the task of posting the surety bond within 90 days. Thus, the effectiveness provision does not contribute to the difficulty of meeting the bond condition. Although Alcoa argues that it is unrealistic to expect the posting of a bond within 90 days given the economic situation and the bond condition's lack of specificity, this argument relates to the reasonableness of the condition, a matter that is not ours to review.<sup>7</sup>

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<sup>5</sup> *Alcoa Power Generating Inc.*, 129 FERC ¶ 61,028 at P 5.

<sup>6</sup> In fact, until the Commission acts (or, in the alternative, if we were to indicate that we were constrained from acting because the certification is not effective), Alcoa's arguments here are premature.

<sup>7</sup> Given the difficulties Alcoa describes, we may have overstated the case to the extent we implied that whether the certification became fully effective was solely up to  
(continued...)

17. Apart from our finding that the issuance of certification is sufficient to fulfill the requirement of section 401(a)(1) that a state must act within one year, Alcoa's position that the bond condition would have had to be satisfied within the one-year statutory period to avoid waiver would lead to a result that Congress could not have intended. While Congress certainly wished to keep states from delaying action indefinitely, it also intended that a state have up to the full one-year period to consider a certification request and to fashion an appropriate certification. Under Alcoa's reasoning, if the Division concluded that Alcoa would have to post a surety bond before the Division could grant an "effective" certification and avoid waiver, it would have had to make that determination, to fashion a far more detailed bond requirement, and to provide an opportunity for Alcoa to initiate the process of obtaining a bond well before the expiration of the statutory one-year period, especially given the financial conditions that Alcoa describes. This would have given the Division far less than a year to consider the certification request and to determine appropriate conditions.

18. Alcoa argues that our order is inconsistent with section 4.34(b)(5)(iii) of our regulations,<sup>8</sup> which provides that a certifying agency is deemed to have waived the certification requirements of section 401(a)(1) if it "has not denied or granted certification by one year after the date the certifying agency received a written request for certification." Therefore, even if the Division were deemed to have "acted" in issuing the May 7 certification, it would not have met the Commission requirement that a certifying agency grant or deny certification within one year. This argument is without merit, because the issuance of certification here is a grant of the request for certification, albeit one that is dependent on the satisfaction of certain conditions.

19. Finally, Alcoa contends that our order did not represent reasoned decision-making, in that we failed to cite any factual or legal support for our conclusion, to apply Commission regulations and precedent, and to address the factual support set forth in its petition. However, we have not previously ruled on a condition such as this, and, in considering the petition, it was clear to us that, under the plain language of section 401(a)(1), the Division did not fail or refuse to act on the request for certification within one year of the receipt of the request. Although Alcoa criticizes us for failing to cite precedent in support of our conclusion, none of the cases Alcoa itself cites is

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Alcoa. However, while satisfaction of the bond condition might not be completely within Alcoa's control, it would be solely up to Alcoa whether to pursue satisfying the condition or to refrain from pursuing it. In the event, since the certification was issued in May 2009, Alcoa has had over eight months to satisfy the bond requirement, and so, under the facts of the case, its argument that the condition could not have been fulfilled in a timely manner is not entirely convincing.

<sup>8</sup> 18 C.F.R. § 4.34(b)(5)(iii) (2009).

inconsistent with our findings here. Alcoa notes that, in *City of Tacoma, Washington*,<sup>9</sup> we issued a new license but stayed it because the state stayed the effectiveness of its certification. This case is not on point, because we are not dealing here with a state's stay of the effectiveness of a certification that was previously issued but with a provision in a certification itself that the certification is not yet effective. Alcoa cites *Airport Cmty. Coal v. Graves*<sup>10</sup> for the proposition that

[w]hether a state begins to act but does not complete the issuance of a certification or whether the state entirely fails to act at all, the legislative history of Section 401 makes clear that either of those two situations was unacceptable to Congress because both result in delays in issuing Federal permits.

This case is also not on point, because here the Division has acted by issuing an entire certification, and we do not regard the "effectiveness" provision it contains as a cause for delaying license issuance. Alcoa also cites *Great Northern Paper, Inc.*,<sup>11</sup> in which we rejected a condition that the certification would not be effective until the issuance of a new license, on the ground that issuance of a license "without issuance of an "effective" certification makes our compliance with section 401(a)(1) ambiguous and impractical."<sup>12</sup> However, as Alcoa itself recognizes,<sup>13</sup> the court of appeals, in *American Rivers, Inc. et al. v. FERC*,<sup>14</sup> subsequently determined that the Commission cannot alter or delete water quality certification conditions, and we eventually included this condition in the license we issued.

20. For the above reasons, Alcoa does not persuade us that we erred in reaching the conclusions in our declaratory order. Accordingly, its request for hearing is denied.

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<sup>9</sup> 104 FERC ¶ 61,092 (2003).

<sup>10</sup> 280 F. Supp. 2d 1207, 1215-16 (W.D. Wash. 2003).

<sup>11</sup> 77 FERC ¶ 61,066 (1996).

<sup>12</sup> *Id.* at 61,243.

<sup>13</sup> Petition for declaratory order at n.21.

<sup>14</sup> 129 F.3d 99 (2d Cir. 1997).

The Commission orders:

(A) The motions to intervene in this proceeding, filed October 19, November 10, and November 13, 2009, by Stanly County, North Carolina DENR, and the State of North Carolina, respectively, are granted.

(B) The request for rehearing filed November 13, 2009, by Alcoa Power Generating Inc., of the Commission's October 15, 2009 Order in this proceeding is denied.

By the Commission. Commissioner Norris voting present.

( S E A L )

Kimberly D. Bose,  
Secretary.