RATH YOUNG PIGNATELLI

August 31, 2016

VIA E-FILING

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20009

Re: New Energy Capital Partners, LLC's Corrected Comments on Application for Transfer of License and Motion to Intervene Yadkin Project, Project No. P-2197-109

Dear Secretary Bose:

Please accept the enclosed filing as a full substitution for the filing yesterday by New Energy Capital Partners, LLC ("NEC") in this docket. This corrected version better confirms NEC's principal place of business and the address to direct all service and communications in these proceedings; the attached is otherwise identical to the comments and motion filed on August 30, 2016.

Please do not hesitate to contact me should you have any questions concerning this filing.

Respectfully submitted,

/s/ M. Curtis Whittaker
M. Curtis Whittaker
Frederick J. Coolbroth, Jr.
Rath, Young and Pignatelli, P.C.
One Capital Plaza, Box 1500
Concord, NH 03301
Tel.: (603) 226-2600
mcw@rathlaw.com
fjc@rathlaw.com

Counsel to New Energy Capital Partners, LLC

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

NEW ENERGY CAPITAL PARTNERS, LLC's CORRECTED COMMENTS ON APPLICATION FOR TRANSFER OF LICENSE AND MOTION TO INTERVENE

Pursuant to the Commission's notice dated August 1, 2016, New Energy Capital Partners, LLC ("NEC") provides its comments with respect to an application for the transfer of license of the Yadkin Hydroelectric Project No. 2197. Alcoa Power Generating Inc. ("Alcoa") desires to transfer this license to Cube Yadkin Generation, LLC. NEC also provides a motion to intervene.

In this proceeding, all service should be made upon and communications should be addressed to:

M. Curtis Whittaker
Frederick J. Coolbroth, Jr.
Rath, Young and Pignatelli, P.C.
One Capital Plaza
Concord, New Hampshire 03301-1500
mcw@rathlaw.com
fjc@rathlaw.com
Tel: (603) 226-2600

Counsel to New Energy Capital Partners, LLC
300 Delaware Avenue, Suite 201
Wilmington, Delaware 19801

BACKGROUND

On April 30, 2013, NEC filed a pleading before the Commission seeking to reopen the relicensing process for the Yadkin Project. NEC's "Petition to Reopen Relicensing Process"[1] maintained that the Commission's administration of this docket did not comply with the Federal Power Act ("FPA"), because the Commission had allowed Alcoa to undermine the statutory process designed to protect the public's interest in any new license – the *competitive* relicensing process. NEC argued there, and in subsequent filings,[2] that (i) Alcoa had fundamentally changed its proposed use of the power from the Yadkin Project from local industrial use to regional wholesale power sales, and (ii) since Alcoa failed to notify the Commission of that change and because the change came *after* any competitive license application could be made, the only way to know whether there were alternatives to Alcoa's revised power uses that better served the public was to reopen the competition for this license and allow competing uses to come forward for examination under the FPA's standards.

The Commission summarily rejected NEC's arguments, and in doing so announced a completely new position regarding the FPA Part I – the Commission would no longer care about what a hydropower license applicant proposes to do with the power potential of a public river.[3]

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[1] New Energy Capital Partners LLC, Petition to Reopen Relicensing Application Process and in the Alternative, Motion for Late Intervention in the Yadkin Project Relicensing, P-2197-073, at P.17-21 (filed Apr. 30, 2013).

[2] *See*, New Energy Capital Partners Supplement to Petition, P-2197-073 (filed Jan. 1, 2014); New Energy Capital Partners LLC's Request for Rehearing, P-2197-073, at P. 2, 13 (filed June 27, 2013); Request For Rehearing, P-2197-073, at P. 2, 5-9 (Apr. 2, 2015).

[3] Notice Rejecting Motion to Reopen Record, Alcoa Power Generating, Inc., P-2197-073, at P. 1 (Mar. 3, 2015).

The Commission has never explained why it no longer cares about how different hydropower uses affect the public interest.

The Commission is obliged to care. Hydropower uses matter, because they determine how the power potential of a public watershed will be allocated between the public and the private developer. When Alcoa utilized low-cost Yadkin power to energize local aluminum mills, the North Carolina public realized a share of the value of that low cost power – in the form of expanded industrial base, jobs, taxes and economic multipliers. When Alcoa, without formally amending its relicensing application, permanently shuttered those mills and dedicated all future Yadkin power to regional wholesale power market sales, the North Carolina public was shut out of any meaningful share of the power potential of the Yadkin River. Instead, all Yadkin power is now sold at prices set by gas-fired plants in the open market, and Alcoa keeps the entire differential between the cost of producing Yadkin power and regional power prices set by fossil fuel plants. None of that differential is returned to North Carolina in the form of jobs, taxes from expanded industrial development and multipliers – despite Alcoa's statements that it would provide exactly that kind of return to the public in its original relicense application.

Those promises by Alcoa – promises that could only be made by Alcoa – froze out would be competitors, giving Alcoa the freedom to simply trade power uses later and keep all the benefits of Yadkin River power. Alcoa has benefitted from that unilateral trade for over eight years now as the Commission has annually extended its license without condition. Alcoa has insisted that this Commission enshrine that trade in a new, 50-year license. It now asks this

Commission for permission to pre-sell that 50-year license, to cash in now on its enormous value – a value bloated by this Commission's refusal to ensure that the public realize any share of the value of Yadkin River power.

That result is achingly inconsistent with Sections 10(a) and 15(a) of the FPA. That is because HYDROPOWER IS DIFFERENT. It is the only form of generation that intensively utilizes a public asset – the only technology where the public contributes the essential power input. The FPA, Part I is set up to attract private capital to exploit that public asset, give that capital a reasonable time to earn a return, and then ensure that the public realizes a fair return on its own contribution – the public watershed. The Commission in this docket has openly abandoned that mission. Instead, it wants to reduce its workload by treating hydropower like every other type of power plant – let competition set prices and ignore what the generator does with its power or profits or whether the public realizes any share of those benefits.

That regulatory approach works everywhere else but hydropower. The competitive wholesale power markets set up by the Commission over the last 20 years work beautifully, and have saved power customers untold billions of dollars as competitive forces allocate resources and determine wholesale power prices – all just great. But that's not the point here. This docket is about sharing the profits of those sales, making sure that the public gets a fair shake at obtaining a share of hydropower power values in return for contributing the Yadkin River's power potential to Alcoa – or its successors. The Commission has completely fallen down in its essential mission here – ensuring a fair shake for the North Carolina public. *If other applicants*

would provide North Carolina with a real share of those wholesale market profits to replace what North Carolina lost in jobs, taxes and economic multipliers when Alcoa permanently changed power uses, the Commission's fundamental job is to give such applicants an opportunity to come forward and make those offers to the public's representative.

We can't say it any more clearly than that.

I. HOW TO GAME FERC'S RELICENCING RULES.

The Commission's Notice of August 1, 2016 in this docket merely soliciting Comments, Motions to Intervene and Protests embodies a fundamental flaw in the Commission's rules implementing the FPA. Pursuant to Commission Rule 4.35, if a new license applicant substantially amends its license application to change the identity of the applicant or to materially amend the proposed plans of development, real consequences follow – aimed at protecting the sanctity of the competitive licensing process. The revised license application will have a new date of acceptance – which may make it untimely for purposes of competitive filing deadlines – and it will be repositioned pursuant to the rules of preference among competing applications under Rule 4.37. The entire and extremely sobering point to applicants is this: make your proposals by the deadlines so we can compare them, and adjudge which best serves the public interest. There will be no gaming the competition by baiting the public with promises of benefit shares, and then switching after filing deadlines. All that is entirely consistent with the FPA.

Yet when it comes to an application for a relicense on a previously licensed project, the Commission's rules expressly throw those protections out the window. Rule 16.9 states that Rule 4.35 does not apply to an application for a project with an existing license under FPA Sec. 14 or 15. Rather, any change in the applicant apparently doesn't matter. Further, even if the original applicant or its transferee materially amends the plans of development proposed in the original application, all the Commission will do is re-notice the application and solicit comments, motions to intervene and protests. The Commission will not invite any competitive applications – meaning that if there is only one pending application, the public is stuck with the current applicant, and applicant that now has the unlimited ability to change any aspect of its application without fear of competition. Unsurprisingly, as here, the tendency of an applicant in that circumstance is to make changes and arrogate for itself more of the benefits of utilizing a public resource.

The Commission's rules must fall if inconsistent with the FPA. Rule 16.9 is inconsistent with the FPA because FPA Section 15 requires that the Commission provide for a full and fair competitive relicensing proceeding, so that it can determine, on behalf of the public, which applicant has "the final proposal which the Commission determines is best adapted to serve the public interest." Rule 16.9 on its face undermines the competitive relicensing proceeding, as it invites exactly the type of gaming that Alcoa engaged in here. The rule baldly invites an applicant to inflate its proposals to benefit the public through local industrial investment and employment (Alcoa), or capacity expansions and resulting tax base increases, or even straight up

shares of power revenues. This is especially easy for existing licensees, which have a statutory tie-breaker preference and a chance to amend their applications to meet the proposals of others designed to benefit the public. Say anything, urges Rule 16.9, chill competition, and after the deadlines are passed, change your application in any way you wish – there will be no repercussions. All the Commission will do is solicit comments, and then decide if the revised application is better than tearing out the hydropower facilities.

The Commission's suffering of such bait-and-switch tactics, so harmful to the public interest, is the subject of NEC's appeal to the Court of Appeals of the District of Columbia.[4] FPA Section 15(a)(3) provides the Commission with the mandatory statutory directive to stop such gaming by an existing licensee: "[i]n the case of an application by the existing licensee, the Commission *shall* also take into consideration each of …[t]he actions taken by the existing licensee related to the project which affect the public." (emphasis added). That is, the Commission *shall* take into account the fact that Alcoa has changed its proposed uses of Yadkin power since its application was filed and deadlines for competitive applications passed, and the Commission *shall* take into account the impact of those actions on the public interest.

This is the Commission's last chance to pick up the mantel of public protector embodied in the FPA, recognize the profound flaws in its relicensing rules and use this docket to fix them, before the Courts do. The Commission should deny the license transfer application, and instead allow Cube and others the ability to directly compete for the new license (and offer the North

[4] *See*, Final Brief of Petitioner New Energy Capital Partners, LLC, District of Columbia Court of Appeals, Consolidated Cased No. 13-1277, 15-1307, at P. 18-21 (Apr. 1, 2016).

Carolina public a share of the hydropower benefits in the process), rather than allow Cube to purchase, and Alcoa to take and effectively bank, 50 years-worth of such hydropower benefits.

II. THE COMMISSION HAS NO BASIS TO DETERMINE THAT THE LICENSE TRANSFER IS IN THE PUBLIC INTEREST.

In the context of this license transfer application, the Commission must ask this question: how will the public benefit from the proposed license transfer? We have no answer to that here – and neither does Alcoa or Cube, at least based on their license transfer application. The Commission must develop a record to form a reasoned basis for any decision regarding either license transfer or license reissuance.

This docket now involves the future operation of hydroelectric facilities that fall into a narrow subset of facilities relicensed by the Commission: *those that would be materially repurposed under a new license*. In such circumstances, the public interest standard set forth in Sections 10(a) and 15(a) of the FPA requires the Commission to conduct a broad examination of any legacy issues arising from the applicant's use of the original licensee and the implementation of the prior "comprehensive plan," and then examine whether and how the new purposes proposed for the hydroelectric facilities address those legacy issues – and whether alternatives exist that might further benefit the public. Alcoa is a necessary party to that comprehensive examination.

The Commission has been admonished by reviewing courts when it has refused to comply with its statutory duty to review all information bearing on an application for a relicense

under these circumstances. Indeed, at least one court has stated that the "Commission has an affirmative duty to inquire into and consider all relevant facts" when determining whether granting a license is in the public interest, and reversed when the Commission has failed to do so.[5]

Prior to awarding a license, Sections 10(a) and 15(a) of the Act expressly require the Commission to find that a proposal is "best adapted" to a "comprehensive plan for improving or developing a waterway"[6] and to "the public interest."[7] The "public interest" standard of the Act must be "broadly defined, keeping in mind that the license will allow the holder 'to appropriate water resources from the public domain.'"[8] The FPA's public interest standard has been consistently construed as a broad mandate to the Commission to investigate and determine whether granting a license will benefit the public:

> The grant of authority to the Commission to alienate federal water resources does not, of course, turn simply on whether the project will be beneficial to the licensee. Nor is the test solely whether the region will be able to use the additional power. The test is *whether the project will be in the public interest*.[9]

[5] *Scenic Hudson Preservation Conference v. F.P.C.*, 354 F.2d 608, 620 (2nd Cir. 1965) (remanding for failure to compile a record and sufficiently study the impact of the grant of a license to a licensee) (citations omitted) (emphasis added).

[6] 16 U.S.C. § 803(a)(1) (2013).

[7] 16 U.S.C. § 808(a)(2) (2013).

[8] *Energie Group LLC v. F.E.R.C.*, 511 F.3d 161, 163–64 (D.C. Cir. 2007) (quoting *Udall v. F.P.C.*, 387 U.S. 428, 450 (1967)).

[9] *Udall v. F.P.C.*, 387 U.S. 428, 450 (1967) (remanding grant of hydroelectricity license to Federal Power Commission with instructions to investigate the extent to which granting a license would impact the public interest) (emphasis added).

This mandate has been reinforced since 1986 in light of the changing circumstances of the nation's economy and the realities of hydropower development over time:

> When the FPA was amended in 1986, Congress recognized that "[FERC] and the courts have held the Section 10(a) standard to be [a] broad public interest standard, requiring consideration of all factors affecting the public interest." H.R. Rep. No. 99-507, at 12 (1986), as reprinted in 1986 U.S.C.C.A.N. 2496, 2499. … Section 15(a)(2) of the FPA mandates a similar analysis with respect to the applications for new licenses.[10]

Further,

> [t]he Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive *active and affirmative protection* at the hands of the Commission. The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts.[11]

Commission action that falls short of this mandate will result in reversal.[12] In short, without soliciting competing applications, the Commission cannot possibly know whether the transfer of Alcoa's annual license and relicense application to Cube, and the payments from Cube to Alcoa in return, are in the public interest. Absent a solicitation of new license applications, there is simply no mechanism for the Commission to gather the relevant record, and undertake an active and affirmative protection of the public interest.

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[10] *Green Island Power Auth. v. F.E.R.C.*, 57 F. 3d 148, 167 (2d Cir. 2009) (remanding to the Commission for failure to permit late intervenor upon material amendment to license application).

[11] *Scenic Hudson Preservation Conference v. F.P.C.*, 354 F.2d 608, 620 (2nd Cir. 1965) (remanding for failure to compile a record and sufficiently study the impact of the grant of a license to a licensee) (emphasis added).

[12] *Id*.

III. THE COMMISSION HAS NO AUTHORITY TO TRANSFER AN ANNUAL LICENSE.

The Commission does not have the authority under the Federal Power Act to transfer an annual license. FPA Section 15(a)(1) reads in relevant part:

> *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the existing licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to ***the then licensee*** under the terms and conditions of the existing license until the property is taken over or a new license is issued as aforesaid.

(emphasis added). The statutory reference to "the then licensee" is plainly a reference to the licensee existing at the termination of the original license. The FPA's definition of a licensee is "any person, State, or municipality licensed under the provisions of section 797 of this title, and any assignee or successor in interest thereof." 16 U.S.C. 796(5). Here, there is no party holding a license issued under the provisions of 16 U.S.C. 797; Alcoa holds only an annual license issued under 16 U.S.C. 808(a). Thus, the reference to "the then licensee" must be understood as a reference to the last entity holding a long term license issued under 16 U.S.C. 797. Here, that is Alcoa.

This conclusion marries with the long standing depiction of an annual license as a distinct issuance from a long term license, and a *status quo* preservation tool used to preserve project operations until the Commission can make findings and take discretionary actions on a long term license application or project transfer to the United States. *See, California Trout, Inc. v. FERC, et. al.*, 313 F.3d 1131, 1137 (9th Cir. 2002), cert. denied, 124 S.Ct. 85 (2003), and cases cited

therein. Discretionary transfers of non-discretionary annual licenses would undermine the essential statutory purpose of annual licenses.

IV. MOTION TO INTERVENE.

Pursuant to Commission Rule 214(a)(3), NEC hereby motions to intervene in this docket. NEC is a limited liability company formed under the laws of the State of Delaware with a principal place of business of 300 Delaware Avenue, Suite 201, Wilmington, Delaware 19801. NEC has stated its positions regarding the license transfer application, as well as the underlying relicensing application that are the subjects of this proceeding. NEC has a direct interest in this proceeding as a "competitor" for any final license issued for the Yadkin Project, having declared its intent to file a competing license application for the Yadkin Project if and when the Commission provides a renewed opportunity to do so. Further, NEC's participation in this docket is in the public interest, as NEC has actively advocated positions before this Commission and the D.C. Circuit Court of Appeals that urge the Commission to take a more active role in protecting the public interest with respect to the Yadkin Project, positions expressly aimed at shifting hydropower benefits away from any private licensee for the Yadkin Project, and to the North Carolina public.

To reiterate, in this proceeding, all service should be made upon and communications should be addressed to:

M. Curtis Whittaker
Frederick J. Coolbroth, Jr.
Rath, Young and Pignatelli, P.C.
One Capital Plaza
Concord, New Hampshire 03301-1500
mcw@rathlaw.com
fjc@rathlaw.com
Tel: (603) 226-2600

Counsel to New Energy Capital Partners, LLC
300 Delaware Avenue, Suite 201
Wilmington, Delaware 19801

CONCLUSION

NEC therefore respectfully reiterates its prior requests that the Commission allow the submission of competing new license applications with respect to the Yadkin Project. NEC further requests that the Commission (i) grant NEC's motion for intervention in this docket; and (ii) deny Alcoa's application to transfer its annual license and relicense application for the Yadkin River Project to Cube.

Respectfully submitted this August 31, 2016.

/s/ M. Curtis Whittaker

M. Curtis Whittaker
Frederick J. Coolbroth, Jr.
Rath, Young and Pignatelli, P.C.
One Capital Plaza
Concord, New Hampshire 03301-1500
mcw@rathlaw.com
fjc@rathlaw.com
Counsel to New Energy Capital Partners, LLC

cc: Service list

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Concord, New Hampshire, this 31st day of August, 2016.

/s/ Frederick J. Coolbroth, Jr.
Frederick J. Coolbroth, Jr.
RATH, YOUNG AND PIGNATELLI, P.C.
One Capital Plaza
Concord, NH 03301
603-226-2600
fjc@rathlaw.com
COUNSEL TO NEW ENERGY CAPITAL, LLC

Service List

Service by Mail

Fred Adkins
270 Marion Brown Trl
Salisbury, North Carolina 281465016

Lou Adkins
270 Marion Brown Trl
Salisbury, North Carolina 281465016

Charles T Steinman, MD
Animal Care Center of Salisbury
1500 E Innes St
Salisbury, North Carolina 281466009

Dr. Richard Blase
177 NC Highway 42 N Ste A
Asheboro, North Carolina 272037955

Legal Department
Carolina Power & Light Company
PO Box 1551
Raleigh, North Carolina 27602-1551

Gaither Walser
Friends of the Yadkin River Basin, Inc.
Brinkley Walser, PLLC
10 Lsb Plz
Lexington, North Carolina 272923393

Ronnie Lee Qualkenbush
156 Stratford Rd
Lexington, North Carolina 272929650

Mark Tyson
President
Sandhills Rod and Gun Club
340 Grey Fox Road
Ellerbe, North Carolina 28338

Dick Christie
SCDNR
1771-C Highway 521 By-Pass South
Lancater, South Carolina 29720

Jim L Shuping
755 Riverwalk Dr
Salisbury, North Carolina 281465020

Henry D McMaster
South Carolina Office Of Attorney Gen.
PO Box 11549
Columbia, South Carolina 29211-1549

Clerk of Court
Davie County, North Carolina
140 S Main St
Mocksville, North Carolina 27028

Service by eServe

Teresa Morton
Roger Morton
134 Peach Drive
Troy, North Carolina 27371
United States
mort2527@yahoo.com

Andy Lucas
County Manager
Alcoa Power Generating Inc.
1000 N 1st St, Suite 10
Stanly County
Albemarle, North Carolina 28001
alucas@co.stanly.nc.us

Gene Ellis
Licensing & Property Manager
Alcoa Power Generating Inc.
PO Box 576
Badin, 28009-0576
gene.ellis@alcoa.com

Max W Laun
Alcoa Power Generating Inc.
7th Street Bridge
201 Isabella St
Pittsburgh, Pennsylvania 15212-5858
max.laun@alcoa.com

David Bernhart
Assistant Regional Administrator
NOAA National Marine Fisheries Service
National Marine Fisheries Service -SERO
263 13th Avenue South
St. Petersburg, Florida 33701-5505
david.bernhart@noaa.gov

Miles Croom
Assistant Regional Administrator
NOAA National Marine Fisheries Service
National Marine Fisheries Service
263 13th Avenue S
St. Petersburg, Florida 33701
Miles.Croom@noaa.gov

Gerrit Jobsis
SE Regional Director
American Rivers
2231 Devine St, Ste 202
Columbia, South Carolina 29205
gjobsis@americanrivers.org

Philip Marston
218 N. Lee Street
Suite 300
Alexandria, Virginia 22314
client.admin@marstonlaw.com

Julie Gantenbein
Staff Attorney
2140 Shattuck Avenue, Ste. 801
Berkeley, California 94704-1229
jgantenbein@waterpowerlaw.com

Richard Roos-Collins
Director, Legal Services
2140 Shattuck Avenue, Ste. 801
Berkeley, California 94704-1229
rrcollins@waterpowerlaw.com

V. Tinsley
City of Salisbury
Brooks, Pierce, Mclendon, Humphrey Et Al
230 N. Elm Street
Suite 2000
Greensboro, North Carolina 27401
rtinsley@brookspierce.com

Guy Cornman
Planning Director
Davidson County
Davidson County Governmental Center
913 Greensboro Street
Lexington, North Carolina 27292
gcornman@co.davidson.nc.us

John Whittaker
Winston & Strawn LLP
1700 K St. N.W.
Washington, District of Columbia 20006-3817
jwhittaker@winston.com

Jeffrey G Lineberger
Director, Water Strategy & Hyd
Duke Energy Carolinas, LLC
PO Box 1006
Charlotte, District of Columbia 28201-1006
jeff.lineberger@duke-energy.com

Michael Kurman
Arent Fox PLLC
415 Green Pasture Drive
Rockville, Maryland 20852
mkurman18@gmail.com

Larry Jones
High Rock Lake Association
310 Fox Hollow Farm Road
Salisbury, North Carolina 28146
hrla@bellsouth.net

Neil Robinson
Attorney
Nexsen Pruet Law Firm
PO Box 486
Charleston, South Carolina 29402-0486
nrobinson@npjp.com

Marc Bernstein
Special Deputy Att'y General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001
mbernstein@ncdoj.gov

Donald Laton
N.C. Attorney General's Office
North Carolina Department of Justice
114 West Edenton Street
Raleigh, North Carolina 27603-1712
dlaton@ncdoj.gov

Marc Bernstein
Special Deputy Att'y General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001
mbernstein@ncdoj.gov

Christopher J Goudreau
Hydropower Relicensing Coord.
North Carolina Wildlife Resources Commission
645 Fish Hatchery Road
Marion, North Carolina 28752-8254
chris.goudreau@ncwildlife.org

Todd Ewing
Eastern FERC Coordinator
North Carolina Wildlife Resources Commission
808 Briggs St., NW
Valdese, North Carolina 28690
todd.ewing@ncwildlife.org

Paul F Shiers
Project Manager
PB POWER INC
75 Arlington St
Boston, Massachusetts 021163904
shiers@pbworld.com

Neil Robinson
Attorney
Nexsen Pruet Law Firm
PO Box 486
Charleston, South Carolina 29402-0486
nrobinson@npjp.com

James Hancock
Balch & Bingham LLP
1710 Sixth Avenue N
Birmingham, Alabama 35203
jhancock@balch.com

Richard Roos-Collins
Director, Legal Services
Sandhills Rod and Gun Club
2140 Shattuck Avenue, Ste. 801
Berkeley, California 94704-1229
rrcollins@waterpowerlaw.com

Robert Petree
SaveHighRockLake.org
263 High Rock Drive
Lexington, North Carolina 27292
pete@savehighrocklake.org

Mullen Taylor
Willoughby & Hoefer, PA
120 S. Waccamaw Ave.
Columbia, South Carolina 29205
mullentaylor@earthlink.net

Hank Stallworth
South Carolina Office of the Governor
PO Box 11829
Columbia, South Carolina 29211-1829
hstallwo@gov.state.sc.us

Frances Francis
Spiegel & McDiarmid LLP
1875 Eye Street, NW
Suite 700
Washington, District Of Columbia 20006
frances.francis@spiegelmcd.com

Rebecca Baldwin
Spiegel & McDiarmid LLP
1875 Eye Street, NW
Suite 700
Washington, District Of Columbia 20006
rebecca.baldwin@spiegelmcd.com

William Huang
Spiegel & McDiarmid LLP
1875 Eye Street NW
Suite 700
Washington, District Of Columbia 20006
william.huang@spiegelmcd.com

E Service
Spiegel & McDiarmid LLP
1875 Eye St, NW
Suite 700
Washington, District Of Columbia 20006
eService@spiegelmcd.com

Faison Hicks
Special Deputy Attorney General
State of North Carolina
114 West Edenton Street
Post Office Box 629
Raleigh, North Carolina 27602-0629
fhicks@ncdoj.gov

Jason Walser
The LandTrust for Central North Carolina
215 Depot St
salisbury, North Carolina 28144
jason@landtrustcnc.org

Eric Krueger
Aquatic Program Mgr
The Nature Conservancy
PO Box 20246
Charleston, South Carolina 29413-0246
ekrueger@tnc.org

Richard Roos-Collins
Director, Legal Services
The Nature Conservancy
2140 Shattuck Avenue, Ste. 801
Berkeley, California 94704-1229
rrcollins@waterpowerlaw.com

Ann Brownlee
President
Trading Ford Historic District Preservation Association
400 Lantz Avenue
Salisbury, North Carolina 28144
ann.brownlee1@gmail.com

Gerald Thornton
U.S. Department of Interior
530 South Gay Street
Suite 308
Knoxville, Tennessee 37902
gatwildcat@aol.com

David Poe
Partner
Bracewell & Giuliani LLP
2000 K Street NW
Washington, District Of Columbia 20006-1872
Dave.Poe@bracewelllaw.com

Nancy Gottovi
Executive Director
PO Box 159
Star, North Carolina 27356-0159
nancy@centralparknc.org