

FILED

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09 Cvs 394

STANLY COUNTY 2009 MAR 13 PM 12:15

ALCOA POWER GENERATING INC. S.C.)
Tennessee Corporation,)

Plaintiff,)

vs.)

STANLY COUNTY THROUGH ITS BOARD)
OF COUNTY COMMISSIONERS; TONY M.)
DENNIS, IN HIS OFFICIAL CAPACITY AS)
CHAIRMAN OF THE BOARD OF)
COMMISSIONERS; GENE McINTYRE, IN)
HIS OFFICIAL CAPACITY AS VICE)
CHAIRMAN OF THE BOARD; LINDSEY)
DUNEVANT, IN HIS OFFICIAL CAPACITY)
AS A BOARD MEMBER; JANN K.)
LOWDER, IN HER OFFICIAL CAPACITY)
AS A BOARD MEMBER; SHERRILL)
SMITH, IN HIS OFFICIAL CAPACITY AS A)
BOARD MEMBER; ANDY LUCAS, IN HIS)
OFFICIAL CAPACITY AS COUNTY)
MANAGER; JOHN L. ROBERTS, IN HIS)
OFFICIAL CAPACITY AS COUNTY)
ATTORNEY; and JERRY MYERS, IN HIS)
CAPACITY AS A COUNTY EMPLOYEE,)

Defendants.)

COMPLAINT

The plaintiff, complaining of the defendants, alleges and says:

Parties

1. Plaintiff Alcoa Power Generating Inc. ("APGI") is a Tennessee corporation that has its principal place of business in Tennessee. APGI is registered and authorized to do business, and does business, in North Carolina. APGI maintains an office in Badin, North Carolina.
2. Defendant Stanly County is a body politic and corporate created by the General Assembly of North Carolina pursuant to Article VII of the North Carolina Constitution and N.C. Gen. Stat. § 153A-10. The county holds and is authorized to exercise all powers conferred by

N.C. Gen. Stat. § 153A-11, including the power to sue and be sued. The county exercises its powers and discharges its responsibilities through its board of commissioners, which by ordinance or resolution has delegated certain powers and responsibilities to the county manager and the county attorney. Accordingly, the defendants are referred to collectively hereafter as “the County.”

3. Defendant Tony M. Dennis is a citizen of Stanly County. He is sued in his official capacity as chairman of the Stanly County Board of Commissioners.

4. Gene McIntyre is a citizen of Stanly County. He is sued in his official capacity as vice chair of the Stanly County Board of Commissioners.

5. Lindsey Dunevant is a citizen of Stanly County. He is sued in his official capacity as a member of the Stanly County Board of Commissioners.

6. Jann K. Lowder is a citizen of Stanly County. She is sued in her official capacity as a member of the Stanly County Board of Commissioners.

7. Sherrill Smith is a citizen of Stanly County. He is sued in his official capacity as a member of the Stanly County Board of Commissioners.

8. Andy Lucas is a citizen of Stanly County. He is sued in his official capacity as the Stanly County Manager.

9. John L. Roberts is a citizen of Stanly County. He is sued in his official capacity as the Stanly County Attorney.

10. Jerry Myers is a citizen of Stanly County and is the former Stanly County manager. He is sued in his official capacity as an employee of Stanly County.

11. Each of the defendants is an “agency of North Carolina government or its subdivisions” as defined by N.C. Gen. Stat. § 132-1; as such, they are subject to the North Carolina Public Records Law.

Jurisdiction and Venue

12. This is an action to declare that certain records made or received by the defendants are public records as defined by N.C. Gen. Stat. § 132-1 and to compel the disclosure of those and other public records. This court has jurisdiction over the subject matter of this action pursuant to N.C. Gen. Stat. § 132-9 and pursuant to the North Carolina Uniform Declaratory Judgment Act, N.C. Gen. Stat. §§1-253 through 1-267.

13. Venue of this action is laid in Stanly County pursuant to N.C. Gen. Stat. § 1-77.

The North Carolina Public Records Law

14. The North Carolina Public Records Law ("the Public Records Law") is codified at N.C. Gen. Stat. §§ 132-1 through 132-10. The public policy underlying the Public Records Law is set out in G.S. § 132-1(b), which provides:

The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law. As used herein, 'minimal cost' shall mean the actual cost of reproducing the public record or public information.

15. The Public Records Law provides, in § 132-1(a), that public records are defined as:

all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions.

16. The Public Records Law further provides that "Every custodian of public records shall permit any record in the custodian's custody to be inspected and examined at reasonable times and under reasonable supervision by any person, and shall, as promptly as possible, furnish copies thereof upon payment of any fees as may be prescribed by law." N.C. GEN. STAT. §132-6(a).

17. The Public Records Law also provides, in G.S. §132-6(c) that:

No request to inspect, examine, or obtain copies of public records shall be denied on the grounds that confidential information is commingled with the requested nonconfidential information. If it is necessary to separate confidential information from nonconfidential information in or to permit the inspection, examination, or copying of the public records, the public agency shall bear the costs of such separation . . .

APGI's Public Records Requests

18. APGI owns and operates a hydroelectric project located on a 38-mile stretch of the Yadkin River in Montgomery, Stanly, Davidson, Rowan and Davie Counties known as "the Yadkin Project." The Federal Energy Regulatory Commission ("FERC") issued the original 50-year license for the project to APGI's predecessor in 1958. In April 2006 APGI filed an application with FERC to re-license the Project for another 50 years. Stanly County has opposed APGI's re-licensing application.

19. By letter dated April 5, 2008 APGI requested that the County permit APGI to inspect and obtain copies of public records pertaining to APGI's re-licensing application. A true copy of APGI's request is attached and incorporated by reference as Exhibit A.

20. Because the County neither replied in writing nor produced any significant number or types of records in response to APGI's April 5, 2008 letter, APGI reiterated its requests in almost identical language in a letter dated August 8, 2008. A true copy of APGI's letter of August 8, 2008 is attached and incorporated by reference as Exhibit B.

21. Although the defendants have acknowledged their responsibility to produce for inspection and copying the records requested by APGI in Exhibits A and B, the County has almost wholly failed to fulfill its obligations pursuant to the Public Records Law and has engaged in a variety of unwarranted and improper tactics in an effort to avoid those obligations. At the County's request, APGI has attempted to narrow and prioritize its requests, but rather than facilitating and expediting the County's

compliance these conciliatory and cooperative efforts have been met with obfuscation, foot-dragging, non-responsiveness and untenable interpretations of the law.

22. The County has failed to provide APGI with access to the vast majority of the requested records, and the few copies that it has produced have not been provided “as promptly as possible,” as the law requires; to the contrary, they have dribbled them out in small batches occasionally over a period of several months. Although the Public Records Law explicitly requires the County to separate confidential and nonconfidential information that is co-mingled in public records and to bear the cost of doing so, the County – which has spent hundreds of thousands of dollars in taxpayer funds to oppose APGI’s re-licensing application – has refused to conduct a timely or prompt review of the requested records for the purpose of redacting “privileged” or “confidential” information. Rather, the County has presented APGI with the Hobson’s choice of either bearing the cost (which the County estimates at \$331,170) of having the records reviewed on a timely basis by its outside law firm, or enduring the delay attendant to having the county’s staff attorney review the records “as he is able.” The Public Records Law does not countenance either option, in letter or in spirit.

23. In addition to being unconscionably slow and thus violating the Public Record Law’s directive that public records be made available as promptly as possible, the County’s review and production of its documents also has violated the law because information that is neither privileged nor confidential has been improperly redacted from some of the records that have been produced by the County.

24. The County also has taken the position that some of the requested records, or portions thereof, are not public records and thus are exempt from disclosure.

25. APGI is informed and believes that the defendants have engaged, and are continuing to engage, in a systematic, purposeful and concerted effort to deny APGI access to the requested records, or to delay such access to the point that it becomes

tantamount to denial.

26. By reason of the County's denial of APGI's requests and/or its inordinate and unjustified delay in complying with them APGI is entitled to an order pursuant to N.C. Gen. Stat. § 132-9 compelling the immediate disclosure and copying of the requested records.

27. Owing to the differences between APGI and the County as to the proper interpretation and application of the Public Records Law to certain of the records requested by APGI, a genuine and subsisting dispute exists between APGI and the County that can and should be resolved by this court's reviewing the disputed records and issuing a judgment declaring whether and to what extent the disputed records must be made available to APGI for inspection and copying.

WHEREFORE the plaintiff respectfully prays:

1. Pursuant to N.C. Gen. Stat. § 132-9(a), that this matter be set down for immediate hearing and that the court establish an expedited schedule for discovery and adjudication;

2. That the court review any records requested by APGI that the County contends are not public records or are otherwise exempt from inspection and copying and issue an order declaring whether and to what extent such records are public records;

3. That the court issue an order requiring the County to make all public records requested by APGI available for inspection and copying immediately;

4. That the court award APGI its reasonable attorney fees pursuant to N.C. Gen. Stat. § 132-9(c);

5. That the court award APGI such further and additional relief as the court shall deem just and proper.

This the _____ day of March, 2009.

EVERETT GASKINS HANCOCK & STEVENS, LLP

By: _____

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