



North Carolina Department of Environment and Natural Resources
Division of Water Resources

Beverly Eaves Perdue, Governor

Dee Freeman, Secretary
Thomas A. Reeder, Director

November 1, 2010

TO: Environmental Management Commission

FROM: Toya Ogallo
Division of Water Resources

SUBJECT: Comments Regarding Reopener Condition in the Proposed Interbasin Transfer (IBT) Certificate for the Greenville Utilities Commission (GUC), Town of Farmville, Town of Winterville, and Greene County

On November 5, 2009, The Environmental Management Commission held a public hearing concerning GUC's Petition for an IBT Certificate. The public record for that hearing was scheduled to close on December 4, 2009. On December 1, 2009, the Town of Rocky Mount requested that the comment period be extended for an additional 45 days. As a result, the Hearing Officers agreed to grant a one-time extension ending January 19, 2010.

During the comment period, Rocky Mount requested that the certificate include a reopener condition. Therefore the Hearing Officers requested that Rocky Mount and the Greenville Utilities Commission jointly work to recommend language. While the parties were not able to come to a mutual recommendation, the Hearing Officers were provided an early draft of each entity's proposed verbiage. Based on those drafts, the following discussion was included in the Finding of Fact:

Rocky Mount proposed that any decision by the Commission to grant or deny a request to reopen the certificate should be subject to administrative and judicial review according to Chapter 150B of the General Statutes. However, the Hearing Officers have determined that it would not be appropriate for a condition of the Certificate to attempt to define any right a party may or may not have in challenging the EMC's decision. Therefore the Hearing Officers do not recommend that Rocky Mount's proposed language be used in the Certificate. Instead, the reopener language will be consistent with language used in other IBT Certificates.

On October 19, 2010, Rocky Mount submitted the attached letter (pp D2-D3) containing their proposed reopener language. Since the Hearing Officers recommendations were already complete at this time, the Town requested that its letter be presented to the Commission for consideration. On October 28, 2010, the Greenville Utilities Commission submitted the attached response (ppD4-D5) to Rocky Mount's letter, which GUC also asks be presented to the Commission for consideration.

Although Rocky Mount submitted comments after the Hearing Officer's recommendations were completed, the issues raised were already considered and addressed by the Hearing Officers in the development of their report, the Findings of Fact, and the proposed IBT certificate. The Hearing Officers have asked that I provide both letters and this explanatory information to the full Commission.



October 18, 2010

H. Glenn T. Dunn
Partner
D: 919.783.2842
F: 919.783.1075
gdunn@poynerspruill.com

Ms. Toya F. Ogallo
Division of Water Resources
DENR
1611 Mail Service Center
Raleigh, North Carolina 27699-1611

RE: City of Rocky Mount Comment Regarding Reopener Condition in Greenville Utilities Commission's Proposed IBT Certificate

Dear Ms. Ogallo:

On behalf of the City of Rocky Mount, I am requesting that the following language be added at the end of the "reopener" condition that is being considered for the Greenville Utility Commission's IBT request.

Any significant user of water in the Tar-Pamlico River Basin may submit new information to the Commission and request that the Commission review such information and reopen the Certificate. A decision by the Commission to deny such a request or a decision by the Commission, after reviewing such information, to either modify or not modify the Certificate shall be subject to administrative and judicial review according to Chapter 150B of the General Statutes. Nothing in this condition is intended to determine the procedure that shall be followed for reopening or modifying this Certificate or modifying its conditions.

I had hoped to see the proposed condition before the hearing officers made their recommendation, and regret that we are in the position of requesting this wording after they have done so. Nevertheless, Rocky Mount continues to have concerns regarding the requested IBT that were stated in comments submitted December 1, 2009, the seriousness of which can be better determined following the completion of DWR's Tar River Hydrologic Model in 2011. Rocky Mount does not want to delay the IBT decision at this time, but does want to be sure there is an opportunity to present to the Commission information supporting modification and, if necessary, to seek legal review if it is dissatisfied with the Commission's decision regarding the requested modification. We think the following language accomplishes this in a clear and reasonable manner.

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We ask that this addition to the reopener provision be presented to the Commission for inclusion in the IBT Certificate. We are not wedded to this exact wording and would be open to a rewording provision that accomplishes the same objective. Please don't hesitate to contact me to discuss this, and I would appreciate a response to this request.

Yours truly,



H. Glenn T. Dunn
Partner

LAW OFFICES

DIXON LAW GROUP, PLLC

A Professional Limited Liability Company

110 E. ARLINGTON BOULEVARD

GREENVILLE, NORTH CAROLINA 27858

Established 1978

PHILLIP R. DIXON

Telephone (252) 355-8100

PHILLIP R. DIXON, JR.

Facsimile (252) 355-0271

Ms. Toya F. Ogallo
Environmental Engineer
River Basin Management Section
Division of Water Resources
NCDENR
1611 Mail Center
Raleigh, North Carolina 27699-1611

Re: Draft IBT Certificate – Reopener Clause Comments from Rocky Mount

Dear Ms. Ogallo:

The Greenville Utilities Commission (“GUC”) recently received a copy of the comments submitted by Mr. Glenn Dunn on behalf of the City of Rocky Mount, seeking further language changes to the proposed reopener clause provision. GUC has requested that we provide comments on their behalf regarding these very late proposed changes to the certificate. The purpose of the reopener clause is to describe the conditions under which the Commission might impose additional requirements in the event that new information, not available at the time of certificate issuance, confirms that alternative provisions are necessary to ensure compliance with the statutory provisions for granting the certificate. This language was closely modeled after prior reopener language approved by the Commission. The recently proposed language, however, does not seek any changes on the substantive provisions that would govern the circumstances under which the IBT certificate could be reopened. Rather, the proposed additional language is directed solely at describing certain administrative review procedures that would govern any reopener decision.

GUC does not agree that such language is appropriate to be included in the reopener clause. The purpose of this clause is not to describe administrative review procedures or to seek to amend or clarify how such decisions may be reviewed should a party disagree with the outcome. The law that governs administrative review is separately established by the state legislature and is not the subject of IBT certificate issuance. Consequently, this certificate may neither expand nor contract whatever procedural rights a party has with regard to a reopener decision request by any party.

We therefore respectfully request that the reopener clause provision remain as currently drafted by the Division.

Sincerely,



Philip R. Dixon