

facilities. In addition, Complainant alleges that it did not submit to Respondents the Notice of Commitment (NoC) Form required to establish a legally enforceable obligation (LEO) under the Commission's implementation of PURPA, and that the NoC Form does not apply to the Yadkin River Facilities because (1) the construction of the Yadkin River Facilities pre-dated the enactment of N.C. Gen. Stat. § 62-110.1, (2) Complainant committed to purchase and upgrade the facilities in reliance, in part, upon the status of the Yadkin River Facilities as QFs, and (3) that the communications between Complainant and Respondents established a LEO prior to November 15, 2016, the date on which the availability of the rates, terms, and conditions based on the Commission's Order Establishing Standard Rates and Contract Terms for Qualifying Facilities, issued on December 17, 2015, in Docket No. E-100, Sub 140 (Sub 140 Order) expired. Complainant requests relief in the form of (1) treating this matter as a request for a declaratory judgment pursuant to N.C. Gen. Stat. § 1-253, (2) declaring that Respondents are obligated to purchase the electric output of the Yadkin River Facilities at rates established in accordance with the Commission's Order issued on March 10, 2016, in Docket No. E-100, Sub 140, (3) directing Respondents to enter into purchase power agreements (PPAs) with Complainant for the sale of the electric output of the Yadkin River Facilities for a term of not less than 10 years, (4) providing for arbitration of the unresolved issues, and (5) setting this matter for consideration on an expedited procedural schedule.

On May 7, 2018, Respondents filed a joint answer and motion to dismiss the complaint. In summary, Respondents allege that in their dealings with Complainant they have acted in good faith and consistent with the requirements of PURPA, N.C. Gen. Stat. § 62-156, and the Commission's orders implementing PURPA. Respondents argue that Complainant is not entitled to the relief requested because Complainant did not follow the requirements for establishing a LEO prior to November 16, 2016. Citing the Commission's Sub 140 Order, Respondents allege that, at the time relevant to this case, the Commission's requirements for establishing a LEO were: (1) that the QF has self-certified with the Federal Energy Regulatory Commission (FERC) as a QF, (2) that the QF has made a commitment to sell the QF's output to a utility under PURPA using the NoC Form, and (3) that the QF has filed a report of proposed construction or has been issued a certificate of public convenience and necessity (CPCN). Respondents then state, among other things, that there is no dispute that Complainant has not submitted the NoC Form to Respondents. In their motion to dismiss, Respondents then argue that, based upon the failure to submit the NoC Form, among other things, Complainant has failed to meet the Commission's requirements for establishing a LEO prior to November 15, 2016 (the expiration of the availability of the avoided cost rates based on the methods approved in the Sub 140 Order), the complaint should be dismissed, Complainant's request for a declaratory judgment should be denied, and because there are no issues ripe for determination, the request for arbitration should also be denied.

On May 23, 2018, Complainant filed a response to Respondents' joint answer and motion to dismiss the complaint, and requested a hearing to present evidence and offer arguments in this matter. On July 16, 2018, the Commission granted Respondents' motion to dismiss by holding that Complainant had failed to establish a LEO because it

had not submitted a NoC form. The Commission further concluded that Complainant's request for a waiver of the NoC requirement should be denied. Dissenting opinions filed by Commissioners Brown-Bland and Clodfelter, concluded that the Commission was issuing its Order without the benefit of a fully-developed factual record or an evidentiary hearing, and without assuming the truth of Complainant's well-pleaded allegations.

Complainant appealed the Commission's decision. The Court of Appeals reviewed two dispositive issues on appeal: first, whether the Commission erred in ruling that Cube failed to establish a LEO by not submitting the NoC Form; and second, whether the Commission erred at the motion to dismiss stage by holding that Complainant was not entitled to a waiver of the NoC Form. The Court of Appeals held that as to the first issue, that the Commission did not err in concluding that Complainant failed to establish a LEO when it did not submit the NoC Form. With respect to the second issue, the Court of Appeals held that the Commission's order denying waiver of the NoC Form requirement was not supported by competent, material, and substantial evidence because the Commission resolved factual issues at the motion to dismiss stage without the benefit of a developed record. The Court reversed the portion of the Commission's order dismissing Complainant's claim for a waiver of the NoC Form requirements.

On remand to the Commission, the Commission issued an Order Scheduling Hearing and Establishing Procedural Schedule on Remand that established new deadlines for discovery, prefiled testimony, and a hearing on the issue of waiver of the NoC Form. After the parties' sought extensions of time, Complainant filed its pre-filed testimony on or about December 14, 2020. Respondents filed their own pre-filed testimony on January 15, 2021. On February 16, 2021, Complainant filed its rebuttal pre-filed testimony. On March 3, 2021, the Commission conducted a hearing for the purpose of receiving expert witness testimony on remand of the case from the North Carolina Court of Appeals on the sole issue of whether Complainant should be granted a waiver of the NoC Form requirement with respect to establishing a LEO for the Yadkin River Facilities. By order entered on March 17, 2021, the Commission provided that any proposed orders and/or post-hearing briefs be filed by April 16, 2021. By subsequent order, the Commission extended the time in which to file proposed orders and post-hearing briefs to May 17, 2021.

FINDINGS OF FACT

1. Complainant is a Delaware limited liability company that was created to own, develop, and modernize hydroelectric facilities through the acquisition of projects in North Carolina. Complainant is an affiliated company of Cube Hydro Partners, LLC (Cube Hydro) through Complainant's managing member, Cube Hydro Carolinas, LLC. As the affiliate of Complainant, Cube Hydro was responsible for all stages of the acquisition and operation of four hydroelectric power facilities on the Yadkin River, including the three facilities that are the subject of this proceeding. Complainant, and its affiliates, are skilled in all aspects of hydroelectric project acquisition, development, and operation, including knowledge of federal, state, and local permitting processes and

requirements and has been recognized by the Federal Energy Regulatory Commission as a “qualified operator.”

2. The Yadkin River Facilities were purchased by Complainant from Alcoa Power Generating Inc. (Alcoa) and include three hydroelectric stations, dams and reservoirs along a 38-mile stretch of the Yadkin River as it flows through Davidson, Montgomery, Davie, Rowan and Stanly Counties. The three purchased facilities are commonly referred to as: High Rock, Tuckertown, and Falls. A fourth facility on the Yadkin River, Narrows, was also purchased by Complainant; however, this facility is not a QF under PURPA and is not the subject of this proceeding.

3. The High Rock facility was placed in service on or about January 1, 1927 and contains three turbine/generator units with a total installed capacity of 32.91 MW. The Tuckertown facility was placed in service on or about January 1, 1962 and contains three turbine/generator units with a total installed capacity of 38.04 MW. The Falls facility was placed in service on or about January 1, 1917 and contains three turbine/generator units with a total installed capacity of 31.13 MW.

4. Together (along with the Narrows facilities), the four purchased facilities have a total generating capacity of 215 megawatts (MW), and they are expected to produce nearly 800,000 MWhs of clean, reliable electricity per year – enough to power approximately 72,000 homes with renewable energy. Downstream of these facilities are two additional hydroelectric facilities, Tillery and Blewett Falls. Both of these facilities are licensed by Respondents as the Yadkin-Pee Dee Project.

5. The four facilities originally operated under a 50-year FERC license issued to Carolina Aluminum Company on May 19, 1958, later transferred to Alcoa on July 17, 2000. Complainant sought FERC authorization to transfer the License from Alcoa to Complainant on July 27, 2016 and the transfer was authorized on September 30, 2016. On September 22, 2016, FERC issued a new long-term license to Alcoa authorizing the operation and maintenance of the facilities until March 31, 2055. At Complainant’s request and with Alcoa’s cooperation, the Yadkin River Facilities self-certified as QFs under PURPA by filing the Form 556s with FERC on or about September 28, 2016.

6. In 2015, Alcoa sought to sell the facilities making up the Yadkin River Facilities to prospective purchasers, including Complainant and Respondents. Alcoa agreed to sell the facilities to Complainant. Complainant and Alcoa signed a contract to acquire the Yadkin Project from Alcoa on June 30, 2016. The sale of the Yadkin River Facilities’ energy and capacity to Respondents at the then-prevailing avoided cost rates was material to Complainant’s decisions to acquire the Yadkin Project and to commit to facility upgrades required in connection with the acquisition. The purchase agreement was executed on July 1, 2016. Complainant and Alcoa consummated the agreement to purchase the Yadkin Project on February 1, 2017.

7. Complainant understood that the NoC Form was intended to give the Commission notice of potential new power generating facilities coming online. The Yadkin River Facilities were operating long before the requirements for both a NoC Form and CPCN pursuant to N.C. Gen. Stat. § 62.110.1. The Yadkin River Facilities were also well-known to both the Commission and Respondents. Complainant directed its counsel to consult with the Public Staff of the Commission who informed them that a CPCN would not be required for operation of the Yadkin River Facilities. Complainant believed, after due diligence and consultation with Public Staff, that since the CPCN was not required, that the NOC was not required since a CPCN was needed in order to complete the NOC.

8. Beginning as early as March 2016, Complainant initiated discussions with Respondents concerning the purchase of the Yadkin River Facilities' energy and capacity because these QFs are interconnected to Respondents' power grid and are components of hydroelectric operations with which Respondents are familiar. Complainant had multiple meetings and communications with Respondents between August and October 2016 concerning Complainant's intention to enter into long-term PPAs to sell the energy and capacity provided by the Yadkin River Facilities. In August 2016, Complainant's executives Kristina Johnson and John Collins communicated with Respondents' employees Dhia Jamil, Regis Repko, Mathew Palasek, and Michael Keen concerning the sale of power from the Yadkin River Facilities.

9. On September 21, 2016, Mr. Keen submitted a letter to Mr. Collins stating that Respondents had no obligation to purchase the energy from the Yadkin River Facilities. He did not mention the requirements of ownership as hindering these discussions, nor did he mention any requirements for a CPCN or NoC Form. In that letter, Mr. Keen stated that Complainant was not the owner of the QFs and that if approached under PURPA, Respondents had no obligation to purchase any output of energy or capacity from the Yadkin River Facilities. By letter sent to Respondents on or about October 11, 2016, Mr. Collins responded that the Yadkin River Facilities were self-certified with FERC and that Complainant wanted to meet to discuss the process for making sales from the facilities to Respondents pursuant to PURPA.

10. On 14 October 2016, Respondents notified Complainant that it would not honor Complainant's assertion of rights under PURPA at that time or in the future. Respondents claimed an exemption from any obligation to purchase the from QFs energy and capacity, pursuant to PURPA Section 210(m). However, Respondents did not file a petition with FERC in order to obtain an exemption from Respondents' PURPA obligations.

11. The parties continued further non-PURPA discussions with Respondents concerning the purchase of the energy from the Yadkin River Facilities along with the Narrows facility beginning in November 2016 and continuing through March 2018. At no time during the course of these discussions, however, did Complainant waive its right to a PURPA PPA. In February 2017, Complainant communicated with Respondents to

continue these discussions after the consummation of the purchase agreement between Complainant and Alcoa.

12. Respondents required Complainant to enter into a confidentiality agreement and a letter agreement. The letter agreement, dated April 25, 2017, acknowledged that Complainant and Respondents would enter into non-PURPA discussions. Complainant sought to enter a PPA that would be beneficial to, and diversify, the power grid in a manner consistent with goals of the State of North Carolina.

13. While the confidentiality agreement and letter agreement were executed by the end of April 2017, Respondents did not provide its first term sheet containing terms for the purchase of power from the Yadkin River Facilities until roughly 4 months later, on August 10, 2017. The parties exchanged term sheets throughout the remainder of 2017 and into 2018, with Cube providing its final counteroffers to Respondents on or about January 3, 2018. Despite further communications between the parties, Respondents rejected the term sheet and Complainant terminated the letter agreement and filed its complaint.

14. At no time during the PURPA and non-PURPA negotiations did Respondents request that Complainant submit a NoC Form, and the parties did not discuss the NoC Form during these negotiations. Further, Respondents never mentioned the NoC Form requirement, nor did it communicate with Complainant concerning alternative methods to complete the NoC Form for the Yadkin River Facilities which were in operation prior to the enactment of the NoC Form requirement and N.C. Gen. Stat. § 62-110.1.

EVIDENCE FOR FINDINGS OF FACT 1 THROUGH 5

The evidence supporting the findings of fact are contained in Complainant's Complaint and the record in this proceeding.

Summary of Evidence

The evidence supporting Findings of Fact 1 through 5 consists primarily of the prefiled and rebuttal testimony of Complainant's witness Mr. Collins.

Complainant's witness testified to Complainant's corporate structure, goals, and experience operating hydroelectric facilities. He also spoke to the facilities which Complainant purchased from Alcoa, including providing a summary of each of the facilities purchased, including the Yadkin River Facilities. He further provided a summary of FERC filings, including transfer of the FERC License and self-certification by the Yadkin River Facilities.

EVIDENCE FOR FINDINGS OF FACT 6 THROUGH 7

The evidence supporting the findings of fact are contained in Complainant's Complaint and the record in this proceeding.

Summary of Evidence

The evidence supporting Findings of Fact 6 through 7 consists primarily of the prefiled and rebuttal testimony of Complainant's witness Mr. Collins.

Complainant's witness testified that Complainant sought, and agreed, to purchase Yadkin River Facilities from Alcoa. Respondents were aware of the purchase of the Yadkin River Facilities as they both received news updates and were contacted by Complainant. Complainant further testified that Complainant's decision to purchase the Yadkin River Facilities was based on the sale of the electrical output from the facilities at the avoided cost rate.

Complainant further performed due diligence that included consultation with the Public Staff to determine whether a CPCN would be required for operation of the Yadkin River Facilities. The Public Staff informed Complainant's counsel that a CPCN would not be required to operate the facilities. Because no CPCN was required, Complainant understood that a NoC Form would not apply.

EVIDENCE FOR FINDINGS OF FACT 8 THROUGH 10

The evidence supporting the findings of fact are contained in Complainant's Complaint and the record in this proceeding.

Summary of Evidence

The evidence supporting Findings of Fact 8 through 10 consists primarily of communications between Complainant and Respondent, as well as the prefiled and rebuttal testimony of Complainant's witness Mr. Collins and the prefiled testimony of Respondents' witnesses Mr. Keen and Glen Snider.

Complainant noted that the communications between the parties establishes that as early as March 2016 the parties were in communication concerning potential opportunities to partner through hydroelectric facilities. Complainant and Alcoa entered into a purchase agreement for the Yadkin River Facilities in July 2016.

Once Alcoa and Complainant entered into a purchase agreement, Complainant contacted Respondents through multiple channels to begin negotiations concerning a potential PURPA PPA in August 2016. Prior to and during these discussions, Complainant employed legal counsel and experts in an effort to determine what steps it needed to take to establish an LEO so that the Yadkin River Facilities would qualify as a QF. It communicated with the Public Staff, who informed it that a CPCN was not

required, and by extension, Complainant understood that it would not be able to complete a NoC Form as written and that the NoC Form requirement did not fit into these circumstances.

In response to these communications and by letter dated September 21, 2016, Respondents stated that Complainant was not the owner of the Yadkin River Facilities. Unbeknownst to Complainant, as well as any other seller of QF electrical output, Mr. Keen testified that it was Respondents' unwritten policy not to negotiate with parties he did not believe were the owners of QFs. Respondents further stated, without explanation, that they had no obligations to negotiation under PURPA. Respondents did direct Complainant to complete a NoC Form, did not assert that the submission of a NoC Form was a prerequisite to establishing a LEO, or discuss how a QF could even complete the NoC Form in the absence of a CPCN.

In direct response, Complainant through Alcoa submitted Form 556s for the self-certification of the Yadkin River Facilities on September 28, 2016. By letter sent on or about October 11, 2016, Complainant firmly committed to sell the electrical output of the Yadkin River Facilities, noted that it had authority to sell the electrical output as evidenced by the filing of the Form 556s, and explained that Respondents were obligated to purchase the electrical output under PURPA contrary to Respondents' erroneous contention. By letter dated October 14, 2016, Respondents stated that they would not honor Complainant's PURPA rights, reiterated that they believed that Alcoa was the owner, and further claimed an exemption, which they acknowledge they were not eligible for, from any obligation to purchase electrical output from the Yadkin River Facilities.

Respondents testified that at the beginning of any PURPA negotiations, they seek to establish that the entity seeking the commitment to sell is authorized to do so as the owner of the QF. Respondents were unable to establish any actual policy that identifies this ownership test as a specific requirement for negotiations, and further, the NoC Form itself only applies to a seller of the electrical output and not the specific owner.

EVIDENCE FOR FINDINGS OF FACT 11 THROUGH 13

The evidence supporting the findings of fact are contained in Complainant's Complaint and the record in this proceeding.

Summary of Evidence

The evidence in this matter consists primarily of communications between Complainant and Respondent, as well as the prefiled and rebuttal testimony of Complainant's witness Mr. Collins and the prefiled testimony of Respondents' witnesses Mr. Keen and Mr. Snider.

Complainant's and Respondents witnesses testified that the parties negotiated for a non-PURPA PPA after the initial discussions between the parties concerning a PURPA PPA. These discussions incorporated a fourth facility, Narrows, in addition to the Yadkin

River Facilities. Respondents required that Complainant execute both a confidentiality agreement concerning the negotiations and a letter agreement outlining the discussions, with the latter being executed on April 25, 2017. After execution of the letter agreement, Respondents provided the first term sheet nearly four months later. After execution of confidentiality and letter agreements outlining the process of the non-PURPA negotiations, these discussions continued for nearly a year with the parties unable to come to terms.

EVIDENCE FOR FINDINGS OF FACT 14

The evidence supporting the findings of fact are contained in Complainant's Complaint and the record in this proceeding.

Summary of Evidence

The evidence for Finding of Fact 14 consists primarily of communications between Complainant and Respondent, as well as the prefiled and rebuttal testimony of Complainant's witness Mr. Collins and the prefiled testimony of Respondents' witnesses Mr. Keen and Mr. Snider.

Respondents stated that an initial step in PURPA negotiations involved a QF submitting the NoC form and mentioned that they assist QFs in completing the forms. Here, Complainant and Respondents both agree that Respondents never broached the topic of the NoC Form requirement during the discussions in 2016, and or any further discussions including after the ultimate consummation of the sale of the Yadkin River Facilities on February 1, 2017.

Respondents claimed that Complainant had the option of submitting an incomplete NoC Form, with any sections it believed did not need to be completed either crossed out or revised with pen to say "N/A." Respondents stated that 8 other similar facilities (hydroelectric plants that predated the requirements of N.C. Gen. Stat. § 62-110.1 had completed a NoC Form in or around the month of March 2021. By late filed exhibit, Respondents noted that 7 of the 8 other facilities were in South Carolina, whose NoC Form is not the same as the North Carolina NoC Form nor does it have the same LEO requirements including that the QFs have a CPCN. The only North Carolina QF that did receive a CPCN, however, was required to do so because it was purchased by Respondents, who by state law, was required to obtain a CPCN as an acquiring incumbent utility. Accordingly, Respondents have not shown any evidence of QFs that predate the requirements of N.C. Gen. Stat. § 62-110.1 and have not received a CPCN completing, either partially or in whole, the NoC Form.

DISCUSSIONS AND CONCLUSIONS

The novel question before the Commission is whether Complainant, as the contract-purchaser and ultimate owner of QFs that were constructed prior to the enactment of N.C. Gen. Stat. § 62-110.1, should be relieved from the required use of the

NoC Form in demonstrating a commitment to sell the output of the Yadkin River Facilities to Respondents and with that waiver, that Complainant established a LEO. Based on the factual evidence presented and the arguments of the parties in light of the purpose of the LEO and the development of the requirements for establishing a LEO, the Commission holds that waiver is appropriate and Complainant has, therefore, established a LEO.

Purpose of the LEO

PURPA was enacted in 1978 to encourage conservation of oil and natural gas and to promote the development of alternative energy resources. One of the stated goals of PURPA and its implementing regulations is to encourage the development of small power production facilities with renewable fuel sources. 16 U.S.C. § 824a-3; *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 405 n.1 (1983). FERC created the concept of a legally enforceable obligation (LEO) in its rules implementing the requirements of PURPA. Section 292.304(d) of the rules provides:

(d) Purchases “as available” or pursuant to a legally enforceable obligation. Each qualifying facility shall have the option either: (1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility’s avoided costs calculated at the time of delivery; or (2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either: (i) The avoided costs calculated at the time of delivery; or (ii) The avoided costs calculated at the time the obligation is incurred.

18 C.F.R. 292.304(d).

FERC created the LEO concept to prevent utilities from circumventing their obligation to purchase from a QF “by refusing to enter into a contract with a qualifying facility.” *See, e.g., Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 (2011) (explaining that Section 292.304(d) and the requirement that a QF can sell, and a utility must purchase pursuant to a legally enforceable obligation were adopted to prevent utilities from circumventing the requirement of PURPA that utilities purchase energy and capacity from QFs). A QF creates a LEO when it commits itself to sell its output to the utility, whether or not a contract has been signed. *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187, P 40 (2013) (“In order to protect the rights of a QF, once a QF makes itself available to sell to a utility, a legally enforceable obligation may exist prior to the formation of a contract’.) A QF that commits itself “to sell to an electric utility . . . ‘also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations.’” *Id.* Importantly, a QF may elect to sell its output to the utility at rates equal to avoided cost

calculated at the time of delivery, or at the time the LEO is incurred. 18 C.F.R. § 292.304(d)(2). Notably, the QF establishes the LEO date and not the owner, as a LEO date would transfer to a new owner.

In the Commission’s Order Establishing Date of Legally Enforceable Obligation, issued on September 22, 2015, in Docket No. E-22, Sub 521, the Commission stated:

The purpose of the LEO is to establish a date certain for determining the applicable avoided cost rates to be used in the PPA between the generator and the utility. For example, smaller QFs, which qualify for the standard avoided cost rates and contract approved biennially by the Commission, would be entitled to receive the rates in effect on the date the LEO was established. Larger QFs, which are not eligible for the standard avoided cost rates and contract, but must negotiate rates, are, nonetheless, entitled to be paid at the avoided cost rates calculated as of the date of the LEO. In this way, the LEO protects the generator from delays in PPA negotiations. In turn, the LEO also protects the utility from having to expend time unnecessarily engaging in negotiations to sign a PPA when a generator might never obtain a CPCN to build its proposed facility or make a commitment to sell its electricity to the utility.

Order Establishing Date of Legally Enforceable Obligation, at 6-7, Docket No. E-22, Sub 521 (September 22, 2015).

In the Commission’s Order Establishing Standard Rates and Contract Terms for Qualifying Facilities, issued on October 11, 2017, in Docket No. E-100, Sub 148 (Sub 148 Order), the Commission explained:

Use of the term “legally enforceable obligation” is intended to require the QF to make a commitment to sell as well as to prevent a utility from circumventing PURPA’s requirements merely by refusing to enter into a contract with the qualifying facility, or by delaying the signing of a contract, so that a later and lower avoided cost is applicable. By committing itself to sell to an electric utility, a QF also commits the electric utility to buy from the QF, resulting in either a contract or in a noncontractual, but binding, legally enforceable obligation. FERC has held: the establishment of a LEO turns on the QF’s commitment, and not the utility’s actions. (emphasis in original).

Sub 148 Order, at 105-06 (quotations and citations omitted).

Development of the Requirements for Establishing a LEO

The Commission addressed the prerequisites for establishing a LEO in two arbitration proceedings. In the first, the Commission concluded that a LEO was established when the QF made clear to the utility that it wanted to sell its output to the

utility pursuant to a LEO and the QF had a CPCN in hand. Order on Arbitration, at 8-9, Docket No. SP-467, Sub 1 (June 18, 2010). In the second, where the QFs had CPCNs in hand, the Commission focused its analysis on the timing of the QFs' commitment to sell, concluding that something more than "preliminary contacts or negotiations" is required to establish a LEO, and that the LEO was established when the QFs, through the action of the Board of Directors of its corporate-owner, made a significant investment in modifications to the facilities. Order on Arbitration, at 9-10, Docket No. E-2, Sub 966 (January 26, 2011). The Commission cited *J.D. Wind* and these two arbitration Orders in concluding that each QF that (a) has obtained a CPCN and (b) has indicated to the utility that it is seeking to commit itself to sell its output should be entitled to the fixed, long-term avoided costs rates approved in the immediately preceding biennial proceeding. Order Establishing Standard Rates and Contract Terms for Qualifying Facilities, at 37, Docket No. E-100, Sub 136 (February 21, 2014) (Sub 136 Order). This established, for the first time, a standard for a QF to establish a LEO in North Carolina.

In phase one of the 2014 avoided cost proceeding, the Commission was presented with a proposal to require the use of a simple form to be completed by a QF seeking to sell its output to a regulated utility. See Order Setting Avoided Cost Input Parameters, at 64, Docket No. E-100, Sub 140 (Dec. 31, 2014). There, the Commission indicated its inclination to move toward such an approach, but requested further comments from the parties addressing various aspects of the use of the form. *Id.* To "provide clarity" and "reduce the number of disputes" between QFs and utilities concerning the establishment of a LEO, in phase two of the 2014 avoided cost proceeding, the Commission concluded:

[U]se of a simple form clearly establishing a QF's commitment to sell its electric output to a utility to establish the notice of commitment to sell prong for creation of an LEO would provide clarity both to QFs and the Utilities and would, therefore, reduce the number of disputes between the parties and the number of complaints brought before the Commission for adjudication as to when an LEO was established.

Sub 140 Order, at 51. The Commission noted that the NoC form was the appropriate method by which QFs should demonstrate their commitment to sell so as to establish a LEO. *Id.* at 52. The NoC Form adopted by the Commission includes three relevant sections here: Sections 1 and 2 require certification that the "Seller" who is committing to sell electrical output to Respondents and identification of the same; and Section 3 which requires a certification by the Seller that it has received a CPCN (or is applying for one) or that the Seller is exempt from the CPCN requirements and has filed a report of proposed construction (or that it will file the same).

The Commission then further discussed its conclusion in light of the evidence that the commitment to sell standard was too vague to be implemented in a fair manner, particularly with regard to the commitment to sell prong. *Id.* at 48. Therefore, the Commission held that, beginning on January 26, 2016 (40 days from the date of the issuance of the Commission's Order), to establish a LEO, the developer of a QF project would be required to: (1) have self-certified the project with the FERC as a QF; (2) have

made a commitment to sell the facility's output to a utility pursuant to PURPA via the use of an approved LEO form; and (3) have received a CPCN for the construction of the facility. *Id.*, at 52. Notably, the Commission did not consider the novel issue as to whether the NoC Form was appropriate where a QF predated the CPCN requirement and would not need to procure one to continue operation.

Waiver

The Commission has the power to waive its non-statutory rules and standards, but such waiver determinations involve a case- and fact-specific inquiry. *Gemini Drilling & Found., LLC v. Nat'l Fire Ins. Co. of Hartford*, 192 N.C. App. 376, 382, 665 S.E.2d 505, 509 (2008) (“[T]he waiver determination is fact-specific”) (citation omitted); *In re BellSouth Telecomms., Inc.*, Docket No. P-100, Sub 99, 2005 WL 588333, at *3 (N.C.U.C. Jan. 31, 2005) (finding a waiver justified “based on the specific facts of th[e] case”). The Commission may grant waivers of statutes, rules and Commission orders where “the equities or other circumstances warrant without obviating the requirements being waived.” *In the Matter of Cube Yadkin Generation, LLC*, Complainant, No. E-2, 2018 WL 3533334, at *13 (July 16, 2018) (Comm. Brown-Bland, dissenting).

As the Commission has previously noted, this case presents a novel issue, namely, whether Complainant is entitled to waiver of the NoC Form requirement because the QFs at issue were constructed prior to the enactment of N.C. Gen. Stat. § 62-110.1. The Commission addresses each of Complainant's arguments in light of the evidence presented, the purpose of the LEO, and the development of the requirements for establishing a LEO.

Complainant argues that the factual circumstances surrounding the Yadkin River Facilities establish that waiver is appropriate because: (1) the Yadkin River Facilities are unique in that they have been operating for decades before and after the enactment of N.C. Gen. Stat. § 62-110.1 and thus the purpose of the LEO would be satisfied; (2) Complainant established a commitment to sell as early as October 11, 2016; (3) Respondents have not produced any evidence establishing that a North Carolina QF that was constructed prior to the enactment of N.C. Gen. Stat. § 62-110.1 completed a NoC Form without a CPCN; and (4) Respondents cannot preclude the establishment of a LEO where it has only now stated that it would accept a partially completed NoC Form. Complainant also argues that the equities between the parties warrant a waiver of the NoC Form requirement because: (1) Respondents' behavior, including making knowingly erroneous arguments, support waiver; (2) Complainant acted reasonably and diligently during the course of negotiations; (3) Complainant would have waived its rights to establishment of a LEO by submitting the NoC Form and creating a circumstance where there would never be LEO date with the absence of a CPCN; (4) an unwaivable requirement would harm ratepayers; and (5) any rates paid by Respondents for the Yadkin River Facilities electrical output would be consistent with PURPA. The Commission agrees that the factual circumstances and equities here warrant waiver of the NoC Form requirement.

The evidence, facts, and equities demonstrate that the Yadkin River Facilities operate under unique circumstances not originally contemplated by the Sub 140 Order. The Order required that establishment of an LEO required demonstration of a commitment to sell through the use of the NoC Form (which required certifications related to receipt of a CPCN). The Commission has not did not determine whether a CPCN was required in its prior order in these Dockets, however, the CPCN requirement is now squarely before us.

Now, the fact that the Yadkin River Facilities predate the requirements of N.C. Gen. Stat. § 62-110.1 must be considered. Complainant understood that it was not required to obtain a CPCN to continue operation of the Yadkin River Facilities, and it further employed experts, outside legal counsel, and reached out to the Public Staff to determine how this would be viewed in light of the requirements for an establishment of an LEO. It received guidance that a CPCN would not be required, and thus it reasonably believed that the CPCN elements of the LEO test were inapplicable to the Yadkin River Facilities. The Commission, nor the legislature, has never required a pre-existing facility to seek permission for construction. For this reason, it was not unreasonable for the Complainant to proceed based on the advice it received and the lack of requirement pre-existing facilities to procure a CPCN.

One of the purposes of the NoC Form and CPCN requirements was to ensure that utilities have some measure of assurance that QF owners are beyond the mere planning stage, and the CPCN and NoC Form requirement are meaningful for those facilities that are new or to be constructed. Here, however, the Yadkin River Facilities are long-existing, already constructed hydroelectric facilities that have longstanding relationships with Respondents. The Yadkin River Facilities have an extensive performance record that demonstrates the electrical output it could provide to Respondents. Further, Complainant made significant investments in both procuring FERC licensing that required extensive upgrades for the protection of water quality and the environment.

Equally, there is little risk that a waiver here would negatively impact judicial economy and increase the number of controversies before the Commission. First, the Yadkin River Facilities, and others like them, are a small subset of QFs in the state. There are not many facilities in the same circumstances. Second, without waiver, any similarly situated QFs would, at a minimum, likely have to engage the Commission for CPCN applications which would in and of itself increase the number of potential controversies before the Commission. Finally, by providing a summary of the circumstances where waiver would be appropriate, both utilities and QF owners would have guidance and would respond accordingly when presented with similar circumstances, including enacting policies that would allow these QFs to submit an incomplete NoC Form.

IT IS THEREFORE ORDERED

1. That the requirements to complete the NoC Form be waived with respect to the Yadkin River Facilities.
2. That the Yadkin River Facilities shall be deemed to have established an LEO as of October 11, 2016; and
3. That the Parties are directed to meet and confer regarding avoided cost rates and terms for the purchase of energy and capacity from the Yadkin River Facilities, at rates calculated as of the date the LEO was established. Within 60 days of the date of this Order, and every 30 days thereafter, the Parties shall file a status report detailing their progress in negotiations. In the event the Parties are unable to agree on appropriate rates and/or terms, either party may file a petition for arbitration by the Commission in this docket.

ISSUED BY ORDER OF THE COMMISSION.

This ____ day of _____, 2021.

NORTH CAROLINA UTILITIES COMMISSION

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served by electronic mail, hand delivery, or by depositing a copy in the United States Mail, 1st Class Postage Prepaid, properly addressed to parties of record.

This the 17th day of May, 2020.

/s _____
Benjamin L. Snowden
Kilpatrick Townsend Stockton LLP
4208 Six Forks Road, Suite 1400
Raleigh, North Carolina 27609
Telephone: (919) 420-1700
bsnowden@kilpatricktownsend.com