

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

Docket No. E-7, Sub 1172
Docket No. E-2, Sub 1177

CUBE YADKIN GENERATION LLC,)	
)	
Complainant,)	
)	
v.)	COMPLAINANT’S
)	REQUEST FOR APPROVAL OF
)	PROCEDURAL SCHEDULE
DUKE ENERGY CAROLINAS, LLC, and)	
DUKE ENERGY PROGRESS, LLC)	
)	
Respondents.)	

COMES NOW Complainant Cube Yadkin Generation LLC (“Cube Yadkin” or “Complainant”) proposing the approval of a procedural schedule to govern this proceeding. In support of this request, Cube Yadkin shows the Commission as follows:

1. Cube Yadkin initiated this proceeding by filing a Verified Complaint, Request for Declaratory Ruling, and Request for Arbitration (collectively, “Complaint”) in the above-referenced proceedings on March 29, 2018.

2. In its Complaint, Cube Yadkin alleges that three specified Cube Yadkin hydroelectric facilities are each certified as Qualified Facilities (“QFs”) under the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3 (“PURPA”); each has established a legally enforceable obligation (“LEO”) with respect to the sale of energy and capacity to Duke Energy Progress, LLC and/or Duke Energy Carolinas, LLC (collectively, “Duke”) in September or October 2016; each requested a long-term QF PPA with Duke, at rates that reflect Duke’s avoided cost as of the date of the respective LEOs; and that, contrary to its obligations under the law, Duke has refused to negotiate the terms of a long-

term QF PPA with each of the Cube Yadkin QFs, taking the preemptive position that Cube Yadkin is not entitled to assert its rights under PURPA.

3. Based on the allegations of its Complaint, Cube Yadkin seeks a declaration of its rights to sell its energy and capacity, and Duke's obligation to purchase such energy and capacity, under applicable state and federal law, including a declaration of the date that Duke became legally obligated to purchase energy and capacity from Cube Yadkin. Related to these rights, Cube Yadkin requests an order compelling Duke to fulfill its legal obligation to enter into a financially viable long-term PPA with each of the Cube Yadkin QFs at rates that reflect Duke's avoided cost as of the date that the LEOs were established. Finally, Cube Yadkin seeks arbitration of all unresolved issues between the parties concerning the PPA.

4. In its Joint Answer and Motion to Dismiss filed May 7, 2018, Duke generally denies that Cube Yadkin has properly established a LEO or that it has justified waiver of the formal LEO requirements; Duke asserts that Cube Yadkin was not entitled to assert a LEO at the dates alleged in its Complaint because it did not own the facilities in issue until February 2017; Duke asserts that Cube did not follow the Commission's prescribed procedures governing establishment of a LEO, including submission of the Notice of Commitment ("NoC") form to Duke; and Duke asks that the Complaint be dismissed on the grounds that the Complaint fails to state a claim upon which relief can be granted. Duke also argues that there are no issues ripe for arbitration and that, therefore, Cube's request for arbitration should be dismissed.

5. In its Order Serving Joint Answer and Motion to Dismiss dated May 8, 2018, the Commission requested Complainant to advise the Commission whether

Duke's Answer was acceptable to it, and, if not, whether Cube Yadkin "requests a hearing to present evidence or to provide oral argument." In this order, the Commission also advised Cube that it "may" file a reply to the Answer and Motion to Dismiss.

6. Based on the invitation of the Commission, and Cube Yadkin's understanding that its response would not substitute for further factual development of contested issues,¹ full briefing, and the opportunity to be heard, Cube Yadkin submitted its Response to Respondents' Joint Answer and Motion to Dismiss on May 23, 2018. There, Cube Yadkin explained how it had alleged facts supporting its assertion of LEO rights prior to November 16, 2016, and how Duke had unilaterally refused to comply with its obligations under the law to negotiate in good faith concerning the terms of a long-term QF PPA with each of the Cube Yadkin QFs. Cube Yadkin further explained that PURPA rights attach to facilities, not owners of the facilities; that the Commission's CPCN requirements do not apply to Cube Yadkin's operation of the QFs or that such requirements should be waived under the circumstances presented here; and that the use of Duke's NoC form was not applicable to Cube's circumstances and/or should be waived.

7. Based on review of the pleadings and filings by the parties it is apparent that both parties—either in a Request for Declaratory Ruling or Motion to Dismiss—raise threshold legal issues relating to Cube's assertion of rights under PURPA that should be reviewed by the Commission in advance of any consideration of the specific PPA terms and conditions. These legal issues include:

- a. Whether Duke was entitled, consistent with obligations under state and federal law, to unilaterally refuse to negotiate with Cube Yadkin concerning a PURPA PPA due to the possibility that it might, in the future, seek a waiver of its PURPA obligations.

¹ See Response at note 1. As discussed below there are important factual issues associated with certain of the defense which it is important for Cube to explore in connection with its claims.

- b. Whether, given the inapplicability of the NoC form and certificate requirements to Cube Yadkin's circumstances, coupled with the unique nature of the already-operating QFs in issue as distinguished from prior cases giving rise to the formal LEO requirements, Cube Yadkin should be deemed to have substantially complied with the requirements for establishment of a LEO as set forth in the Commission's *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities* in Docket E-100, Sub 140 issued December 17, 2015.
 - c. Whether, assuming arguendo that Cube Yadkin has not substantially complied with the formal LEO requirements, those requirements should be waived under the circumstances presented here, or whether they are, as applied to Cube Yadkin and the specific factual circumstances here, otherwise preempted by PURPA to the extent that their implementation of such requirements serve as a barrier to the exercise of PURPA rights.
 - d. Whether Cube Yadkin is able to rely on the QF self-certification of Alcoa, its predecessor in interest with respect to ownership of the facilities in issue, in support of its establishment of a LEO for the Cube Yadkin QFs where Cube Yadkin was under contract to purchase the facilities at the time of the LEO and Alcoa was aware and supportive of Cube's desire to put the energy and capacity of the QFs to Duke under PURPA.
 - e. Whether, assuming that Cube Yadkin established a LEO prior to November 16, 2016, the Commission's avoided cost determinations in Docket No. E-100, Sub 140 apply to Cube's request.
 - f. Whether, given the required modifications and improvements imposed by FERC in connection with its re-licensing of the Yadkin facilities, the capacity of the three Cube Yadkin QFs in issue here constitutes "new" capacity under the requirements of PURPA.
 - g. Whether H.B. 589's reference to a five-year fixed term (*see* G.S. § 62-156(c)) applies to Cube's assertion of rights here and, if so, whether it is preempted by PURPA or other requirements of federal law.
8. Although many facts relating to these legal issues are not contested, other facts need further development through discovery or have been disputed by the parties. For example some of the factual issues in dispute or that need further development include:

- In its October 14, 2016 letter to Cube (*see* Complaint, at Exh. 4), Duke stated that it was “exempted from any purchase obligation under PURPA,” yet in its Answer, Duke concedes that it had no such exemption. *See* Answer at ¶ 28a. The issue arises whether Duke had any good faith basis for assertion of an exemption from PURPA, including whether Duke had the intention of seeking a waiver of its PURPA obligations, whether Duke had a reasonable belief in its potential success in obtaining a waiver – and if a waiver were to be obtained, would it affect existing purchase obligations, and whether Duke took any action to obtain such a waiver.
- Duke disputes Cube Yadkin’s claim that Duke suggested that Cube seek registration by the Commission of the QFs at issue as New Renewable Energy Facility. *See* Complaint at ¶ 9; Answer at ¶ 9. This factual assertion bears directly on Cube’s allegation that Duke sought to treat Cube’s facilities as “new” facilities and was steering Cube on a path away from asserting its PURPA rights by holding out the illusion that it would enter in a non-PURPA contract for all four Cube Yadkin facilities.
- Duke, citing lack of information, disputes Cube Yadkin’s claim that, as of October 2016, it was bound by a purchase agreement with Alcoa containing only “limited regulatory out clauses.” *See* Complaint at ¶ 27; Answer at ¶ 27(e). This factual assertion bears directly on Cube Yadkin’s contention that it was entitled to assert the PURA rights of facilities owned by Alcoa.
- Cube Yadkin alleges that it clearly and unequivocally communicated its desire to “put” the energy and capacity of the Cube Yadkin QFs to Duke in September or October 2016. Duke alleges that Cube Yadkin had no PURPA rights to assert in September and October 2016 and that, in any event, Cube Yadkin did not comply with the procedural requirements set by the Commission for establishment of the LEO. Discovery between the parties may uncover further facts relating to the communications between, and understandings of, the parties on these points, which bear on the Commission’s analysis of and disposition of the threshold legal issues, including any weighing of equities required by Cube’s alternative request for waiver.

9. To facilitate the efficient conduct of this proceeding, Cube Yadkin proposes that the Commission bifurcate the issues in this proceeding by addressing, first, the threshold legal issues identified by the parties in their pleadings and, subsequently, if necessary, the specific terms and conditions to be contained in a QF PPA. In light of the nature of the issues presented, which represent matters of first impression before the Commission, Cube specifically requests oral argument on the legal issues identified by the

parties. At present, Cube believes that phase one of the proceeding can be resolved based on the written submissions of the parties and oral argument, but Cube reserves its right to seek additional supplementation of the evidentiary record based on matters learned in discovery, the nature of the responses received, and whether issues before the Commission are capable of being resolved on the written record or require live testimony and the opportunity for cross-examination.

10. Based on the foregoing, and consistent with the procedure applied on other similar proceedings,² Cube Yadkin requests that the Commission approve the following procedural schedule to address the threshold legal issues and factual disputes presented by the parties in phase one of the proceeding:

- a. The parties shall exchange information in a cooperative manner so that each party may understand the other's position and obtain information to develop its own position and to present its position to the Commission. All initial discovery requests shall be served by August 3, 2018. Any disputes concerning discovery shall be brought to the Commission for resolution. The parties shall negotiate and enter into any necessary protective agreements as soon as practicable that may be necessary to facilitate the exchange of information.
- b. The parties shall submit briefs supporting their legal positions and, to the extent necessary, supporting affidavits on August 27, 2018.
- c. Assuming the parties have the opportunity to present oral argument, reply briefs would be waived.
- d. A hearing shall be held in September 2018, dependent on the Commission's availability, to receive oral argument on the legal issues identified above and any other legal issues identified by the Commission or the parties.
- e. The parties reserve their rights to seek additional supplementation of the evidentiary record based on matters learned in discovery.

² See, e.g., Coastal Carolina Clean Power LLC v. Duke Energy Progress, Inc., et al., *Order Requiring Filing of Briefs, Requesting Participation by the Public Staff and Scheduling Oral Argument*, Docket Nos. E-2, Sub 105, E-7, Sub 1060, E-22, Sub 511 (Aug. 27, 2014).

Respectfully submitted, this 6th day of June, 2018.

 /s/ Jim Phillips
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Certificate of Service

I hereby certify that a copy of the foregoing *Request for Approval of Procedural Schedule* has been served this day upon counsel of record by electronic mail or by delivery to the United States Post Office, first-class postage pre-paid.

This the 6th day of June, 2018.

BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, LLP

By: \s\ Marcus Trathen