STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1177
DOCKET NO. E-7, SUB 1172

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-2, SUB 1177	)	
	)	
In the Matter of	)	
Cube Yadkin Generation, LLC,	)	
Complainant	)	
	)	
v.	)	
	)	
Duke Energy Progress, LLC,	)	
Respondent	)	ORDER GRANTING
	)	MOTION TO DISMISS
DOCKET NO. E-7, SUB 1172	)	
	)	
In the Matter of	)	
Cube Yadkin Generation, LLC,	)	
Complainant	)	
	)	
v.	)	
	)	
Duke Energy Carolinas, LLC,	)	
Respondent	)	

BY THE COMMISSION: On March 29, 2018, Cube Yadkin Generation, LLC, (Complainant), filed a verified complaint, request for declaratory ruling, and request for arbitration, against Duke Energy Progress, LLC, and Duke Energy Carolinas, LLC (together, Respondents).

In summary, Complainant alleges that it is the owner of three hydroelectric facilities located on the Yadkin River (Yadkin River Facilities) that are qualifying facilities (QFs) and, therefore, entitled to sell the electric output of the Yadkin River Facilities to Respondents under terms established pursuant to the Public Utility Regulatory Policies Act of 1978 (PURPA). Complainant further alleges that the Yadkin River Facilities are components of hydroelectric operations well known to Respondents, that Complainant initiated discussions with Respondents concerning the purchase of electric output from the facilities in March 2016 (prior to Complainant's purchase of the Yadkin River Facilities), and that the sale of the electric output from the facilities was an integral component of Complainant's plan to acquire, upgrade, and operate the three 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.[1]

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. 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

[1] Complainant has alleged that each of the Yadkin River Facilities has a generating capacity in excess of 5 MW. Therefore, the Yadkin River Facilities would be eligible for "contracts and rates derived by free and open negotiations." Sub 140 Order at 12. Pursuant to the Commission's Order Setting Avoided Cost Input Parameters, issued on December 31, 2014, in Docket No. E-100, Sub 140, and the Commission's Order of Clarification, issued on March 6, 2015, in the same docket, in the context of a negotiated PURPA contract, the utility is not permitted to use methods for calculating rates found by the Commission to be inappropriate in the context of the standard contract rates, may take into account the characteristics of an individual QF, and is expected to use up-to-date data in determining the inputs for negotiated avoided cost rates.

the Sub 140 Order). Therefore, Respondents argue that the complaint should be dismissed and Complainant's request for a declaratory judgment should be denied. Finally, based upon their view that Complainant has failed to establish a LEO, Respondents argue that there are no issues ripe for arbitration and, therefore, Complainant's 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. Complainant states that it is not satisfied with Respondents' response and requests a hearing to present evidence and offer arguments in this matter. Complainant then renewed many of the arguments raised in the complaint in support of its view that Complainant established a LEO with respect to the Yadkin River Facilities prior to November 15, 2016. In addition, Complainant cites two decisions by the FERC[2] in support of its view that the use of the NoC Form is not applicable to Complainant and/or should be waived because the "inflexible application of the [NoC Form] requirement here … would only frustrate the purposes of PURPA and unfairly deny [Complainant] the benefits of federal law." Complainant then focuses its argument on the contents of the NoC Form (which is attached to Complainant's response as Exhibit A), arguing that the NoC Form requires a seller to select among four options relating to the status of the seller's CPCN, but none of these options, in Complainant's view, apply to the Yadkin River Facilities because the construction of the facilities pre-dated the enactment of N.C. Gen. Stat. § 62-110.1. In short, Complainant argues that because Respondents contend that Complainant is not eligible for a long-term PPA under PURPA, even if Complainant had used the NoC Form, it would have been forced to initiate a proceeding before the Commission to enforce its PURPA rights and determine the date of its LEO because the NoC Form does not accommodate its unique situation. Thus, Complainant argues that requiring the use of the NoC Form would "literally and directly serve to deny" Complainant its rights under PURPA.

DISCUSSION AND CONCLUSIONS

The Commission first concludes that the facts material to the resolution of this matter are undisputed. There are, however, two legal issues ripe for Commission resolution. The first question is whether Complainant's request for a declaratory ruling that Complainant established a LEO prior to November 15, 2016, with respect to the Yadkin River Facilities should be granted, thereby entitling Complainant to a negotiated contract for the sale of the electric output from the Yadkin River Facilities with a rate based on the methodology approved in the Commission's Sub 140 Order. The undisputed facts demonstrate that Complainant did not transmit the NoC Form to Respondents. By its express terms, the Sub 140 Order requires all QFs to use the NoC Form to make a

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[2] Complainant cites Grouse Creek Wind Park, LLC, 142 FERC ¶ 61,187, at 61,895 (Mar. 15, 2013), describing the FERC's decision as "finding that the Idaho Commission's requirement that a QF file a meritorious complaint to the Idaho Commission before obtaining a legally enforceable obligation 'would unreasonably interfere with a QF's right to a legally enforceable obligation and also create practical disincentives to amicable contract formation'" and Hydrodynamics Inc., 146 FERC ¶ 61,193, at 61,845 (Mar. 20, 2014), describing the FERC's decision as "finding that a State utilities commission rule requiring a QF to win a competitive solicitation as a condition to obtaining a long-term contract impose an unreasonable obstacle to obtaining a legally enforceable obligation in violation of PURPA's regulations."

commitment to sell the output of the facility to a utility. Sub 140 Order, at 52. Based upon the foregoing and the entire record herein, the Commission, therefore, concludes that Complainant failed to make a commitment to sell the output of the Yadkin River Facilities pursuant to the requirements of the Sub 140 Order and, thereby, failed to establish a LEO prior to November 15, 2016. Therefore, Complainant's request for declaratory ruling should be denied.

Having determined that Complainant did not establish a LEO prior to November 15, 2016, the Commission proceeds to consider whether Complainant should be granted a waiver of the requirement to use the NoC Form. In the Commission's analysis of this question, the Commission is guided by two main factors: (1) the purpose of a LEO, and (2) the Commission's requirements for establishing a LEO, as determined in the Sub 140 Order.

Purpose of the LEO

The concept of a LEO was created by the FERC 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).

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).

More recently, 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 further 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 non-contractual, 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.[3] 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,

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[3] The Commission has great latitude in determining the manner of implementation of the FERC's rules, provided that the manner chosen is reasonably designed to implement the requirements of PURPA. Final Rule Regarding the Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978, 45 Fed. Reg. 12,214 at 12,230-12,231 (Feb. 1980) (Order No. 69). Further, the FERC generally leaves to state commissions the issue of when and how a LEO is created. J.D. Wind 1, LLC, ¶ 61,127, at 10 (J.D. Wind). However, this does not mean that a state commission is free to ignore the requirements of PURPA or the FERC's regulations. Id. at 10-11.

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. 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 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.

Waiver

This case presents a novel issue that the Commission did not address through the Sub 140 Order: whether Complainant, as the 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. The Commission addresses each of Complainant's arguments in light of the purpose of the LEO and the development of the requirements for establishing a LEO.

First, Complainant argues that the Yadkin River Facilities should be relieved from the required use of the NoC Form because these facilities are exempted from the requirement to obtain a CPCN under N.C. Gen. Stat. § 62-110.1. The Commission finds this argument unpersuasive for several reasons. The Commission has never declared that a facility constructed prior to the enactment N.C. Gen. Stat. § 62-110.1 is exempt from the requirements of that section.[4] Thus, Complainant assumed some risk in concluding that it is exempted from the requirements of N.C. Gen. Stat. § 62-110.1, and in further concluding that exemption from that section obviates the need to submit the NoC Form. Complainant's next argument, that it had no reason to believe any filing by Complainant was required, is undermined by the following authority: (1) the Commission has concluded that, for facilities constructed prior to the enactment of N.C. Gen. Stat. § 62-110.1, a CPCN "can be deemed to have been issued." Order Approving Transfer of Certificates, Docket No. SP-122, Sub 0 (Dec. 3, 1996); (2) as discussed above, in the two arbitration cases decided subsequent to JD Wind, the Commission described one of the requirements for establishing a LEO as having a CPCN "in hand;" (3) in the Sub 136 Order, the Commission announced the standard for establishing a LEO, including that the QF "has obtained a CPCN" and has indicated its intent to sell to the utility; and (4) the provisions of Commission Rule R8-64 imply that Complainant might be required to seek Commission approval, or, at least, inform the Commission of its purchase and plans to operate the Yadkin River Facilities. (See Commission Rule R8-64(a)(3); (a)(4); and (d)(3)). Taken together, this authority, at a minimum, should have alerted Complainant that further investigation into its status under N.C. Gen. Stat. § 62-110.1 and Commission Rule R8-64 was warranted.

The Commission acknowledges Complainant having cited the Commission's Order Allowing Judgment on the Pleadings, issued on May 31, 2012, in Docket No. E-7, Sub 1000, wherein the Commission states that the "the purpose of the Commission's 1985 Order [requiring utilities to develop internal procedures to ensure cogenerators and small power producers obtain a CPCN prior to signing a contract for the sale of electricity] is to assist the supplier in complying with the requirements of obtaining a CPCN." From this, Complainant concludes that "where there is no statutory requirement, the policy has no application." The Commission disagrees that the same logic applies to the NoC Form, because the NoC Form has purposes independent from merely assisting QFs with regulatory compliance, including, providing clarity to QFs and utilities, reducing

[4] The Commission does not reach the question of whether the Yadkin River Facilities are exempt from the requirement to obtain a CPCN because that issue is not squarely before the Commission and is not dispositive of this matter.

complaints brought before the Commission, and providing guidance as to the date the LEO itself was established.

Complainant also focuses narrowly on the CPCN requirement, ignoring the underlying purpose of requiring the use of the NoC Form and other, equally important sections of the NoC Form. Allowing an exception to the required use of the NoC Form, as requested by Complainant, would undermine the Commission's intent in adopting the NoC Form (to provide clarity to QFs and utilities and reduce the number of complaints related to the date of the LEO) by establishing precedent for case-by-case adjudication of claims for exception from the requirement. Further, of the six sections included in the three-page NoC Form, only one, Section 3, cannot be completed by a QF that believes it is not subject to N.C. Gen. Stat. § 62-110.1 because its electric generating facility was constructed prior to the enactment of N.C. Gen. Stat. § 62-110.1. The Commission is not persuaded that the inability to complete this one section justifies Complainant's decision to forgo entirely the submission of the NoC Form. Finally, Complainant was on notice as to the Commission's requirements for establishing a LEO, which took effect 30 days from the date of the Sub 140 Order was issued. The effective date of that requirement (January 16, 2016) was nearly six months prior to the date when Complainant signed a contract to acquire the Yadkin River Facilities (June 30, 2016), which, in turn, was over four months prior to Respondents' required filings in Docket No. E-100, Sub 148 (November 16, 2015). These time periods offered Complainant ample opportunity to become aware of, investigate, seek clarification of, and comply with the Commission's regulatory requirements for establishing a LEO and otherwise consummating the purchase of the Yadkin River Facilities.

Complainant's second argument is that it has "substantially complied with the substance of the requirement" for establishing a LEO. For reasons explained below, the Commission disagrees. Complainant presents three alternative arguments as to the timing of its having established a LEO with respect to the Yadkin River Facilities:[5] (1) "on or about September, 16, 2016," when it "contacted [Respondents] to further discuss Duke purchasing the output of the [Yadkin River Facilities]." Complaint, at 16-18; (2) on September 28, 2016, upon the filing FERC Form 556s for the Yadkin River Facilities with the FERC. Complaint, at 16-18; (3) on October 11, 2016, by Respondents' receipt of an undated letter from Complainant. Complaint, at 16-18; see also Complaint, Exhibit 3.

In support of its first alternative date, Complainant cites a letter from Respondents' employee dated September 21, 2016, as evidence of Complainant having made a commitment to sell the output from the Yadkin River Facilities. See Complaint, Exhibit 2. This letter does not demonstrate that Complainant made a commitment to sell the output from the Yadkin River Facilities because the letter demonstrates that Complainant's

[5] In addressing these alternative arguments, the Commission will assume, without deciding, that Complainant had obtained CPCNs for the facilities (or that the CPCNs would have been deemed issued) and that self-certification by the previous owner was effective for the purposes of establishing a LEO. As with other parts of the Commission's analysis, the Commission addresses the dispositive issues, and, to the extent possible, avoids issuing advisory guidance on issues that are not directly before the Commission in this proceeding.

position was anticipatory, rather than a definite commitment. Id. (stating that Complainant communicated that it "anticipates that it will close [on the purchase of the Yadkin River Facilities]" and that Complainant "is considering certifying the [Yadkin River Facilities] as qualifying facilities"). Even prior to the required use of the NoC Form, this would have likely been insufficient to demonstrate a commitment to sell. The Commission also disagrees with Complainant's second alternative date because, again, at that time Complainant had not communicated a definite indication of its commitment to sell the output from the Yadkin River Facilities. Finally, the Commission disagrees with Complainant's third alternative date because the undated letter also fails to demonstrate that Complainant made a definite commitment to sell the output of the Yadkin River Facilities. At most, this letter demonstrates a disagreement about Respondents' obligations under PURPA, and that Complainant requested an opportunity to discuss and potentially resolve that dispute. Moreover, this letter, like the September 28, 2016 letter, demonstrates the anticipatory nature of Complainant's position at that time. See Complaint, Exhibit 3 (stating that the acquisition of the Yadkin River Facilities "is anticipated to occur" and proposing a meeting "in late October or early November to discuss the process for making sales from these projects"). Complainant argues that the effectiveness of the October 11, 2016 letter is demonstrated by Respondents' October 14, 2016 response (attached to the Complaint as Exhibit 4). This is also unpersuasive, because Respondents' October 14, 2016 letter reiterates the anticipatory posture of the parties' negotiations at that time, stating Respondents' understanding that Complainant "may be the actual owner and operator of the [Yadkin River Facilities] by the end of 2016," and that "if you seek to approach [Respondents] under PURPA we will be glad to discuss this matter further." Complaint, Exhibit 4. Finally, in light of In re: FLS Energy, the Commission is skeptical that a LEO can be established based on the utility's expressions rather than that of the QF.[6]

For the reasons that follow, the Commission is also not persuaded by Complainant's third argument: that there has been a lack of good faith on the part of Respondents in dealing with Complainant. Complainant argues or implies that, had Respondents not insisted that they were not obligated to purchase the output from the Yadkin River Facilities, Complainant would have been able to establish a LEO prior to November 15, 2016. This argument ignores the reality that Complainant could have established a LEO independent of Respondents' actions. See In re: FLS Energy; see also Sub 136 Order, at 37-38 (rejecting proposed tariff provision that required a signed contract to establish a LEO); and Sub 148 Order, at 105-06. Further, Respondents are equally entitled to stand on their right to refuse to purchase power from the Yadkin River Facilities (if such a right exists) as Complainant is entitled to stand on its rights to sell such power (which depend upon establishing a LEO). Moreover, the pleadings demonstrate a good faith basis for Respondents having asserted their position: the Yadkin River Facilities have had competitive access to organized and wholesale markets and historically sold into these markets, rather than through a PURPA-based contract.

[6] In re: FLS Energy emphasizes that the establishment of the LEO turns on the QF's commitment, and not the utility's actions. In re: FLS Energy, 157 FERC 61,211, at 9, (citing J.D. Wind, at 25) (Dec. 15, 2016) (emphasis in original).

Jt. Answer and Motion to Dismiss, at 19. Thus, the Commission agrees that Respondents have merely "reserved, and not waived, their entitlement to petition the FERC" for relief from the obligation to purchase power from the Yadkin River Facilities, and finds no lack of good faith in Respondents having done so. Id. In a related argument, Complainant argues that it relied on Respondents' offer to negotiate a PPA outside of the PURPA context to its detriment, resulting in delay and, ultimately, an impasse. The Commission rejects this argument for similar reasons, and instead determines that Respondents' actions undertaken in March and April of 2017, attempting to negotiate a "non-PURPA PPA," tend to demonstrate the good faith basis for Respondents' view that Complainant was not entitled to PURPA PPAs with regard to the Yadkin River Facilities.

Complainant's fourth argument is that Grouse Creek Wind Park and Hydrodynamics support or require granting a waiver of the required use of the NoC Form. In Grouse Creek Wind Park and in the three cases discussed therein,[7] the FERC addressed the Idaho Public Utilities Commission's requirements for establishing a LEO that included execution of a contract for the sale of power or filing a "meritorious complaint" as a condition precedent to establishing a LEO. It is clear that formation of a LEO can take place in the absence of, and prior to, the formation of a contract. Grouse Creek Wind Park, at 16-17. Further, it is clear that the tool of seeking a state regulatory authority's assistance to enforce the PURPA-imposed obligation to purchase cannot be a required condition precedent to the existence of a LEO. Id., at 17. In addition, the Commission recognizes more broadly that state regulatory commissions cannot, consistent with PURPA, impose requirements for the formation of a LEO that constitute "unreasonable interference" with, or an "unreasonable obstacle" to, the establishment of a LEO. Id.; Hydrodynamics, at 16. The Commission disagrees with Complainant that the required use of the NoC Form in this case would frustrate the purposes of PURPA or unfairly deny Complainant the benefits of PURPA. Instead, the Commission concludes that the use of the three-page NoC Form is not an unreasonable interference with, nor an unreasonable obstacle to, the establishment of a LEO, even where, as in this case, the NoC Form did not provide a check box that exactly described these QFs' situation. Nor does the Commission agree that the required use of the NoC Form is tantamount to requiring Complainant to file a meritorious claim with the Commission to establish a LEO. Both the purpose of the LEO and the development of the requirements for establishing a LEO support the Commission's required use of the NoC Form for all QFs, especially in light of the Commission's goals of providing clarity to QFs and utilities and of reducing the number of complaint proceedings brought before the Commission.

Finally, the Commission weighed equitable considerations, state policy, and considerations of judicial economy in determining whether Complainant should be granted a waiver of the required use of the NoC Form. Complainant is a sophisticated market actor with the ability to retain experts, including legal advisors. Moreover, the

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[7] See Grouse Creek Wind Park, LLC, at 14 (noting several similarities between the facts in Grouse Creek Wind Park, LLC, and the following FERC decisions: Cedar Creek Wind, LLC, 137 FERC ¶ 61,006 (2011); Rainbow Ranch Wind, LLC, 139 FERC ¶ 61,077 (2012); and Murphy Flat Power, LLC, 141 FERC ¶ 61,145 (2012).

development of the requirements for establishing a LEO were, or should have been, well-known to such market actors, and Complainant had several months to determine whether these requirements applied to its unique situation. These factors tend to undermine Complainant's arguments for leniency in the Commission's requirements for establishing a LEO. In addition, Complainant had several options available prior to November 15, 2016, including, seek and obtain a CPCN, thereby resolving the inability to complete Section 3 of the NoC Form; seek guidance from the Commission as to the applicability of N.C. Gen. Stat. § 62-110.1 to its unique situation; and sending the incomplete NoC Form to Respondents (omitting a response in Section 3), along with an explanation of the omission. The Complainant chose none of these options. Further, with enactment of S.L. 2017-192,[8] the State's implementation of PURPA will rely more on negotiated contracts between small power producers and utilities, and less on the long-term PPAs with administratively established rates that the Commission has traditionally required. For example, the availability of the standard contract is now restricted to small power producers with a generating capacity of 1 MW, where the Commission traditionally required that the standard contract be available to QFs with a generating capacity of 5 MW or less. N.C. Gen. Stat. § 62-156(b). In addition, the term of the standard offer contract will now be limited to 10 years, where the Commission traditionally required a term as long as 15 years. Id. For small power producers not eligible for the standard offer contract, the maximum length of term for the fixed rate is now five years (with some exceptions not relevant here). N.C. Gen. Stat. § 62-156(c). The Commission recognizes that granting Complainant's requested waiver would result in Respondents being obligated to enter into a long-term contract that is arguably contrary to the policy enacted by S.L. 2017-192. Finally, the Commission also concludes that granting Complainant's requested waiver would undermine the goal of reducing the number of complaints filed with the Commission by creating precedent for an exception to the required use of the NoC Form. Thus, considerations of judicial economy also weigh against granting Complainant a waiver of the required use of the NoC Form.

Based upon the foregoing and the entire record herein, the Commission concludes that Complainant's request for waiver of the required use of the NoC Form should be denied. Therefore, the Commission further concludes that Respondents' motion to

[8] The Commission agrees with Complainant that the changes enacted in S.L. 2017-192 are not applicable as to Complainant's claim that it established a LEO with respect to the Yadkin River Facilities prior to November 15, 2016; however, the Commission also agrees with Respondents that current State policy is a relevant consideration in determining whether to grant Complainant's requested waiver.

dismiss should be granted. Finally, the Commission concludes that Complainant's other pending requests are rendered moot by this order and, therefore, should be denied.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the __16th__ day of July, 2018.

NORTH CAROLINA UTILITIES COMMISSION

Janice H. Fulmore, Deputy Clerk

Commissioners ToNola D. Brown-Bland and Daniel G. Clodfelter dissenting.

Commissioner Charlotte A. Mitchell did not participate in this decision.

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Commissioner ToNola D. Brown-Bland dissenting:

I dissent from the majority's decision to grant the Respondent's dispositive motion to dismiss the Complaint, because, in my view, the Complainant has stated a claim upon which relief may be granted, *i.e.*, its qualifying facilities (QFs) have a right under federal law to enter into purchase power agreements with the Respondent utilities. Further, a material issue of fact, among others, remains, *i.e.,* whether a legally enforceable obligation (LEO) was established in 2016 by each of Complainant's three hydroelectric QFs that are the subject of the Complaint, as recited in Complainant's Request for Approval of Procedural Schedule filed on June 6, 2018.

The majority's decision prematurely disposes of the Complaint on a procedural technicality, albeit one established by the Commission for the purpose of reducing the number of disputes brought to the Commission because of uncertainties concerning when and/or whether a QF has established a LEO by conveying (to the utility) its commitment to sell its output to the utility. Although in J.D. Wind 1, LLC, 130 FERC ¶61,127 (February 19, 2010), at para. 24, the FERC did agree that it "generally" leaves to state commissions the issue of when and how a LEO is created, it expressly combined the acknowledgment of that practice with its very next statement.

> However, that the Commission [FERC] generally leaves this issue to the states (and to nonregulated utilities when applicable), does not mean that a state commission is free to ignore the requirements of PURPA or the Commission's regulations.

Id. The FERC further noted in J.D. Wind that it has prescribed the rules it found necessary to encourage small power production and that PURPA directs the states to implement those rules adopted by FERC. Id. Thus, when this (state) Commission established the Notice of Commitment Form (Form) as a method to communicate, as of a date certain, an intention to sell power, it did so as a means of implementing PURPA requirements and FERC regulations, neither of which requires or depends upon the completion and transmittal of this Commission's Form.[1]

Whether a LEO has been established is itself a question of fact. When that fact is in dispute, as in the present case, the Commission resolves the dispute and determines what the facts are based on the evidence of record. Indeed, the Commission has engaged in this very exercise in past proceedings and has been able to make such determinations prior to and independent of the creation and use of the Form. Thus, at a

[1] I am of the opinion that while this Commission is free to make decisions on or about what facts establish communication of a QF's commitment to sell (the how) and what facts establish the date that clear commitment was or is made (the when), this Commission is not free to add barriers or requirements that, in effect, conflict with federal law or that ignore the intent of the federal law.

minimum, it is clear that under federal law neither the Commission's Form nor any form is required to establish a LEO. If the Complainant can prove facts sufficient to establish that on or by a specific date or time period it had made clear to the Respondent utilities that it was committed to producing power and making its power output available to the utility for purchase, a LEO would exist under federal law without regard to the Form. Again, this is apparent from the discussions in the prior decisions of this Commission finding facts in support of a LEO without the use of a form.

My opinion does not mean I oppose or reject the use of the Form. Use of a form was favored by interested parties representing QF interests as well as by the three major investor-owned electric utilities in North Carolina. These parties and utilities developed and made contributions to the current Form approved by the Commission. I conclude from their contributions to the Form in Docket Nos. E-100, Subs 140 and 148, that QFs support the use of the Form for the same reasons the Commission approved and mandated its use: it provides clarity, reducing both uncertainty and the number of disputes concerning whether a QF has made a commitment to sell and exactly when the QF provided sufficient notice of such commitment. For the QFs, when used, the Form reduces the risk that either the utility or the Commission will disagree that a commitment to sell was made or will find that a LEO was established on a date less favorable to the QF in terms of the applicable avoided cost rates that must be offered for its output.

While use of the Form, I believe, serves its intended purpose of providing clarity and reducing disputes before the Commission, I find it inappropriate for the Commission to use the Form in this complaint matter 1) to thwart the Complainant's opportunity to develop a record in support of its position; and 2) to evade hearing the matter on its merits. It is inappropriate to interpret use or non-use of the Form in such a way as to conflict with federal law and add hurdles that are not necessary to the pertinent substantive determination of when and whether a commitment to sell output was made. To the extent that the Commission's decision in any way suggests that our prior decisions mandating use of the Form somehow divest the Commission of its discretion to engage in a substantive analysis on the issue of a LEO depending on facts alleged, I would argue to the contrary. It is the Commission's duty to look beyond the submission of the Form where warranted by circumstances, to consider requests for waivers or to otherwise consider exercising forbearance with respect to the Form in order to give effect to the spirit and intent of PURPA. It is for this reason that I strongly dissent from the decision to dismiss the Complaint.

The majority's concern that looking past the Complainant's failure to submit, or decision not to submit, the Form "would undermine the Commission's intent in adopting the NoC Form . . . by establishing precedent for case-by-case adjudication of claims for exception from the requirement" is misplaced. The Commission is routinely asked by parties and interested persons for all manner of waivers from statutes, rules and orders and the Commission oftentimes grants such waivers when the equities or other circumstances warrant without obviating the requirements being waived. See, *e.g.*, Commission Orders in Docket Nos. E-100, Sub 118 (May 21, 2008), E-7, Sub 1173 (May 7, 2018), E-100, Sub 113 (December 18, 2017 and December 3, 2014), W-1298, Sub 2

(April 29, 2016), W-1298, Sub 0 (May 2, 2012), E-7, Sub 938 (April 6, 2010), P-850, Sub 3 (October 9, 2008). Moreover, as discussed above, the use of the Form eliminates or lessens the QF's risk that the Commission will not agree with its assertion of a LEO. QFs are more likely to use the Form, especially when a QF is being proposed and has not yet been constructed, because use of the Form is in its best interest, lessens risk and provides certainty. Thus, the Commission's purpose of clarity and the reduction (not the elimination) of LEO disputes will still be served. It is unlikely that a QF will avoid use of the Form just to insist on the more difficult road posed by the case-by-case route. It is reasonable to conclude that little or no harm would result either from looking beyond the Complainant's non-submittal of the Form and/or from waiving the Form requirement based on the facts alleged in Complainant's filings to date.

It is my opinion that the majority's decision today literally elevates a form over substance in order to avoid hearing the matter on its merits and having an opportunity to receive facts in evidence that could shed light on whether a LEO was in fact established by the QFs under and in accordance with existing federal law. Creating and requiring the use of the Form did not strip the Commission of its own authority or discretion to look beyond the QFs' decision not to submit the Form and make a determination based on the facts of this specific case when the allegations support that the Complainant may be able to prove that it took sufficient steps under PURPA to establish a LEO; that the Form either did not or should not apply to the QFs' circumstances or at worst that the Form's applicability to the QFs under the facts and circumstances as alleged was reasonably ambiguous; and that completion and submission of the Form could have undercut the QFs' position as to a LEO created prior to a later use of the Form or at least have made the date of the LEO further ambiguous.

Further, it is not lost on this Commissioner that the QFs involved in this docket are long-existing, already constructed hydroelectric facilities that are and have been operating and functioning and have longstanding business relationships with the Respondent utilities. The commitment to sell prong of the LEO test is significant because, as utilities have long argued before this Commission, most often those approaching utilities attempting to establish a utility's obligation to purchase their output are proposed QFs in the planning, yet-to-be constructed stage. Thus, according to the utilities, they have difficulty knowing whether the owner(s) of the proposed facility is a serious power producer capable of delivering output in such a way that the utilities can count on the QF's energy and capacity in their long term planning decisions. Without some assurance beyond the mere expression of interest or preliminary contact, utilities complain that it is burdensome, costly and unfair to be required to engage in negotiations or the performance of preparatory actions to receive power that will never come to market. It is for this reason that the CPCN/report of proposed construction and the submittal of interconnection request elements have been added to the Commission's test for determining the existence of a LEO: QFs that have not been constructed and that do not have a performance history need to provide utilities with some reasonable information that the utilities can reasonably rely on delivery of output prior to obligating utilities to

expend time and effort negotiating purchase power agreements.[2] Here, the QFs have a performance track record known or knowable to the Respondent utilities. The facilities have been in existence for years, the Respondent utilities have had longstanding relationships with them for many years, the Complainant owner has made significant investments in obtaining licensing from FERC,[3] and the Complainant has obtained such licensing subject to conditions that it make extensive and costly upgrades for the protection of water quality and the environment. Thus, in the present matter, the Respondent utilities can hardly claim not to understand that they will be able, reasonably, to count on the QFs and the Complainant owner to deliver. In fact, according to the QFs, one of the reasons they did not believe the Form applied to them was precisely because their known track record meant that the utilities never had any serious reliability concerns.

For these reasons, I respectfully dissent from the majority's decision and find it inappropriate to dismiss the Complaint at this stage of the proceeding.

/s/ ToNola D. Brown-Bland
Commissioner ToNola D. Brown-Bland

[2] I note that the Respondent conceded in its Answer to the Complaint that the Commission's interconnection LEO requirement does not apply to Complainant as the QFs are currently interconnected to the Respondent utilities. Because the QFs in this matter were constructed and operating prior to the CPCN requirements of G.S. 62-110.1, imposed initially in 1965, the same logic would seem to apply to the CPCN prong of the Commission's LEO test, but the Respondent did not make that point. The legislature has never required such pre-existing facilities to go backward and seek permission to construct or exist; under current law I would not think the Commission would impose such a requirement either. In any case, it was not necessarily unreasonable under the circumstances known at this time that the Complainant would have considered the Form and the CPCN elements of the LEO test inapplicable to the QFs.

[3] As the majority notes, the Commission previously has considered evidence of the level of investment made as determinative of the timing of the commitment to sell. In the Matter of EPCOR USA North Carolina LLC v. Carolina Power & Light Co., Docket No. E-2, Sub 966, Order on Arbitration, at 9 (January 26, 2011).

DOCKET NO. E-2, SUB 1177
DOCKET NO. E-7, SUB 1172

Commissioner Daniel G. Clodfelter dissenting:

I join in the dissenting opinion filed by Commissioner Brown-Bland and write to supplement her analysis with a few additional observations. The Commission opens the Waiver section of its Order with the following:

> This case presents a novel issue that the Commission did not address through the Sub 140 Order: whether Complainant, as the 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.

Quite so. The Commission's Order then proceeds to resolve this "novel issue" by imposing a rule of strict compliance with the NoC Form requirement and directing dismissal of the Complaint. I find it difficult to square this approach with the opening observation quoted. In the course of arriving at its result the Commission draws certain factual inferences adverse to the Complainant. In that respect, the Commission is being less than faithful to the basic rule that the well-pleaded allegations of the Complaint must be accepted as true for purposes of deciding a motion to dismiss.[1] For example, the Order treats the letter exhibits attached to the Complaint as exhaustive of Complainant's possible evidence, even though by their own terms they reference other meetings and discussions among the parties, to the point that in one case (Complaint Exhibit 4), the author points out that the series of written communications do not fully reference or capture the parties' discussions. An alternative reading of the letter exhibits is that they are offered not on the question of whether Complainant has or has not established a LEO but, instead, on the issue of whether Respondents have refused to negotiate in good faith as required by G.S. §62-156. See, e.g., Complaint ¶¶ 28, 38. Unlike the Commission majority, I am unable to conclude that the Complaint contains a complete presentation of all of Complainant's or Respondents' evidence, nor can I conclude that only one set of factual inferences can be drawn from the allegations of the Complaint.

It may well be that on grounds of policy and based on the facts of this case, Complainant should be denied the relief it seeks. However, I do not believe this is an appropriate outcome in the absence of further development of the factual record. This is especially so in light of the fact that Complainant has requested equitable relief from strict application of the NoC requirement based on what it alleges are unique circumstances.

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[1] I find some of the analysis puzzling. After first stating, in footnote 4, that the question whether Complainant's facilities must have a certificate of public convenience and necessity under G.S. §62-110.1 is not dispositive of the motion and is not before the Commission for decision, the Order then proceeds to take Complainant to task for not having sought further clarification of the status of its facilities under that statute.

Issues of the sort raised by this request are particularly inappropriate for summary disposition on an undeveloped factual record. Such issues include at least the following:

1. Whether Complainant's situation is unique and unlikely to be replicated by other QF's, as is alleged in the Complaint, and if so, whether that circumstance justifies relief from strict application of the otherwise applicable NoC requirement in order to advance and support the underlying purposes and policies of PURPA.

2. Whether Respondents' repeated insistence that it would have no responsibility to negotiate with Complainant if it were approached under PURPA is a circumstance that should be given weight in determining Complainant's request for relief from the NoC Form requirement in this case.

3. If Complainant's situation is not in fact unique, contrary to the allegations of the Complaint, what impact granting the relief sought by Complainant would have on the consistency, clarity, and predictability of the Commission's adoption of the NoC process.

4. Whether it is just and reasonable in considering the "novel question" acknowledged by the Commission to arise upon the facts alleged in the Complaint, to apply changes in statutory policy embodied in S.L. 2017-192 retroactively to judge actions, conduct, expectations, rights and obligations of the parties during time periods before enactment of that law in 2017.

5. Whether the Complainant's demand for arbitration, in accord with Ordering Paragraph No. 3 of the Commission's Order in Docket No. E-100 Sub 140, should be taken as establishing a LEO as of a date no later than the filing of the Complaint in this matter and, if so taken, whether the Commission may dismiss the demand for arbitration on the merits without conducting a hearing.

At this point I believe it is unwise and premature to dispose of such questions based solely on the allegations of the verified Complaint, uniformed by a more fully developed factual record and by more extended opportunity for the parties to present their legal and factual arguments to the Commission.

For these reasons, as well as those set forth in the dissent by Commissioner Brown-Bland, I therefore dissent from the Order granting Respondents' Motion to Dismiss.

/s/ Daniel G. Clodfelter
Commissioner Daniel G. Clodfelter