No. _____

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; DUKE ENERGY PROGRESS, LLC; DUKE ENERGY CAROLINAS, LLC;	)	
Appellees	)	
	)	From the North Carolina Utilities Commission
v.	)	Docket Nos. E-2, Sub 1177; E-7, Sub 1172
CUBE YADKIN GENERATION, LLC,	)	
Appellant	)	

****

RECORD ON APPEAL

****

No. _____

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; PUBLIC STAFF – NORTH CAROLINA UTILITIES COMMISSION; DUKE ENERGY PROGRESS, LLC; DUKE ENERGY CAROLINAS, LLC;	)	
Appellees	)	From the North Carolina Utilities Commission Docket Nos. E-2, Sub 1177; E-7, Sub 1172
v.	)	
CUBE YADKIN GENERATION, LLC,	)	
Appellant	)	

****

INDEX TO RECORD ON APPEAL

STATEMENT OF ORGANIZATION OF THE NORTH CAROLINA UTILITIES COMMISSION

On 29 March 2018, Appellant Cube Yadkin Generation, LLC ("Appellant" or "Cube Yadkin") initiated this matter by filing a Verified Complaint, Request for Declaratory Relief, and Request for Arbitration with the North Carolina Utilities Commission ("Commission"). Appellees Duke Energy Progress, LLC and Duke Energy Carolinas, LLC (collectively, "Duke Energy") submitted a Joint Answer and Motion to Dismiss Complaint of Cube Yadkin Generation, LLC on 7 May 2018. On 23 May 2018, Cube Yadkin filed its Response to Joint Answer and Motion to Dismiss. Cube Yadkin also filed a Request for Approval of Procedural Schedule on 6 June 2018. Duke Energy submitted its Joint Response in Opposition to Cube Yadkin's Request for Approval of Procedural Schedule on 8 June 2018.

On 16 July 2018, the Commission issued and filed its Order Granting Respondents' Motion to Dismiss, without first holding a hearing. By Order entered 2 August 2018, the Commission granted Cube Yadkin an extension of time to file its notice of appeal by 30 days pursuant to N.C. Gen. Stat. § 62-90(a). On 13 September 2018, Complainant filed a Notice of Appeal of the Order Granting Respondents' Motion to Dismiss.

The Record on Appeal was filed in the Court of Appeals on 27 November 2018 and docketed on 27 November 2018.

STATEMENT OF JURISDICTION

Appellant filed its Verified Complaint, Request for Declaratory Relief, and Request for Arbitration with the North Carolina Utilities Commission pursuant to N.C. Gen. Stat. § 62-73. The Parties agree that the North Carolina Utilities Commission was at all times duly constituted during the pendency of these Dockets and had personal jurisdiction over all parties and subject matter jurisdiction over the claims asserted. Appellant appeals to this Court as a matter of right pursuant to N.C. Gen. Stat. § 7A-29.

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,	)	ORDER SERVING VERIFIED
Respondent	)	COMPLAINT, REQUEST FOR
	)	DECLARATORY RULING, AND
	)	REQUEST FOR ARBITRATION
DOCKET NO. E-7, SUB 1172	)	
	)	
In the Matter of	)	
Cube Yadkin Generation, LLC,	)	
Complainant	)	
	)	
v.	)	
	)	
Duke Energy Carolinas, LLC,	)	
Respondent	)	

BY THE COMMISSION: Notice is hereby given of the filing with this Commission on March 29, 2018, of a Verified complaint, Request for Declaratory Ruling, and Request for Arbitration by Cube Yadkin Generation, LLC (Complainant), against Duke Energy Progress, LLC (DEP), and Duke Energy Carolina, LLC (Duke), (hereinafter referred to collectively as Respondents).

In accordance with the Commission's Rules of Practice and Procedure, service of the complaint is hereby made on Respondents by copy thereof attached to this Order Serving Complaint, by electronic mail (e-mail), delivery confirmation requested. Respondents are hereby directed to either satisfy the demands of Complainant or to file an answer with the Commission on or before April 16, 2018. The answer should comply

with Rule R1-9 of the Commission's Rules of Practice and Procedure.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 29th day of March, 2018.

NORTH CAROLINA UTILITIES COMMISSION

Linnetta Threatt, Deputy Clerk

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March 29, 2018

Via Electronic Filing

M. Lynn Jarvis
Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, NC 27699-4300

Re: ***Docket No. E-7, Sub 1172***
Docket No. E-2, Sub 1177
Cube Yadkin Generation LLC v. Duke Energy Carolinas, LLC and Duke Energy Progress, LLC

Dear Ms. Jarvis:

Transmitted on behalf of Cube Yadkin Generation LLC for filing in the above-referenced dockets is a Verified Complaint, Request for Declaratory Ruling, and Request for Arbitration against Duke Energy Carolinas, LLC and Duke Energy Progress, LLC. We are separately transmitting via hand-delivery fifteen paper copies of this filing.

Should any questions arise in connection with this matter, please do not hesitate to contact either of us.

Very truly yours,

Jim W. Phillips, Jr.
Marcus W. Trathen

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. DUKE ENERGY CAROLINAS, LLC, and DUKE ENERGY PROGRESS, LLC Respondents.	)	**VERIFIED COMPLAINT, REQUEST FOR DECLARATORY RULING, AND REQUEST FOR ARBITRATION**

COMES NOW Complainant Cube Yadkin Generation LLC ("Cube Yadkin" or "Complainant"), pursuant to N.C. Gen. Stat. § 62-73 and § 1-253 and Rule R1-9 of the Rules and Regulations of the North Carolina Utilities Commission, and files this Complaint and Request for Declaratory Ruling against Duke Energy Carolinas, LLC ("DEC"), and Duke Energy Progress, LLC ("DEP") (collectively, "Duke"), based on Duke's refusal to enter into long-term power purchase agreements ("PPAs") with Cube Yadkin as required by federal and North Carolina law. Cube Yadkin also requests arbitration of any unresolved terms pursuant to N.C. Gen. Stat. § 62-40 and the Commission's Orders in the avoided cost proceedings. The Complainant respectfully shows the Commission as follows:

INTRODUCTION AND SUMMARY

Complainant operates the Yadkin Project, a series of four 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. Together, the four hydroelectric stations have a total generating capacity of 215 megawatts ("MW") and they

are expected to produce nearly 800,000 megawatt-hours of clean, reliable electricity per year—enough to power some 72,000 homes with renewable energy.

Three of the Yadkin Project facilities have been self-certified as Qualifying Facilities ("QFs") under the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3 ("PURPA"), while the fourth facility exceeds PURPA's "small power production facility" size limit. By this action, Complainant seeks to enforce its right under federal law to commit the output and capacity of the QFs to DEC and/or DEP at avoided cost rates determined as of the date that Complainant first established a legally enforceable obligation to provide such energy and capacity to Duke.

Here, the evidence will show that the QFs are interconnected with both DEC and DEP and are components of hydroelectric operations well known to Duke; that Complainant initiated discussions with Duke concerning the purchase of the QF energy and capacity in March 2016, prior to Cube Yadkin's purchase of the QFs, as part of its due diligence activity; that the sale of the QF energy and capacity to Duke was an integral component of Complainant's business plan in proceeding with the acquisition of the Yadkin Project and committing to the facility upgrades required by the Federal Energy Regulatory Commission ("FERC") in connection with the acquisition; that Cube Yadkin had multiple meetings and communications with Duke in the August through October 2016 timeframe to discuss Cube Yadkin's desire to enter into a long-term PPA to sell the energy and capacity provided by the Yadkin Project; that by letter transmitted on October 11, 2016, Cube Yadkin further apprised Duke of the status of its QFs and the utilities' obligation, under the law, to purchase the energy and capacity of those facilities; and that by letter dated October 14, 2016, Duke

gave notice to Complainant that it would not honor Cube Yadkin's assertion of rights under PURPA.

Complainant acknowledges that it did not submit to Duke the commitment form recognized by the Commission in its avoided cost orders. However, because the Cube Yadkin QFs are existing facilities that are not subject to the certificate of public convenience and necessity ("CPCN") requirement in N. C. Gen. Stat. § 62-110.1(a) and have had long-standing relationships—including existing interconnections—with the electric utilities in question, the commitment form by its own terms does not apply to the Cube Yadkin QFs. Given that (1) the construction of the hydroelectric QFs pre-dated the CPCN statute and their current status as operating facilities; (2) Cube Yadkin committed to purchase and upgrade the facilities in reliance in part upon the QF status of three of the facilities; and (3) multiple communications between the Complainant and Duke confirmed Complainant's intention to "put" its PURPA-qualifying energy and capacity to Duke, as acknowledged by Duke in its purported anticipatory rejection of Complainant's assertion of PURPA rights, Complainant established legally enforceable obligations no later than October 11, 2016, to sell the energy and capacity from the three QFs to Duke.

Notwithstanding the existence of a binding commitment by Cube Yadkin to sell the energy and capacity of the QFs to Duke as of October 2016, since that time, at Duke's urging, Cube Yadkin sought to negotiate a mutually-beneficial alternative, non-PURPA commercial arrangement by which it would deliver energy and capacity from all four of the Yadkin Project facilities to Duke. As it became clear as of March 19, 2018 that Duke has no intention of entering into such an agreement, Complaint now seeks enforcement of its federally-protected rights as to the three QFs. As hydroelectric facilities, the QFs are unique

assets that are available to meet the growing demand for renewable, carbon-free energy sources, consistent with Duke's publicly-stated strategy to reduce dependence on fossil fuels and move toward clean, renewable energy sources.[1] In particular, the purchase of energy and capacity from hydroelectric resources is consistent with Duke Energy's stated goal of reducing CO_2 emissions 40 percent from 2005 levels by 2030.[2]

NATURE OF ACTION

This action arises from Duke's refusal to enter into long-term QF PPAs with Cube Yadkin, the owner of three hydroelectric generating facilities that are entitled to sell power to Duke under the PURPA, N.C. Gen. Stat. § 62-156, the Commission's rules, and Duke's own tariffs and schedules. Each of the Cube Yadkin hydroelectric facilities is certified as a QF under PURPA[3]; each has established a legally enforceable obligation ("LEO") with respect to the sale of energy and capacity to Duke; and 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. 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. By this action, Complainant seeks to compel Duke to fulfill its legal obligation to enter into a financially viable long-term

[1] *See* Duke Energy 2017 Climate Report to Shareholders, released March 22, 2018 (available at https://www.duke-energy.com/_/media/pdfs/our-company/shareholder-climate-report.pdf).

[2] *Id.* at 1. *See also id.* at 7 (stating goal of doubling generation from hydro, wind and solar by 2030).

[3] *See* Letter dated September 30, 2016 from Serena A. Rwejuna of Bracewell LLP on behalf of Alcoa Power Generating, Inc. transmitting FERC Form 556, Notice of Self-Certification of Qualifying Facility Status for FERC Docket Nos. QF16-1309-000 (Falls), QF16-1310-000 (High Rock), and QF16-1311-000 (High Rock), N.C.U.C. Docket No. SP-8651 (Company Folder) (filed Oct. 24, 2016) (collectively, the "FERC Form 556s").

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. Cube Yadkin also 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. Finally, Cube Yadkin seeks arbitration of all unresolved issues between the parties concerning the PPA.

PARTIES, JURISDICTION AND VENUE

1. Cube Yadkin is a Delaware limited liability company, authorized to transact business in North Carolina. It is in the business of owning, developing and modernizing hydroelectric facilities and is the owner of the hydroelectric QFs that are the subject of this proceeding. Cube Yadkin's principal place of business is located at 2 Bethesda Metro Center, Suite 1330, Bethesda, Maryland 20814. Correspondence in connection with this Complaint should be sent to:

Cube Yadkin Generation LLC
c/o Cube Hydro Partners
2 Bethesda Metro Center, Suite 1330
Bethesda, Maryland 20814
Attn: Eli Hopson, VP for Legal, Regulatory and Policy
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2. Respondents DEC and DEP are electric public utilities operating under the laws of the State of North Carolina for the purposes of generating, transmitting, and distributing electricity in its service territories in North Carolina. Respondents are operating subsidiaries of Duke Energy Corporation. DEC's principal office is located at 526 South Church Street, Charlotte, North Carolina 28202-1802. DEP's principal office is located at 410 S. Wilmington Street, Raleigh, North Carolina 27601.[4]

3. This Commission has jurisdiction over the subject matter and action, and venue is proper.

BACKGROUND ON CUBE YADKIN AND THE CUBE YADKIN QFs

4. Cube Yadkin owns the four hydroelectric facilities[5]—historically referred to as the "Yadkin Project"—that were first operated under a 50-year license issued by the FERC to Carolina Aluminum Company on May 19, 1958.[6] The FERC approved a transfer of the license to Alcoa Power Generating Inc. ("Alcoa") on July 17, 2000. Following the expiration of the initial license in April 2008, the Yadkin Project was operated under short-term, annual licenses. In 2006, Alcoa initiated the re-licensing process, and on September

[4] As discussed herein, the Cube Yadkin QFs are interconnected with both DEP and DEC through Cube Yadkin's affiliate, Cube Yadkin Transmission LLC. Cube Yadkin is willing to sell its QF energy and capacity to either or both Duke utilities.

[5] The four facilities are High Rock, Tuckertown, Falls, and Narrows. The first three are the subject of this complaint. The fourth facility—Narrows—is not at issue in this proceeding because it exceeds the "small power production facility" size limit.

[6] Two of the facilities, however, have been in operation for nearly a century and the third for nearly six decades.

22, 2016, the FERC issued a new long-term license to Alcoa for the Yadkin Hydroelectric Project No. 2197 (the "License").[7] The License authorizes the operation and maintenance of the Yadkin Project until March 31, 2055.

5. Cube Yadkin signed a contract to acquire the four hydroelectric facilities making up the Yadkin Project from Alcoa on June 30, 2016; it submitted an application to FERC seeking approval of the transfer of the License from Alcoa to Cube Yadkin on July 25, 2016; and the FERC issued an order approving the transfer of the License to Cube Yadkin on December 13, 2016.[8] Cube Yadkin formally consummated its agreement to purchase the Yadkin Project on February 1, 2017.

6. The Cube Yadkin facilities are interconnected with both DEP and DEC. They are located approximately 130 miles downstream of the W. Kerr Scott Dam and Reservoir along a 38-mile segment of the Yadkin River as it flows through Davidson, Montgomery, Davie, Rowan and Stanly Counties. From upstream to downstream, descriptions of the three facilities in issue here are as follows:[9]

a. High Rock. The High Rock facility, located at river mile ("RM") 253, consists of a 14,400-acre reservoir at a full pool elevation with a usable capacity of 217,400 acre-feet. High Rock Reservoir is impounded by a 936-foot-long, 101-foot high dam that includes a non-overflow section, a gated spillway section with ten 45-footwide by 30-foot-high gates, a powerhouse intake, and a non-overflow section. The powerhouse is integral with the dam and contains three turbine/generator units with a total installed capacity of 32.91 MW. The e911 address for the High Rock Powerhouse is 3344 Bringle Ferry Road, Denton, North Carolina 27239.

[7] Alcoa Power Generating, Inc., *Order Issuing New License*, 156 FERC ¶ 62,210 (2016) ("Order Issuing New License").

[8] *Order Approving Transfer of License*, 157 FERC ¶ 62,188, December 13, 2016.

[9] The fourth facility, Narrows, is located at river mile 236.3 and has a total installed capacity of 110.36 MW.

b. Tuckertown. The Tuckertown facility, located at RM 244.3, consists of a 2,560-acre reservoir at a full pool elevation of 564.7 feet, with a usable capacity of 6,700 acre-feet. Tuckertown Reservoir is impounded by a 1,370-foot-long, 76-foot-high dam that includes a rock filled section, several non-overflow sections, a gated spillway section with eleven Tainter gates that are 35-foot-wide by 38-foot-high and a powerhouse intake section. The powerhouse is integral with the dam and contains three turbine/generator units with a total installed capacity of 38.04 MW. The e911 address for the Tuckertown Powerhouse is 711 Tuckertown Road, New London, North Carolina 28127.

c. Falls. The Falls facility, which is located at RM 234, consists of a 204-acre reservoir at a full pool elevation of 332.8 feet, with a usable capacity of 940 acre-feet. The Falls Reservoir is impounded by a 748-foot-long, 112-foot-high dam that includes a powerhouse intake section, a trash gate section, a gated spillway with ten 33-foot-wide by 34-foot-high gates, a gated section with two Tainter gates, and a non-overflow section. The powerhouse is integral with the dam and contains three turbine/generator units with a total installed capacity of 31.13 MW. The e911 address for the Falls Powerhouse is 49156 Falls Road, Badin, North Carolina 28009.

Downstream of the Cube Yadkin facilities are the Tillery and Blewett Falls facilities, which are located at RM 218 and RM 188.2, respectively, and which are licensed to DEP as the Yadkin-Pee Dee Project.

7. On information and belief, the Falls facility was placed into operation on January 1, 1917; the High Rock facility was placed into operation on January 1, 1927; and the Tuckertown facility was placed into operation on January 1, 1962. As each of the QFs was in operation prior to the enactment of the Electricity Act of 1965, Session Law 1965-287, those facilities are not subject to certification under N.C. Gen. Stat. 62-110.1(a). *See also* Order Withdrawing Application, N.C.U.C. Docket No. E-56, Sub 1 (Dec. 2, 1999) (concluding that Alcoa, Tapoco and Yadkin, "by virtue of their current activities, their proposed reorganization and their proposed activities" should not be considered "public utilities" under North Carolina law).

8. The Cube Yadkin QFs have undergone, and will undergo further, substantial modifications, as required by the License in order for Cube Yadkin to generate electricity at the facilities. In general, the modifications required by the License address turbine/generator efficiency and water quality. However, the License includes extensive terms and conditions related the protection of aquatic habitat, fish populations, wetlands, recreational opportunities, and aesthetics. In its Order Issuing New License, the FERC estimated a total capital cost of $112,629,390 for the turbine/generator modifications and water quality measures alone.[10] While Cube Yadkin's current scope of work and budget has been reduced below this amount, the required modifications are significant and allow these QFs to be treated as "new" capacity under PURPA. More specifically, the FERC license requires:

a. High Rock. The License requires that all three turbine/generator units be refurbished to improve hydraulic efficiency. The dissolved oxygen ("DO") monitoring equipment below the dam must be upgraded to allow for the transmittal of data in 15-minute increments from the DO monitors to the Dispatch Center. A telemetry system must be installed to provide real-time water quality data to researchers and the public via the web. Turbine aerating technology and cone valves must be installed to provide the maximum water quality improvement. These improvements will increase the total installed capacity from 32.9 MW to 40.32 MW. Cube Yadkin is also replacing the balance of plant at High Rock, including all electrical and mechanical systems such as switchgear, transformers, governors, and protective relays. Modern spill control and containment technology will also be installed. New unit controls and governors will be installed, which will improve plant efficiency. High efficiency transformers and power distribution systems will be installed to reduce plant power consumption.

[10] *See Order Issuing New License* at ¶¶ 38, 43, describing certain of the proposed upgrades, with FERC staff cost estimates in 2007 dollars provided in the Final Environmental Impact Statement for Hydropower Licenses, Yadkin Hydroelectric Project - FERC Project No. 2197-073 at 245, 248.

b. Tuckertown. The License requires that the three turbine/generator units be refurbished to improve hydraulic efficiency. The License requires the installation of aerating cone valves, DO monitoring equipment below the dam, and a telemetry system to provide real-time water quality data. New cooling systems were installed to improve unit efficiency, as well as provide an improvement in spill containment and control. New unit controls were installed in two units, and the third will be installed next year, to provide improved plant efficiency.

c. Falls. The License requires that three of the turbine/generator units be refurbished to improve hydraulic efficiency. DO monitoring equipment below the dam must be upgraded and telemetry system developed and installed to provide real-time water quality data.

d. System control. A new master control system will be developed, allowing operation of all the facilities in a coordinated and optimized way. By operating the plants as a single group instead of individual units, the overall efficiency and generated power will be increased.[11]

e. Enhancement of aquatic habitat, fish populations, wetlands, recreational opportunities, and aesthetics. In addition to the modifications and upgrade, the License requires that the operations of the Cube Yadkin QFs (and Narrows) be significantly altered to enhance aquatic habitat, fish populations, wetlands, recreational opportunities, and aesthetics. These requirements are detailed more fully in the License, but specifically include elevation controls and flow regimes to protect "aquatic habitat, fish populations, wetlands, recreational opportunities, and aesthetics."[12] The License requires that significant recreational facility upgrades, including improvements to several existing recreational sites and construction of new fishing piers, campsites, and a swimming area, be implemented.[13] The License also requires a number of operational changes and studies to identify and protect endangered species within the project boundaries.[14] Finally, the License requires that an Historic Properties Management Plan intended to protect cultural resources in the vicinity be developed and implemented.[15]

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[11] This includes Narrows, as well as the three QFs.

[12] *Order Issuing New License* at ¶ 32.

[13] *Id.* at ¶ 47.

[14] *Id.* at ¶ 5.

[15] *Id.* at ¶ 49.

Thus, while the Cube Yadkin QFs have been capable of generating hydroelectricity for decades—in two cases nearly a century—the License effectively restarts the useful life of these facilities as hydroelectric generating facilities by requiring sweeping operational and infrastructure changes, including state-of-the-art turbine/generator units, aeration technology, environmental controls, and resource management protocols, all comparable to those applicable to new facilities. The License includes detailed and specific terms and conditions related to the improvement and operation of the Cube Yadkin QFs for the next thirty-eight (38) years.

9. At Duke's suggestion, reflecting the substantial investment in the modernization and renewal of the Cube Yadkin facilities, Cube Yadkin has sought registration of all four of the Yadkin facilities as New Renewable Energy Facilities. *See* Docket Nos. SP-9172, Sub 0; SP-9172, Sub 1; SP-9172, Sub 2; and EMP-94, Sub 0. These registrations were filed on March 16, 2017, and remain pending as of this date.

10. Unlike solar QFs and some other types of renewables, the Cube Yadkin QFs are available 24 hours a day, can be scheduled during peak periods, and can provide significant value to Duke's transmission systems, particularly in counterbalancing existing, and integrating the expected expansion of, intermittent resources. In addition, as explained subsequently herein, a PPA that included all four of Cube Yadkin's hydroelectric facilities would provide significant value in that they could be made subject to Duke's dispatch control, and Duke could use the energy and capacity during the hours Duke needed them the most. Given the large expected increase in solar generation on the Duke system over the next several years, having the ability to fully dispatch all four Yadkin facilities would provide Duke significant operational flexibility and enable the integration of new solar

resources with the clean, renewable energy generated by the Yadkin facilities. In addition, Duke's downstream hydroelectric facilities, Blewett and Tillery, would benefit from the increased dispatch coordination with the Yadkin facilities.

COUNT ONE: COMPLAINT AND DECLARATORY RULING

11. PURPA was part of a package of legislation called the National Energy Act and was designed to combat a nationwide energy crisis by encouraging conservation of oil and natural gas and promoting 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 using renewable fuel sources, such as hydroelectric energy. 16 U.S.C. § 824a-3; *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 405 n.1 (1983).

12. Section 210 of PURPA obligates electric utilities to purchase the energy and capacity of cogeneration facilities and small power production facilities that meet the requirements of PURPA Section 201, which are called qualifying facilities or QFs.

13. PURPA charges the FERC with implementing the mandatory purchase and sell obligations, requiring electric utilities to purchase electric power from, and sell power to, qualifying cogeneration and small power production facilities. *S. Cal. Edison Co. v. FERC*, 443 F.3d 94, 95 (D.C. Cir. 2006) (citing PURPA Section 210(a)(1)-(2), 16 U.S.C. § 824a-3(a)(1)-(2)). State regulatory authorities are, in turn, required to implement PURPA in a way that gives effect to FERC's regulations implementing PURPA. *See* PURPA Section 210(f)(1), 16 U.S.C. § 824a-3(f)(1); *FERC v. Mississippi*, 456 U.S. 742, 751 (1982).

14. The regulations promulgated by FERC allow the QF to elect to sell energy "as available" or to sell "energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term." 18 C.F.R. § 292.304(d).

15. As the Commission has acknowledged in various orders, FERC wrote the "legally enforceable obligation" concept into its PURPA rules knowing that QF and utility negotiations might not proceed smoothly and that a utility might try to frustrate a QF's exercise of its PURPA rights. The LEO concept protects the QF in such a situation. The concept was explained by FERC in a PURPA enforcement action, where the FERC wrote:

> Thus, under our regulations, a QF has the option to commit itself to sell all or part of its electric output to an electric utility. ***While this may be done through a contract, if the electric utility refuses to sign a contract, the QF may seek state regulatory authority assistance to enforce the PURPA imposed obligation on the electric utility to purchase from the QF, and a non-contractual, but still legally enforceable, obligation will be created pursuant to the state's implementation of PURPA.*** Accordingly, a QF, by committing 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 noncontractual, but binding, legally enforceable obligations.*** The LEO is based upon the QF's exercise of its options under PURPA and FERC rules.

J.D. Wind, 129 FERC ¶61,148 (2009), *recon. denied*, 130 FERC ¶61,127 (2010) (emphasis supplied). *See also id.* Order on Arbitration, Docket No. E-2, Sub 966 (EPCOR v. Progress Energy Carolinas) (Jan. 26, 2011), at 8-9.

16. In explaining a QF's rights under PURPA and its regulations, the FERC has said that QFs are entitled to "long-term avoided cost contracts or other legally enforceable obligations ["LEOs"] with rates determined at the time the obligation is incurred, even if the avoided costs at the time of delivery ultimately differ from those calculated at the time the obligation is originally incurred." *J.D. Wind 1, LLC*, 130 FERC ¶ 61,127, at para. 23

(2010); *see also Order Setting Avoided Cost Input Parameters*, N.C.U.C. Docket No. E-100, Sub 140 (Dec. 31, 2014) ("*Order Setting Parameters*") at 19 (acknowledging a QF's legal right to long-term fixed rates pursuant to Section 210 of PURPA under the *J.D. Wind* Orders).

17. The FERC has not, by regulation or by order, specified a minimum or maximum term for PPAs offered by electric utilities to QFs. However, the FERC has held that QFs are entitled to contracts "long enough to allow QFs reasonable opportunities to attract capital from potential investors." *Windham Solar LLC & Allco Fin. Ltd.,* 157 FERC ¶ 61,134 at para. 8 (Nov. 22, 2016). In other words, the FERC has made clear that a QF is entitled to a PPA with a duration sufficient to justify investment in the underlying project, an issue of particular concern to Cube Yadkin in acquiring the Yadkin facilities. A long-term PPA at fixed rates is the only practical way to provide sufficient certainty for QFs of the size and scope of the Cube Yadkin QFs.

18. On November 15, 2016, Duke filed its Joint Initial Statement and Proposed Standard Avoided Cost Rate Tariffs of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC with the Commission in Docket No. E-100 Sub 148 (the "2016 Duke Avoided Cost Proposal"). The 2016 Duke Avoided Cost Proposal requested sweeping changes to the methodology by which the electric utilities' avoided costs are calculated, which would have the impact of dramatically reducing the utilities' avoided costs, and, therefore, rates offered to QFs.

19. The 2016 Duke Avoided Cost Proposal asserted that DEP and DEC "routinely negotiate PURPA PPAs with larger QFs, mitigating concerns raised in 2014 in the Sub 140 [avoided cost] proceeding" about the difficulty of obtaining a negotiated PPA

with DEP or DEC. 2016 Duke Avoided Cost Proposal at 27. On information and belief, however, Duke is currently declining to enter into long-term PPAs with QFs not eligible for the standard offer and is insisting instead on short, five-year agreements. *See, e.g.,* Hearing Transcript, Vol. 5, Docket No. E-100, Sub 148, at p. 73, lines 20-22 ("Q. And I also heard you to say earlier today that now for the negotiated contracts, Duke is offering not a 10-year term but a five-year term. A. That's correct."). *See also id.* at pp. 79-82 (colloquy between Chairman Finley and Witnesses Bowman and Freeman concerning the potential for rash of complaints at the Commission concerning the appropriate length of the term of non-standard purchase agreements to appropriately reflect the need for financial viability of renewable energy projects).

20. The Cube Yadkin QFs have self-certified by filing Form 556s with the FERC on September 28, 2016. Hard copies of the FERC Form 556s were mailed to Duke at its principal place of business in Charlotte (Attn: Customer Owned Generation - Mail Code ST13A, P.O. Box 1010, Charlotte, NC 28201) on October 3, 2016. As a result of the consummation of the purchase of the Cube Yakin QFs, Cube Yadkin is now the owner of the QFs and has updated the FERC Form 556s to reflect its ownership. *See* Amended Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility, Docket Nos. QF16-1309-000, QF16-1310-000, and QF16-1311-000 (March 9, 2018).

21. Each of the Cube Yadkin QFs has a nameplate capacity in excess of the maximum size for which the Commission has approved standard contract terms and conditions. *See, e.g., Order Establishing Standard Rates and Contract Terms for Qualifying Facilities,* N.C.U.C. Docket No. E-100, Sub 140 (Dec. 17, 2015), at Finding of

Fact 1. The QFs must therefore negotiate the terms and conditions of their respective PPAs with Duke.

22. Conversations with Duke concerning the purchase of QF capacity began over a year and a half ago. In fact, Cube Yadkin reached out to Duke in March 2016, prior to signing the purchase agreement with Alcoa, as part of the due diligence process to introduce itself and learn how Duke might approach a long-term PPA. Such an agreement was a critical component of Cube Yadkin's business plan to acquire the Yadkin Project facilities from Alcoa, and it was known and supported by Alcoa. As evidenced by Alcoa's submittal of the Form 556s to establish QF rights, it was understood and agreed by the parties that Alcoa would support Cube Yadkin's efforts to enter into a long-term PPA with Duke to sell energy and capacity.

23. Immediately upon executing the purchase agreement with Alcoa, Cube Yadkin again contacted Duke, which resulted in in-person meetings in early August 2016 to discuss a potential long-term PPA for the QFs. On August 23, 2016, Cube Yadkin contacted Duke via email to follow-up an in-person meeting confirming its plan to certify High Rock, Tuckertown, and Falls as QFs and reiterating its request "to have further discussions with Duke regarding longer-term QF contracts for these facilities." *See* email dated August 23, 2016 from John R. Collins, Executive Vice President and Managing Director – Business Development, Cube Hydro Partners to Regis Repko, Senior Vice President and Chief Fossil/Hydro Officer, Duke Energy (attached as Exhibit 1).

24. Again, on or about September 16, 2016, Cube Yadkin contacted Duke to further discuss Duke purchasing the output of the Cube Yadkin QFs. This discussion was confirmed by Duke in a responsive letter dated September 21, 2016, sent by Duke to Cube

Yadkin in "follow up to our conversation of September 16, 2016, during which [Duke] communicated [its] ... positions in response to your inquiry soliciting Duke's interest in purchasing the output of the Yadkin system." *See* Letter dated September 21, 2016 from Michael Keen, Business Development Manager, Duke Energy, to John R. Collins, Executive Vice President and Managing Director – Business Development, Cube Hydro Partners (attached as Exhibit 2). In this letter, Duke states that it has no current need for energy or capacity and that "to the extent Cube Yadkin approached Duke under PURPA, that under PURPA's requirements, Duke would likely have no obligation to purchase any output of energy or capacity from the Yadkin system units that may be certified as qualified facilities." *Id.*

25. Subsequently, on October 11, 2016, Cube Yadkin transmitted a letter to Duke updating Duke on the Yadkin facilities self-certification as QFs and responding to its assertions regarding eligibility under PURPA. *See* undated letter from John R. Collins, Executive Vice President and Managing Director – Business Development, Cube Hydro Partners to Michael Keen, Business Development Manager, Duke Energy (attached as Exhibit 3). Cube Yadkin further noted Duke's obligations under PURPA and the FERC's regulations to purchase energy and capacity made available from QFs and recommended that the parties meet to discuss any concerns relating to the facilities QF status "at your earliest convenience." *Id.*

26. In response, by letter dated October 14, 2016, Duke rejected Cube Yadkin's commitment to sell electrical output under PURPA, stating that "this letter serves as Duke's formal notice under 292.309/310 that if in the future Cube Hydro is a qualifying facility with respect to the Yadkin system and it seeks to sell power to Duke, it is Duke's view that

it is exempted from any purchase obligation under PURPA with respect to the Yadkin system." *See* Letter dated October 14, 2014 from Michael Keen, Business Development Manager, Duke Energy, to John R. Collins, Executive Vice President and Managing Director – Business Development, Cube Hydro Partners (attached as Exhibit 4). In this letter, Duke goes on to assert—allegedly as a basis for Duke's position that it is "exempted" from any purchase obligation under PURPA—that "Cube Hydro has sought, and Alcoa currently has market-based rate authority on the basis of the ability and history of selling the output of the Yadkin system into competitive wholesale and organized markets." *Id.*

27. As evidenced by the exchange of communications between the parties, Duke's LEO to purchase the output of each of the QFs was established as of September 16, 2016, when Cube Yadkin communicated its commitment to sell the output of the facilities to Duke. At the latest, the LEOs were established as of September 28, 2016 upon the filing of the FERC Form 556s, or October 11, 2016, when Duke received Cube Yadkin's letter confirming its intention to sell to Duke as QFs. The effectiveness of this October 11th letter to establish the LEOs can be determined from Duke's letter dated October 14, 2016, which is attached as Exhibit 4, rejecting Cube Yadkin's commitment to sell its QF output. Although Cube Yadkin had not yet consummated its purchase of the QFs at the time the LEOs were established, it had signed a binding contract to purchase the facilities (with only limited regulatory out clauses), had submitted an application to transfer the FERC license as early as July 25, 2016, and had prepared the self-certification Form 556s that had been filed with the FERC.[16] In any event, the obligation established under

[16] The establishment of a LEO has never been premised upon an ability to deliver power at the time the LEO is created. As has been recognized by the FERC, a QF is entitled to choose avoided costs calculated at the time it incurs the obligation even if those avoided costs differ from the avoided costs at the time of delivery. *Final Rule Regarding the Implementation of Section 210*

PURPA attaches to the facility, not to the owner of the QFs. *See, e.g.,* 16 U.S.C. § 824a-3 (describing obligation of public utilities to purchase electric energy from "facilities"); 18 C.F.R. § 292.303(a) ("Each electric utility shall purchase ... any energy and capacity which is made available from a qualifying *facility*")(emphasis supplied). And just like other situations in which a developer's establishment of an LEO has occurred at the financing stage of the project, Cube Yadkin's commitment to acquire the facilities, and its willingness to make the investment required to upgrade and modernize the facilities required as a condition of the transaction, were predicated on the qualification of the facilities as QFs and the requirement under PURPA that Duke purchase the output of the QFs.

28. Consistent with its "formal notice" to Cube Yadkin of its position that it is not required under PURPA to purchase the output of the Cube Yadkin QFs, Duke has refused to provide proposed contract terms, including pricing, for a long-term QF PPA or to otherwise enter into negotiations for such an agreement. Duke did represent that it would enter into good faith negotiations with Cube Yadkin concerning the purchase of the output of the Yadkin facilities on a non-PURPA basis. The conversations with Duke regarding the "alternative" approach first began as early as November 2016. With hopes of furthering these discussions, Cube Yadkin entered into a letter agreement with Duke dated April 25, 2017, which stated that any such discussions would not be deemed to establish any LEO under or pursuant to PURPA.

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of the Public Utility Regulatory Policies Act of 1978, Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880, and *J.D. Wind 1, LLC*, 130 FERC ¶ 61,127, at para. 23 (2010). Thus, the LEO is a necessary precondition to a QF beginning the process by which ultimately energy and capacity can be delivered, whether through the construction of a new facility or, as in this case, the upgrading and modification of existing facilities.

29. Relying on the possibility of an alternative path to a PPA, Cube Yadkin filed the currently pending registration statements in mid-March. This included all four Cube Yadkin hydroelectric facilities because the four together could be made subject to Duke's dispatch control, and Duke could use the energy and capacity during peak periods or as necessary for reliability due to intermittent resources such as solar. Recognizing the benefits of this approach, Cube Yadkin delayed the enforcement of its rights as a QF because it was waiting, in good faith, on Duke to engage in the alternative approach. While Duke continued to assure Cube Yadkin that an offer was forthcoming, Duke did not provide an offer until August 10, 2017, nearly four months after the parties entered into the letter agreement and six months after the parties has agreed in principle on the approach. Duke's conduct since the beginning of the discussions between the parties appears to have been designed to discourage Cube Yadkin from pursuing its rights under PURPA.

30. Duke's claim that it is "exempted" from any purchase obligation under PURPA because "Cube Yadkin has sought, and Alcoa currently has, market-based rate authority" is without legal basis. First, the FERC's grant of market-based authority does not have any bearing on QF status and is not tied to any history or ability to sell into competitive markets; rather it is based solely on Cube Yadkin's lack of market power under the applicable FERC regulations. Cube Yadkin is required under federal law to have market-based rate authority, even if it obtains PURPA contracts with Duke, because the three QFs are over the 30 MW threshold for the QF exemption from federal rate regulation. Second, Duke has not sought from the FERC, and certainly has not been granted, an exemption from its obligations under PURPA to purchase from the Cube Yadkin QFs and, therefore, is legally required to enter into a contractual arrangement with Cube Yadkin.

31. As shown above, each of the Cube Yadkin QFs had established a LEO prior to Duke's filing of the 2016 Duke Avoided Cost Proposal with the Commission and is entitled to enter into long-term PPAs with Duke for the purchase of the output of the QFs at Duke avoided cost calculated in accordance with the *Order Setting Parameters*.[17]

32. Section 62-156 of the North Carolina General Statutes provides that, in the event that a small power producer and an electric utility are unable to mutually agree to a contract for the sale of electricity or to a price for the electricity purchased by the electric utility, the Commission shall require the utility to purchase the power at a rate and on terms specified in the statute.

33. On July 27, 2017, House Bill 589 (N.C. Session Law 2017-192) was signed into law. Part I of this legislation makes certain revisions to the definition of "small power producer" under G.S. § 62-3(27a) to bring that definition in line with the federal definition and to G.S. § 62-156 governing a utility's obligation to purchase power from small power producers. These statutory revisions, however, are not applicable to the Cube Yadkin QFs as Duke's obligation is effective as of the establishment of the LEO, which predates the new legislation. *See, e.g.,* 18 C.F.R. § 292.304(d)(ii); *Order Setting Parameters*, at 19

[17] As discussed in the introduction to this complaint, the formal LEO process established by the Commission in prior cases is simply not applicable to the facts and circumstances here, which include hydroelectric facilities constructed prior to the enactment of the statutory obligation to secure a CPCN pursuant to G.S. § 62-110.1 that have had long-standing relationships with the electric utilities in question seeking to invoke their rights under PURPA. The Commission's recently-articulated LEO test—which requires that a QF (1) be certified as a QF, (2) have a CPCN (or have filed a report of proposed construction), and (3) have provided to the utility a Notice of Commitment form—has no applicability to the instant situation involving QFs that predate the statutory certification processes. Because this formal LEO process does not by its own terms apply to the Cube Yadkin QFs, its applicability should be waived if the Commission were to determine that it was otherwise applicable to Cube Yadkin, given that Cube Yadkin could not have known that in advance. In any event, Cube Yadkin substantially complied with the substance of the requirement in its communications with appropriate personnel at Duke.

(acknowledging a QF's legal right to long-term fixed rates under Section 210 of PURPA under *J.D. Wind* Orders).

34. Section 62-73 of the North Carolina General Statutes empowers this Commission to hear complaints against public utilities brought "by any person having an interest, either direct or as a representative of any persons having a direct interest in the subject matter of such complaint."

35. In addition to the Commission's complaint authority pursuant to N.C. Gen. Stat. § 62-73, the North Carolina Declaratory Judgment Act, N.C. Gen. Stat. § 1-253, empowers courts of record to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. Such declarations shall have the force and effect of a final judgment or decree. Pursuant to N.C. Gen. Stat. § 62-60, the Commission may exercise this power under the Declaratory Judgment Act with respect to all subjects over which the Commission has jurisdiction.

COUNT TWO: PETITION FOR ARBITRATION

36. The allegations contained in paragraphs 1 – 35 of this Complaint are realleged and incorporated by reference.

37. Cube wishes to enter into a PPA with Duke to sell energy and capacity from the Cube Yadkin QFs at rates that reflect Duke's avoided cost as of the date of the respective LEOs. Duke has refused to negotiate the terms of long-term QF PPAs.

38. The issues to be resolved in this arbitration are: (1) whether Duke has negotiated freely, openly, and in good faith with respect to entering into new long-term PPAs for the output of the Cube Yadkin QFs with a term of not less than ten years, as required by PURPA, and (2) whether Duke has negotiated freely, openly, and in good faith

with respect to payment to Cube Yadkin of its full avoided costs, including both capacity and energy components, also as required by PURPA.

39. Pursuant to N.C. Gen. Stat. § 62-40 and the orders of the Commission in the avoided costs proceedings, Complainant requests that the Commission act as arbitrator and resolve the unresolved issues arising from the negotiations, including Duke's actual avoided costs, including both capacity and energy components. Cube Yadkin seeks ten-year PPAs and, therefore, meets the two-year commitment of capacity requirement for the Commission to conduct such an arbitration.

40. Complainant requests that the Commission require Duke to: (1) enter into long-term PPAs for the output of the three Cube Yadkin QFs and (2) provide payment pursuant to these new long-term PPA of Duke's full avoided costs, including both capacity and energy components, as of the date of the establishment Cube Yadkin's LEOs.

RELIEF REQUESTED

WHEREFORE, Complainant respectfully requests that the Commission grant the following relief:

1. Treat this matter as a formal Complaint against DEP and DEC pursuant to Section 62-73 of the North Carolina General Statutes and the Commission Rules of Practice and Procedure, and as a request for a declaratory judgment pursuant to Section 1-253 of the North Carolina General Statutes;

2. Declare that DEP and DEC are legally obligated to purchase the output of the Cube Yadkin QFs under PURPA, that the legally enforceable obligations arose as of September 16, 2016 (or, at the latest, October 11, 2016), that the formal processes adopted by the Commission in its avoided cost orders respecting the establishment of a LEO were

not intended to and do not apply to the Cube Yadkin QFs, and that the Cube Yadkin QFs are entitled to avoided cost rates established in accordance with the Commission's Order Establishing Avoided Cost Rates for DEC and DEP issued March 10, 2016, in Docket No. E-100, Sub 140;

3. Issue an Order directing DEP and/or DEC to enter into a PPA with each Cube Yadkin QF incorporating fixed, levelized avoided cost rates for energy and capacity and with a contract term of sufficient length that the investment in the underlying QF projects is justified, not less than ten years;

4. Arbitrate the unresolved issues consistent with the position of the Complainant as set forth herein;

5. Set this matter on an expedited procedural schedule; and

6. Grant such other and further relief as this Commission may find just and reasonable.

Respectfully submitted, this 29th day of March, 2018.

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Attorneys for Cube Yadkin Generation LLC

VERIFICATION

The undersigned, being first duly sworn, deposes and says that he is the Secretary of Cube Yadkin Generation LLC. He furthers states that he has read the foregoing Complaint, Request for Declaratory Ruling, and Request for Arbitration ("Complaint") and that, to his personal knowledge and belief, the matters and statements contained therein are true, except as to those matters or statements made upon information and belief, and as to those, he believes them to be true; and that he verifies the foregoing Complaint on behalf of Complainant.

This the 28th day of March, 2018.

Eli Hopson

Sworn to and subscribed before me
this 28th day of March, 2018.
Notary Public
My Commission Expires: 11-14-2018

KRYSTAL JONES NOTARY PUBLIC EXP. 11-14-18 DISTRICT OF COLUMBIA

EXHIBIT 1

From: John Collins
Sent: Tuesday, August 23, 2016 9:50 AM
To: regis.repko@duke-energy.com
Cc: Kristina Johnson <kjohnson@cubehydro.com>
Subject: Follow-up to Our Meeting

Regis,

I hope this email finds you well and enjoying the end of summer. I am emailing to follow-up on our discussions regarding the Yadkin hydroelectric assets that Cube Hydro is purchasing from Alcoa. As we discussed in our meeting, we plan of registering 3 of the assets, High Rock, Tuckertown and Falls, as Qualifying Facilities and would like to have further discussions with Duke regarding longer-term QF contracts for these facilities. In addition, we discussed the possibility of a long-term PPA arrangement for all four facilities including the Narrows plant with Duke that could provide additional flexibility for Duke to manage its grid due to the continuing impact of solar generation on the Duke network.

As a follow-up to the meeting you were going to put us in contact with the appropriate team members at Duke to begin discussions. I wanted to let you know that Kristian and I plan to be in North Carolina next Thursday, September 1st, and have some availability to meet with your team if their schedules permit.

Let me know if that will work or who we should contact to begin further discussion related to long-term PPAs for the Yadkin hydroelectric plants.

Look forward to hearing from you.

Regards,

John

John R. Collins
Executive Vice President and Managing Director – Business Development
Cube Hydro Partners
Two Bethesda Metro Center, Suite 1330
Bethesda, MD 20814
(240) 482-2703 (Work)
jcollins@cubehydro.com

EXHIBIT 2

DUKE ENERGY®

Duke Energy
299 First Avenue North
St. Petersburg, FL 33701

September 21, 2016

Cube Hydro Partners
Two Bethesda Metro Center, Suite 1330
Bethesda, MD 20814

Attn: John R. Collins
Executive Vice President and Managing Director – Business Development

Re: Inquiry concerning sale of output of Yadkin system to Duke Energy

Dear John:

This letter is a follow up to our conversation of September 16, 2016 during which I communicated to you Duke Energy Progress, LLC and Duke Energy Carolinas, LLC's (collectively/individually, "Duke") positions in response to your inquiry soliciting Duke's interest in purchasing the output of the Yadkin system. The "Yadkin System" consists of four hydro-electric units as follows: High Rock Station, approximately 33 MW; Tuckertown Station, approximately 39 MW; Falls Station, approximately 30 MW; and Narrows Station, approximately 119 MW.

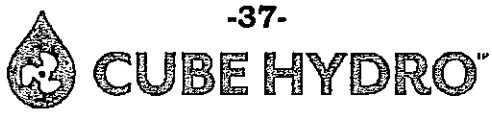
The Yadkin system is currently owned and operated by Alcoa Inc., and is the subject of a potential purchase by Cube Yadkin Generation, LLC ("Cube Yadkin"). You informed me that Cube Yadkin does not currently own or operate the Yadkin system, but anticipates that it will close on the transaction to own and operate the facilities around November 1, 2016. As I communicated to you previously, Duke does not have any current needs for energy or capacity; however, if a need arises in the future, Duke would likely issue a request for proposals and Cube Yadkin can elect to submit a responsive bid. You further informed me that Cube Yadkin is considering certifying the three smaller units as qualifying facilities under the Public Utility Regulatory Policies Act of 1978 ("PURPA"). In that regard, I informed you that to the extent Cube Yadkin approached Duke under PURPA, that under PURPA's requirements, Duke would likely have no obligation to purchase any output of energy or capacity from the Yadkin system units that may be certified as qualified facilities.

Please feel free to contact me with any questions.

Sincerely,

Michael Keen
Business Development Manager
Duke Energy

EXHIBIT 3



Michael Keen
Business Development Manager
Duke Energy
299 First Avenue North
St. Petersburg, FL 33701

Dear Michael,

I am writing in response to your letter dated September 21, 2016 (the "September 21 Letter") regarding the discussions between Duke Energy Progress, LLC and Duke Energy Carolinas, LLC (individually and together, "Duke"), and Cube Hydro Partners, LLC ("Cube Hydro") with respect to the four hydroelectric projects on the Yadkin River (collectively, the "Yadkin Projects") that are currently owned by Alcoa Power Generating Inc. ("Alcoa").

As we discussed, Cube Hydro Carolinas LLC, an affiliate of Cube Hydro, has agreed to acquire the Yadkin Projects from Alcoa. The acquisition is anticipated to occur before the end of 2016. Alcoa has certified three of the four Yadkin Projects – the approximately 30 MW Falls project, the approximately 40 MW Tuckertown project, and the approximately 34 MW High Rock project – as qualifying small power production facilities ("QFs") under the Public Utility Regulatory Policies Act of 1978 ("PURPA") and the implementing regulations of the Federal Energy Regulatory Commission ("FERC").

As you may know, Section 210(m) of PURPA and FERC's regulations require electric utilities, including Duke, to purchase energy and capacity made available from QFs. *See* 16 U.S.C. § 824a-3(a)(2) (2012); 18 C.F.R. § 292.303(a) (2016). FERC's regulations further specify that a QF shall have the option of making sales to an electric utility pursuant to a legally enforceable obligation, or on an "as available" basis. *See* 18 C.F.R. § 292.304(d) (2016).

Given that three of the Yadkin Projects are now QFs, we recommend that we meet to discuss your concerns at your earliest convenience. We are happy to come to your offices in late October or early November to discuss the process for making sales from these projects to Duke pursuant to PURPA. We would anticipate that such discussions would, among other things, address the statement in the September 21 Letter that, "under PURPA's requirements, Duke would likely have no obligation to purchase any output of energy or capacity from the Yadkin system units that may be certified as [QFs]." While electric utilities may petition FERC to be relieved of their mandatory purchase obligations under PURPA, it does not appear that FERC has issued an order relieving Duke of such obligations, or that there are any other applicable exceptions or exemptions.

Thank you for your attention to this matter. We'll be contacting your office to find a mutually agreeable date to meet at your offices.

Sincerely,

John R. Collins
Executive Vice President and
Managing Director – Business
Development

Cc: Kristina Johnson
Dhiaa M. Jamil

EXHIBIT 4

DUKE ENERGY.

Duke Energy
299 First Avenue North
St. Petersburg, FL 33701

October 14, 2016

Via Email and Priority Mail

Mr. John R. Collins
Executive Vice President and Managing Director – Business Development
Cube Hydro Partners, LLC
Two Bethesda Metro Center, Suite 1330
Bethesda, MD 20814

Re: Response to Undated Cube Hydro Letter Received October 11, 2016

Dear John:

This letter is a follow up to your undated letter to Duke Energy Carolinas, LLC and Duke Energy Progress, LLC ("Duke") which was received on October 11, 2016 (the "Cube letter").

In the Cube letter you inform Duke, as Cube Hydro Partners LLC, on behalf of Cube Hydro Carolinas, LLC (collectively, "Cube Hydro"), that Alcoa Power Generation, Inc. ("Alcoa") has certified three out of four units of the Yadkin system as qualifying facilities under PURPA. The "Yadkin system" consists of four hydro-electric units, as follows: High Rock Station, approximately 33 MW; Tuckertown Station, approximately 39 MW; Falls Station, approximately 30 MWs; and, Narrows Station, approximately 119 MW. You further inform us that Cube Hydro seeks to purchase the Yadkin system from Alcoa, and may be the actual owner and operator of the Yadkin system by the end of 2016. At this time, Cube Hydro neither owns nor is a qualifying facility with respect to the Yadkin system. Therefore, Cube Hydro has no potential rights to exert under PURPA. Although your letter fails to reference our discussions, we have previously and prior to your letter informed you of the PURPA provisions under which Duke would be exempted from PURPA with regard to the Yadkin system. Accordingly, this letter serves as Duke's formal notice under 292.309/310 that if in the future Cube Hydro is a qualifying facility with respect to the Yadkin system and it seeks to sell power to Duke, it is Duke's view that it is exempted from any purchase obligation under PURPA with respect to the Yadkin system.

Representations and warranties in applications made at FERC demonstrate that Cube Hydro has sought, and Alcoa currently has market-based rate authority on the basis of the ability and history of selling the output of the Yadkin system into competitive wholesale and organized markets. However, after you have closed on the transaction with Alcoa, if you seek to approach Duke under PURPA we will be glad to discuss this matter further.

Sincerely,

Michael Keen
Business Developer Manager, Duke Energy

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. DUKE ENERGY CAROLINAS, LLC, and DUKE ENERGY PROGRESS, LLC Respondents.	)	**VERIFIED COMPLAINT, REQUEST FOR DECLARATORY RULING, AND REQUEST FOR ARBITRATION**

COMES NOW Complainant Cube Yadkin Generation LLC ("Cube Yadkin" or "Complainant"), pursuant to N.C. Gen. Stat. § 62-73 and § 1-253 and Rule R1-9 of the Rules and Regulations of the North Carolina Utilities Commission, and files this Complaint and Request for Declaratory Ruling against Duke Energy Carolinas, LLC ("DEC"), and Duke Energy Progress, LLC ("DEP") (collectively, "Duke"), based on Duke's refusal to enter into long-term power purchase agreements ("PPAs") with Cube Yadkin as required by federal and North Carolina law. Cube Yadkin also requests arbitration of any unresolved terms pursuant to N.C. Gen. Stat. § 62-40 and the Commission's Orders in the avoided cost proceedings. The Complainant respectfully shows the Commission as follows:

INTRODUCTION AND SUMMARY

Complainant operates the Yadkin Project, a series of four 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. Together, the four hydroelectric stations have a total generating capacity of 215 megawatts ("MW") and they

are expected to produce nearly 800,000 megawatt-hours of clean, reliable electricity per year—enough to power some 72,000 homes with renewable energy.

Three of the Yadkin Project facilities have been self-certified as Qualifying Facilities ("QFs") under the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3 ("PURPA"), while the fourth facility exceeds PURPA's "small power production facility" size limit. By this action, Complainant seeks to enforce its right under federal law to commit the output and capacity of the QFs to DEC and/or DEP at avoided cost rates determined as of the date that Complainant first established a legally enforceable obligation to provide such energy and capacity to Duke.

Here, the evidence will show that the QFs are interconnected with both DEC and DEP and are components of hydroelectric operations well known to Duke; that Complainant initiated discussions with Duke concerning the purchase of the QF energy and capacity in March 2016, prior to Cube Yadkin's purchase of the QFs, as part of its due diligence activity; that the sale of the QF energy and capacity to Duke was an integral component of Complainant's business plan in proceeding with the acquisition of the Yadkin Project and committing to the facility upgrades required by the Federal Energy Regulatory Commission ("FERC") in connection with the acquisition; that Cube Yadkin had multiple meetings and communications with Duke in the August through October 2016 timeframe to discuss Cube Yadkin's desire to enter into a long-term PPA to sell the energy and capacity provided by the Yadkin Project; that by letter transmitted on October 11, 2016, Cube Yadkin further apprised Duke of the status of its QFs and the utilities' obligation, under the law, to purchase the energy and capacity of those facilities; and that by letter dated October 14, 2016, Duke

gave notice to Complainant that it would not honor Cube Yadkin's assertion of rights under PURPA.

Complainant acknowledges that it did not submit to Duke the commitment form recognized by the Commission in its avoided cost orders. However, because the Cube Yadkin QFs are existing facilities that are not subject to the certificate of public convenience and necessity ("CPCN") requirement in N. C. Gen. Stat. § 62-110.1(a) and have had long-standing relationships—including existing interconnections—with the electric utilities in question, the commitment form by its own terms does not apply to the Cube Yadkin QFs. Given that (1) the construction of the hydroelectric QFs pre-dated the CPCN statute and their current status as operating facilities; (2) Cube Yadkin committed to purchase and upgrade the facilities in reliance in part upon the QF status of three of the facilities; and (3) multiple communications between the Complainant and Duke confirmed Complainant's intention to "put" its PURPA-qualifying energy and capacity to Duke, as acknowledged by Duke in its purported anticipatory rejection of Complainant's assertion of PURPA rights, Complainant established legally enforceable obligations no later than October 11, 2016, to sell the energy and capacity from the three QFs to Duke.

Notwithstanding the existence of a binding commitment by Cube Yadkin to sell the energy and capacity of the QFs to Duke as of October 2016, since that time, at Duke's urging, Cube Yadkin sought to negotiate a mutually-beneficial alternative, non-PURPA commercial arrangement by which it would deliver energy and capacity from all four of the Yadkin Project facilities to Duke. As it became clear as of March 19, 2018 that Duke has no intention of entering into such an agreement, Complaint now seeks enforcement of its federally-protected rights as to the three QFs. As hydroelectric facilities, the QFs are unique

assets that are available to meet the growing demand for renewable, carbon-free energy sources, consistent with Duke's publicly-stated strategy to reduce dependence on fossil fuels and move toward clean, renewable energy sources.[1] In particular, the purchase of energy and capacity from hydroelectric resources is consistent with Duke Energy's stated goal of reducing CO_2 emissions 40 percent from 2005 levels by 2030.[2]

NATURE OF ACTION

This action arises from Duke's refusal to enter into long-term QF PPAs with Cube Yadkin, the owner of three hydroelectric generating facilities that are entitled to sell power to Duke under the PURPA, N.C. Gen. Stat. § 62-156, the Commission's rules, and Duke's own tariffs and schedules. Each of the Cube Yadkin hydroelectric facilities is certified as a QF under PURPA[3]; each has established a legally enforceable obligation ("LEO") with respect to the sale of energy and capacity to Duke; and 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. 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. By this action, Complainant seeks to compel Duke to fulfill its legal obligation to enter into a financially viable long-term

[1] *See* Duke Energy 2017 Climate Report to Shareholders, released March 22, 2018 (available at https://www.duke-energy.com/_/media/pdfs/our-company/shareholder-climate-report.pdf).

[2] *Id.* at 1. *See also id.* at 7 (stating goal of doubling generation from hydro, wind and solar by 2030).

[3] *See* Letter dated September 30, 2016 from Serena A. Rwejuna of Bracewell LLP on behalf of Alcoa Power Generating, Inc. transmitting FERC Form 556, Notice of Self-Certification of Qualifying Facility Status for FERC Docket Nos. QF16-1309-000 (Falls), QF16-1310-000 (High Rock), and QF16-1311-000 (High Rock), N.C.U.C. Docket No. SP-8651 (Company Folder) (filed Oct. 24, 2016) (collectively, the "FERC Form 556s").

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. Cube Yadkin also 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. Finally, Cube Yadkin seeks arbitration of all unresolved issues between the parties concerning the PPA.

PARTIES, JURISDICTION AND VENUE

1. Cube Yadkin is a Delaware limited liability company, authorized to transact business in North Carolina. It is in the business of owning, developing and modernizing hydroelectric facilities and is the owner of the hydroelectric QFs that are the subject of this proceeding. Cube Yadkin's principal place of business is located at 2 Bethesda Metro Center, Suite 1330, Bethesda, Maryland 20814. Correspondence in connection with this Complaint should be sent to:

Cube Yadkin Generation LLC
c/o Cube Hydro Partners
2 Bethesda Metro Center, Suite 1330
Bethesda, Maryland 20814
Attn: Eli Hopson, VP for Legal, Regulatory and Policy
ehopson@cubehydro.com

Jim W. Phillips, Jr.
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Raleigh, NC 27601
(919) 839-0300, ext. 207 (phone)
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2. Respondents DEC and DEP are electric public utilities operating under the laws of the State of North Carolina for the purposes of generating, transmitting, and distributing electricity in its service territories in North Carolina. Respondents are operating subsidiaries of Duke Energy Corporation. DEC's principal office is located at 526 South Church Street, Charlotte, North Carolina 28202-1802. DEP's principal office is located at 410 S. Wilmington Street, Raleigh, North Carolina 27601.[4]

3. This Commission has jurisdiction over the subject matter and action, and venue is proper.

BACKGROUND ON CUBE YADKIN AND THE CUBE YADKIN QFs

4. Cube Yadkin owns the four hydroelectric facilities[5]—historically referred to as the "Yadkin Project"—that were first operated under a 50-year license issued by the FERC to Carolina Aluminum Company on May 19, 1958.[6] The FERC approved a transfer of the license to Alcoa Power Generating Inc. ("Alcoa") on July 17, 2000. Following the expiration of the initial license in April 2008, the Yadkin Project was operated under short-term, annual licenses. In 2006, Alcoa initiated the re-licensing process, and on September

[4] As discussed herein, the Cube Yadkin QFs are interconnected with both DEP and DEC through Cube Yadkin's affiliate, Cube Yadkin Transmission LLC. Cube Yadkin is willing to sell its QF energy and capacity to either or both Duke utilities.

[5] The four facilities are High Rock, Tuckertown, Falls, and Narrows. The first three are the subject of this complaint. The fourth facility—Narrows—is not at issue in this proceeding because it exceeds the "small power production facility" size limit.

[6] Two of the facilities, however, have been in operation for nearly a century and the third for nearly six decades.

22, 2016, the FERC issued a new long-term license to Alcoa for the Yadkin Hydroelectric Project No. 2197 (the "License").[7] The License authorizes the operation and maintenance of the Yadkin Project until March 31, 2055.

5. Cube Yadkin signed a contract to acquire the four hydroelectric facilities making up the Yadkin Project from Alcoa on June 30, 2016; it submitted an application to FERC seeking approval of the transfer of the License from Alcoa to Cube Yadkin on July 25, 2016; and the FERC issued an order approving the transfer of the License to Cube Yadkin on December 13, 2016.[8] Cube Yadkin formally consummated its agreement to purchase the Yadkin Project on February 1, 2017.

6. The Cube Yadkin facilities are interconnected with both DEP and DEC. They are located approximately 130 miles downstream of the W. Kerr Scott Dam and Reservoir along a 38-mile segment of the Yadkin River as it flows through Davidson, Montgomery, Davie, Rowan and Stanly Counties. From upstream to downstream, descriptions of the three facilities in issue here are as follows:[9]

a. High Rock. The High Rock facility, located at river mile ("RM") 253, consists of a 14,400-acre reservoir at a full pool elevation with a usable capacity of 217,400 acre-feet. High Rock Reservoir is impounded by a 936-foot-long, 101-foot high dam that includes a non-overflow section, a gated spillway section with ten 45-footwide by 30-foot-high gates, a powerhouse intake, and a non-overflow section. The powerhouse is integral with the dam and contains three turbine/generator units with a total installed capacity of 32.91 MW. The e911 address for the High Rock Powerhouse is 3344 Bringle Ferry Road, Denton, North Carolina 27239.

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[7] Alcoa Power Generating, Inc., *Order Issuing New License*, 156 FERC ¶ 62,210 (2016) ("Order Issuing New License").

[8] *Order Approving Transfer of License*, 157 FERC ¶ 62,188, December 13, 2016.

[9] The fourth facility, Narrows, is located at river mile 236.3 and has a total installed capacity of 110.36 MW.

b. Tuckertown. The Tuckertown facility, located at RM 244.3, consists of a 2,560-acre reservoir at a full pool elevation of 564.7 feet, with a usable capacity of 6,700 acre-feet. Tuckertown Reservoir is impounded by a 1,370-foot-long, 76-foot-high dam that includes a rock filled section, several non-overflow sections, a gated spillway section with eleven Tainter gates that are 35-foot-wide by 38-foot-high and a powerhouse intake section. The powerhouse is integral with the dam and contains three turbine/generator units with a total installed capacity of 38.04 MW. The e911 address for the Tuckertown Powerhouse is 711 Tuckertown Road, New London, North Carolina 28127.

c. Falls. The Falls facility, which is located at RM 234, consists of a 204-acre reservoir at a full pool elevation of 332.8 feet, with a usable capacity of 940 acre-feet. The Falls Reservoir is impounded by a 748-foot-long, 112-foot-high dam that includes a powerhouse intake section, a trash gate section, a gated spillway with ten 33-foot-wide by 34-foot-high gates, a gated section with two Tainter gates, and a non-overflow section. The powerhouse is integral with the dam and contains three turbine/generator units with a total installed capacity of 31.13 MW. The e911 address for the Falls Powerhouse is 49156 Falls Road, Badin, North Carolina 28009.

Downstream of the Cube Yadkin facilities are the Tillery and Blewett Falls facilities, which are located at RM 218 and RM 188.2, respectively, and which are licensed to DEP as the Yadkin-Pee Dee Project.

7. On information and belief, the Falls facility was placed into operation on January 1, 1917; the High Rock facility was placed into operation on January 1, 1927; and the Tuckertown facility was placed into operation on January 1, 1962. As each of the QFs was in operation prior to the enactment of the Electricity Act of 1965, Session Law 1965-287, those facilities are not subject to certification under N.C. Gen. Stat. 62-110.1(a). *See also* Order Withdrawing Application, N.C.U.C. Docket No. E-56, Sub 1 (Dec. 2, 1999) (concluding that Alcoa, Tapoco and Yadkin, "by virtue of their current activities, their proposed reorganization and their proposed activities" should not be considered "public utilities" under North Carolina law).

8. The Cube Yadkin QFs have undergone, and will undergo further, substantial modifications, as required by the License in order for Cube Yadkin to generate electricity at the facilities. In general, the modifications required by the License address turbine/generator efficiency and water quality. However, the License includes extensive terms and conditions related the protection of aquatic habitat, fish populations, wetlands, recreational opportunities, and aesthetics. In its Order Issuing New License, the FERC estimated a total capital cost of $112,629,390 for the turbine/generator modifications and water quality measures alone.[10] While Cube Yadkin's current scope of work and budget has been reduced below this amount, the required modifications are significant and allow these QFs to be treated as "new" capacity under PURPA. More specifically, the FERC license requires:

a. High Rock. The License requires that all three turbine/generator units be refurbished to improve hydraulic efficiency. The dissolved oxygen ("DO") monitoring equipment below the dam must be upgraded to allow for the transmittal of data in 15-minute increments from the DO monitors to the Dispatch Center. A telemetry system must be installed to provide real-time water quality data to researchers and the public via the web. Turbine aerating technology and cone valves must be installed to provide the maximum water quality improvement. These improvements will increase the total installed capacity from 32.9 MW to 40.32 MW. Cube Yadkin is also replacing the balance of plant at High Rock, including all electrical and mechanical systems such as switchgear, transformers, governors, and protective relays. Modern spill control and containment technology will also be installed. New unit controls and governors will be installed, which will improve plant efficiency. High efficiency transformers and power distribution systems will be installed to reduce plant power consumption.

[10] *See Order Issuing New License* at ¶¶ 38, 43, describing certain of the proposed upgrades, with FERC staff cost estimates in 2007 dollars provided in the Final Environmental Impact Statement for Hydropower Licenses, Yadkin Hydroelectric Project - FERC Project No. 2197-073 at 245, 248.

b. Tuckertown. The License requires that the three turbine/generator units be refurbished to improve hydraulic efficiency. The License requires the installation of aerating cone valves, DO monitoring equipment below the dam, and a telemetry system to provide real-time water quality data. New cooling systems were installed to improve unit efficiency, as well as provide an improvement in spill containment and control. New unit controls were installed in two units, and the third will be installed next year, to provide improved plant efficiency.

c. Falls. The License requires that three of the turbine/generator units be refurbished to improve hydraulic efficiency. DO monitoring equipment below the dam must be upgraded and telemetry system developed and installed to provide real-time water quality data.

d. System control. A new master control system will be developed, allowing operation of all the facilities in a coordinated and optimized way. By operating the plants as a single group instead of individual units, the overall efficiency and generated power will be increased.[11]

e. Enhancement of aquatic habitat, fish populations, wetlands, recreational opportunities, and aesthetics. In addition to the modifications and upgrade, the License requires that the operations of the Cube Yadkin QFs (and Narrows) be significantly altered to enhance aquatic habitat, fish populations, wetlands, recreational opportunities, and aesthetics. These requirements are detailed more fully in the License, but specifically include elevation controls and flow regimes to protect "aquatic habitat, fish populations, wetlands, recreational opportunities, and aesthetics."[12] The License requires that significant recreational facility upgrades, including improvements to several existing recreational sites and construction of new fishing piers, campsites, and a swimming area, be implemented.[13] The License also requires a number of operational changes and studies to identify and protect endangered species within the project boundaries.[14] Finally, the License requires that an Historic Properties Management Plan intended to protect cultural resources in the vicinity be developed and implemented.[15]

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[11] This includes Narrows, as well as the three QFs.

[12] *Order Issuing New License* at ¶ 32.

[13] *Id.* at ¶ 47.

[14] *Id.* at ¶ 5.

[15] *Id.* at ¶ 49.

Thus, while the Cube Yadkin QFs have been capable of generating hydroelectricity for decades—in two cases nearly a century—the License effectively restarts the useful life of these facilities as hydroelectric generating facilities by requiring sweeping operational and infrastructure changes, including state-of-the-art turbine/generator units, aeration technology, environmental controls, and resource management protocols, all comparable to those applicable to new facilities. The License includes detailed and specific terms and conditions related to the improvement and operation of the Cube Yadkin QFs for the next thirty-eight (38) years.

9. At Duke's suggestion, reflecting the substantial investment in the modernization and renewal of the Cube Yadkin facilities, Cube Yadkin has sought registration of all four of the Yadkin facilities as New Renewable Energy Facilities. *See* Docket Nos. SP-9172, Sub 0; SP-9172, Sub 1; SP-9172, Sub 2; and EMP-94, Sub 0. These registrations were filed on March 16, 2017, and remain pending as of this date.

10. Unlike solar QFs and some other types of renewables, the Cube Yadkin QFs are available 24 hours a day, can be scheduled during peak periods, and can provide significant value to Duke's transmission systems, particularly in counterbalancing existing, and integrating the expected expansion of, intermittent resources. In addition, as explained subsequently herein, a PPA that included all four of Cube Yadkin's hydroelectric facilities would provide significant value in that they could be made subject to Duke's dispatch control, and Duke could use the energy and capacity during the hours Duke needed them the most. Given the large expected increase in solar generation on the Duke system over the next several years, having the ability to fully dispatch all four Yadkin facilities would provide Duke significant operational flexibility and enable the integration of new solar

resources with the clean, renewable energy generated by the Yadkin facilities. In addition, Duke's downstream hydroelectric facilities, Blewett and Tillery, would benefit from the increased dispatch coordination with the Yadkin facilities.

COUNT ONE: COMPLAINT AND DECLARATORY RULING

11. PURPA was part of a package of legislation called the National Energy Act and was designed to combat a nationwide energy crisis by encouraging conservation of oil and natural gas and promoting 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 using renewable fuel sources, such as hydroelectric energy. 16 U.S.C. § 824a-3; *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 405 n.1 (1983).

12. Section 210 of PURPA obligates electric utilities to purchase the energy and capacity of cogeneration facilities and small power production facilities that meet the requirements of PURPA Section 201, which are called qualifying facilities or QFs.

13. PURPA charges the FERC with implementing the mandatory purchase and sell obligations, requiring electric utilities to purchase electric power from, and sell power to, qualifying cogeneration and small power production facilities. *S. Cal. Edison Co. v. FERC*, 443 F.3d 94, 95 (D.C. Cir. 2006) (citing PURPA Section 210(a)(1)-(2), 16 U.S.C. § 824a-3(a)(1)-(2)). State regulatory authorities are, in turn, required to implement PURPA in a way that gives effect to FERC's regulations implementing PURPA. *See* PURPA Section 210(f)(1), 16 U.S.C. § 824a-3(f)(1); *FERC v. Mississippi*, 456 U.S. 742, 751 (1982).

14. The regulations promulgated by FERC allow the QF to elect to sell energy "as available" or to sell "energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term." 18 C.F.R. § 292.304(d).

15. As the Commission has acknowledged in various orders, FERC wrote the "legally enforceable obligation" concept into its PURPA rules knowing that QF and utility negotiations might not proceed smoothly and that a utility might try to frustrate a QF's exercise of its PURPA rights. The LEO concept protects the QF in such a situation. The concept was explained by FERC in a PURPA enforcement action, where the FERC wrote:

> Thus, under our regulations, a QF has the option to commit itself to sell all or part of its electric output to an electric utility. ***While this may be done through a contract, if the electric utility refuses to sign a contract, the QF may seek state regulatory authority assistance to enforce the PURPA imposed obligation on the electric utility to purchase from the QF, and a non-contractual, but still legally enforceable, obligation will be created pursuant to the state's implementation of PURPA.*** Accordingly, a QF, by committing 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 noncontractual, but binding, legally enforceable obligations.*** The LEO is based upon the QF's exercise of its options under PURPA and FERC rules.

J.D. Wind, 129 FERC ¶61,148 (2009), *recon. denied*, 130 FERC ¶61,127 (2010) (emphasis supplied). *See also id.* Order on Arbitration, Docket No. E-2, Sub 966 (EPCOR v. Progress Energy Carolinas) (Jan. 26, 2011), at 8-9.

16. In explaining a QF's rights under PURPA and its regulations, the FERC has said that QFs are entitled to "long-term avoided cost contracts or other legally enforceable obligations ["LEOs"] with rates determined at the time the obligation is incurred, even if the avoided costs at the time of delivery ultimately differ from those calculated at the time the obligation is originally incurred." *J.D. Wind 1, LLC*, 130 FERC ¶ 61,127, at para. 23

(2010); *see also Order Setting Avoided Cost Input Parameters*, N.C.U.C. Docket No. E-100, Sub 140 (Dec. 31, 2014) ("*Order Setting Parameters*") at 19 (acknowledging a QF's legal right to long-term fixed rates pursuant to Section 210 of PURPA under the *J.D. Wind* Orders).

17. The FERC has not, by regulation or by order, specified a minimum or maximum term for PPAs offered by electric utilities to QFs. However, the FERC has held that QFs are entitled to contracts "long enough to allow QFs reasonable opportunities to attract capital from potential investors." *Windham Solar LLC & Allco Fin. Ltd.,* 157 FERC ¶ 61,134 at para. 8 (Nov. 22, 2016). In other words, the FERC has made clear that a QF is entitled to a PPA with a duration sufficient to justify investment in the underlying project, an issue of particular concern to Cube Yadkin in acquiring the Yadkin facilities. A long-term PPA at fixed rates is the only practical way to provide sufficient certainty for QFs of the size and scope of the Cube Yadkin QFs.

18. On November 15, 2016, Duke filed its Joint Initial Statement and Proposed Standard Avoided Cost Rate Tariffs of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC with the Commission in Docket No. E-100 Sub 148 (the "2016 Duke Avoided Cost Proposal"). The 2016 Duke Avoided Cost Proposal requested sweeping changes to the methodology by which the electric utilities' avoided costs are calculated, which would have the impact of dramatically reducing the utilities' avoided costs, and, therefore, rates offered to QFs.

19. The 2016 Duke Avoided Cost Proposal asserted that DEP and DEC "routinely negotiate PURPA PPAs with larger QFs, mitigating concerns raised in 2014 in the Sub 140 [avoided cost] proceeding" about the difficulty of obtaining a negotiated PPA

with DEP or DEC. 2016 Duke Avoided Cost Proposal at 27. On information and belief, however, Duke is currently declining to enter into long-term PPAs with QFs not eligible for the standard offer and is insisting instead on short, five-year agreements. *See, e.g.,* Hearing Transcript, Vol. 5, Docket No. E-100, Sub 148, at p. 73, lines 20-22 ("Q. And I also heard you to say earlier today that now for the negotiated contracts, Duke is offering not a 10-year term but a five-year term. A. That's correct."). *See also id.* at pp. 79-82 (colloquy between Chairman Finley and Witnesses Bowman and Freeman concerning the potential for rash of complaints at the Commission concerning the appropriate length of the term of non-standard purchase agreements to appropriately reflect the need for financial viability of renewable energy projects).

20. The Cube Yadkin QFs have self-certified by filing Form 556s with the FERC on September 28, 2016. Hard copies of the FERC Form 556s were mailed to Duke at its principal place of business in Charlotte (Attn: Customer Owned Generation - Mail Code ST13A, P.O. Box 1010, Charlotte, NC 28201) on October 3, 2016. As a result of the consummation of the purchase of the Cube Yakin QFs, Cube Yadkin is now the owner of the QFs and has updated the FERC Form 556s to reflect its ownership. *See* Amended Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility, Docket Nos. QF16-1309-000, QF16-1310-000, and QF16-1311-000 (March 9, 2018).

21. Each of the Cube Yadkin QFs has a nameplate capacity in excess of the maximum size for which the Commission has approved standard contract terms and conditions. *See, e.g., Order Establishing Standard Rates and Contract Terms for Qualifying Facilities,* N.C.U.C. Docket No. E-100, Sub 140 (Dec. 17, 2015), at Finding of

Fact 1. The QFs must therefore negotiate the terms and conditions of their respective PPAs with Duke.

22. Conversations with Duke concerning the purchase of QF capacity began over a year and a half ago. In fact, Cube Yadkin reached out to Duke in March 2016, prior to signing the purchase agreement with Alcoa, as part of the due diligence process to introduce itself and learn how Duke might approach a long-term PPA. Such an agreement was a critical component of Cube Yadkin's business plan to acquire the Yadkin Project facilities from Alcoa, and it was known and supported by Alcoa. As evidenced by Alcoa's submittal of the Form 556s to establish QF rights, it was understood and agreed by the parties that Alcoa would support Cube Yadkin's efforts to enter into a long-term PPA with Duke to sell energy and capacity.

23. Immediately upon executing the purchase agreement with Alcoa, Cube Yadkin again contacted Duke, which resulted in in-person meetings in early August 2016 to discuss a potential long-term PPA for the QFs. On August 23, 2016, Cube Yadkin contacted Duke via email to follow-up an in-person meeting confirming its plan to certify High Rock, Tuckertown, and Falls as QFs and reiterating its request "to have further discussions with Duke regarding longer-term QF contracts for these facilities." *See* email dated August 23, 2016 from John R. Collins, Executive Vice President and Managing Director – Business Development, Cube Hydro Partners to Regis Repko, Senior Vice President and Chief Fossil/Hydro Officer, Duke Energy (attached as Exhibit 1).

24. Again, on or about September 16, 2016, Cube Yadkin contacted Duke to further discuss Duke purchasing the output of the Cube Yadkin QFs. This discussion was confirmed by Duke in a responsive letter dated September 21, 2016, sent by Duke to Cube

Yadkin in "follow up to our conversation of September 16, 2016, during which [Duke] communicated [its] ... positions in response to your inquiry soliciting Duke's interest in purchasing the output of the Yadkin system." *See* Letter dated September 21, 2016 from Michael Keen, Business Development Manager, Duke Energy, to John R. Collins, Executive Vice President and Managing Director – Business Development, Cube Hydro Partners (attached as Exhibit 2). In this letter, Duke states that it has no current need for energy or capacity and that "to the extent Cube Yadkin approached Duke under PURPA, that under PURPA's requirements, Duke would likely have no obligation to purchase any output of energy or capacity from the Yadkin system units that may be certified as qualified facilities." *Id.*

25. Subsequently, on October 11, 2016, Cube Yadkin transmitted a letter to Duke updating Duke on the Yadkin facilities self-certification as QFs and responding to its assertions regarding eligibility under PURPA. *See* undated letter from John R. Collins, Executive Vice President and Managing Director – Business Development, Cube Hydro Partners to Michael Keen, Business Development Manager, Duke Energy (attached as Exhibit 3). Cube Yadkin further noted Duke's obligations under PURPA and the FERC's regulations to purchase energy and capacity made available from QFs and recommended that the parties meet to discuss any concerns relating to the facilities QF status "at your earliest convenience." *Id.*

26. In response, by letter dated October 14, 2016, Duke rejected Cube Yadkin's commitment to sell electrical output under PURPA, stating that "this letter serves as Duke's formal notice under 292.309/310 that if in the future Cube Hydro is a qualifying facility with respect to the Yadkin system and it seeks to sell power to Duke, it is Duke's view that

it is exempted from any purchase obligation under PURPA with respect to the Yadkin system." *See* Letter dated October 14, 2014 from Michael Keen, Business Development Manager, Duke Energy, to John R. Collins, Executive Vice President and Managing Director – Business Development, Cube Hydro Partners (attached as Exhibit 4). In this letter, Duke goes on to assert—allegedly as a basis for Duke's position that it is "exempted" from any purchase obligation under PURPA—that "Cube Hydro has sought, and Alcoa currently has market-based rate authority on the basis of the ability and history of selling the output of the Yadkin system into competitive wholesale and organized markets." *Id.*

27. As evidenced by the exchange of communications between the parties, Duke's LEO to purchase the output of each of the QFs was established as of September 16, 2016, when Cube Yadkin communicated its commitment to sell the output of the facilities to Duke. At the latest, the LEOs were established as of September 28, 2016 upon the filing of the FERC Form 556s, or October 11, 2016, when Duke received Cube Yadkin's letter confirming its intention to sell to Duke as QFs. The effectiveness of this October 11th letter to establish the LEOs can be determined from Duke's letter dated October 14, 2016, which is attached as Exhibit 4, rejecting Cube Yadkin's commitment to sell its QF output. Although Cube Yadkin had not yet consummated its purchase of the QFs at the time the LEOs were established, it had signed a binding contract to purchase the facilities (with only limited regulatory out clauses), had submitted an application to transfer the FERC license as early as July 25, 2016, and had prepared the self-certification Form 556s that had been filed with the FERC.[16] In any event, the obligation established under

[16] The establishment of a LEO has never been premised upon an ability to deliver power at the time the LEO is created. As has been recognized by the FERC, a QF is entitled to choose avoided costs calculated at the time it incurs the obligation even if those avoided costs differ from the avoided costs at the time of delivery. *Final Rule Regarding the Implementation of Section 210*

PURPA attaches to the facility, not to the owner of the QFs. *See, e.g.,* 16 U.S.C. § 824a-3 (describing obligation of public utilities to purchase electric energy from "facilities"); 18 C.F.R. § 292.303(a) ("Each electric utility shall purchase ... any energy and capacity which is made available from a qualifying *facility*")(emphasis supplied). And just like other situations in which a developer's establishment of an LEO has occurred at the financing stage of the project, Cube Yadkin's commitment to acquire the facilities, and its willingness to make the investment required to upgrade and modernize the facilities required as a condition of the transaction, were predicated on the qualification of the facilities as QFs and the requirement under PURPA that Duke purchase the output of the QFs.

28. Consistent with its "formal notice" to Cube Yadkin of its position that it is not required under PURPA to purchase the output of the Cube Yadkin QFs, Duke has refused to provide proposed contract terms, including pricing, for a long-term QF PPA or to otherwise enter into negotiations for such an agreement. Duke did represent that it would enter into good faith negotiations with Cube Yadkin concerning the purchase of the output of the Yadkin facilities on a non-PURPA basis. The conversations with Duke regarding the "alternative" approach first began as early as November 2016. With hopes of furthering these discussions, Cube Yadkin entered into a letter agreement with Duke dated April 25, 2017, which stated that any such discussions would not be deemed to establish any LEO under or pursuant to PURPA.

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of the Public Utility Regulatory Policies Act of 1978, Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880, and *J.D. Wind 1, LLC*, 130 FERC ¶ 61,127, at para. 23 (2010). Thus, the LEO is a necessary precondition to a QF beginning the process by which ultimately energy and capacity can be delivered, whether through the construction of a new facility or, as in this case, the upgrading and modification of existing facilities.

29. Relying on the possibility of an alternative path to a PPA, Cube Yadkin filed the currently pending registration statements in mid-March. This included all four Cube Yadkin hydroelectric facilities because the four together could be made subject to Duke's dispatch control, and Duke could use the energy and capacity during peak periods or as necessary for reliability due to intermittent resources such as solar. Recognizing the benefits of this approach, Cube Yadkin delayed the enforcement of its rights as a QF because it was waiting, in good faith, on Duke to engage in the alternative approach. While Duke continued to assure Cube Yadkin that an offer was forthcoming, Duke did not provide an offer until August 10, 2017, nearly four months after the parties entered into the letter agreement and six months after the parties has agreed in principle on the approach. Duke's conduct since the beginning of the discussions between the parties appears to have been designed to discourage Cube Yadkin from pursuing its rights under PURPA.

30. Duke's claim that it is "exempted" from any purchase obligation under PURPA because "Cube Yadkin has sought, and Alcoa currently has, market-based rate authority" is without legal basis. First, the FERC's grant of market-based authority does not have any bearing on QF status and is not tied to any history or ability to sell into competitive markets; rather it is based solely on Cube Yadkin's lack of market power under the applicable FERC regulations. Cube Yadkin is required under federal law to have market-based rate authority, even if it obtains PURPA contracts with Duke, because the three QFs are over the 30 MW threshold for the QF exemption from federal rate regulation. Second, Duke has not sought from the FERC, and certainly has not been granted, an exemption from its obligations under PURPA to purchase from the Cube Yadkin QFs and, therefore, is legally required to enter into a contractual arrangement with Cube Yadkin.

31. As shown above, each of the Cube Yadkin QFs had established a LEO prior to Duke's filing of the 2016 Duke Avoided Cost Proposal with the Commission and is entitled to enter into long-term PPAs with Duke for the purchase of the output of the QFs at Duke avoided cost calculated in accordance with the *Order Setting Parameters*.[17]

32. Section 62-156 of the North Carolina General Statutes provides that, in the event that a small power producer and an electric utility are unable to mutually agree to a contract for the sale of electricity or to a price for the electricity purchased by the electric utility, the Commission shall require the utility to purchase the power at a rate and on terms specified in the statute.

33. On July 27, 2017, House Bill 589 (N.C. Session Law 2017-192) was signed into law. Part I of this legislation makes certain revisions to the definition of "small power producer" under G.S. § 62-3(27a) to bring that definition in line with the federal definition and to G.S. § 62-156 governing a utility's obligation to purchase power from small power producers. These statutory revisions, however, are not applicable to the Cube Yadkin QFs as Duke's obligation is effective as of the establishment of the LEO, which predates the new legislation. *See, e.g.,* 18 C.F.R. § 292.304(d)(ii); *Order Setting Parameters*, at 19

[17] As discussed in the introduction to this complaint, the formal LEO process established by the Commission in prior cases is simply not applicable to the facts and circumstances here, which include hydroelectric facilities constructed prior to the enactment of the statutory obligation to secure a CPCN pursuant to G.S. § 62-110.1 that have had long-standing relationships with the electric utilities in question seeking to invoke their rights under PURPA. The Commission's recently-articulated LEO test—which requires that a QF (1) be certified as a QF, (2) have a CPCN (or have filed a report of proposed construction), and (3) have provided to the utility a Notice of Commitment form—has no applicability to the instant situation involving QFs that predate the statutory certification processes. Because this formal LEO process does not by its own terms apply to the Cube Yadkin QFs, its applicability should be waived if the Commission were to determine that it was otherwise applicable to Cube Yadkin, given that Cube Yadkin could not have known that in advance. In any event, Cube Yadkin substantially complied with the substance of the requirement in its communications with appropriate personnel at Duke.

(acknowledging a QF's legal right to long-term fixed rates under Section 210 of PURPA under *J.D. Wind* Orders).

34. Section 62-73 of the North Carolina General Statutes empowers this Commission to hear complaints against public utilities brought "by any person having an interest, either direct or as a representative of any persons having a direct interest in the subject matter of such complaint."

35. In addition to the Commission's complaint authority pursuant to N.C. Gen. Stat. § 62-73, the North Carolina Declaratory Judgment Act, N.C. Gen. Stat. § 1-253, empowers courts of record to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. Such declarations shall have the force and effect of a final judgment or decree. Pursuant to N.C. Gen. Stat. § 62-60, the Commission may exercise this power under the Declaratory Judgment Act with respect to all subjects over which the Commission has jurisdiction.

COUNT TWO: PETITION FOR ARBITRATION

36. The allegations contained in paragraphs 1 – 35 of this Complaint are realleged and incorporated by reference.

37. Cube wishes to enter into a PPA with Duke to sell energy and capacity from the Cube Yadkin QFs at rates that reflect Duke's avoided cost as of the date of the respective LEOs. Duke has refused to negotiate the terms of long-term QF PPAs.

38. The issues to be resolved in this arbitration are: (1) whether Duke has negotiated freely, openly, and in good faith with respect to entering into new long-term PPAs for the output of the Cube Yadkin QFs with a term of not less than ten years, as required by PURPA, and (2) whether Duke has negotiated freely, openly, and in good faith

with respect to payment to Cube Yadkin of its full avoided costs, including both capacity and energy components, also as required by PURPA.

39. Pursuant to N.C. Gen. Stat. § 62-40 and the orders of the Commission in the avoided costs proceedings, Complainant requests that the Commission act as arbitrator and resolve the unresolved issues arising from the negotiations, including Duke's actual avoided costs, including both capacity and energy components. Cube Yadkin seeks ten-year PPAs and, therefore, meets the two-year commitment of capacity requirement for the Commission to conduct such an arbitration.

40. Complainant requests that the Commission require Duke to: (1) enter into long-term PPAs for the output of the three Cube Yadkin QFs and (2) provide payment pursuant to these new long-term PPA of Duke's full avoided costs, including both capacity and energy components, as of the date of the establishment Cube Yadkin's LEOs.

RELIEF REQUESTED

WHEREFORE, Complainant respectfully requests that the Commission grant the following relief:

1. Treat this matter as a formal Complaint against DEP and DEC pursuant to Section 62-73 of the North Carolina General Statutes and the Commission Rules of Practice and Procedure, and as a request for a declaratory judgment pursuant to Section 1-253 of the North Carolina General Statutes;

2. Declare that DEP and DEC are legally obligated to purchase the output of the Cube Yadkin QFs under PURPA, that the legally enforceable obligations arose as of September 16, 2016 (or, at the latest, October 11, 2016), that the formal processes adopted by the Commission in its avoided cost orders respecting the establishment of a LEO were

not intended to and do not apply to the Cube Yadkin QFs, and that the Cube Yadkin QFs are entitled to avoided cost rates established in accordance with the Commission's Order Establishing Avoided Cost Rates for DEC and DEP issued March 10, 2016, in Docket No. E-100, Sub 140;

3. Issue an Order directing DEP and/or DEC to enter into a PPA with each Cube Yadkin QF incorporating fixed, levelized avoided cost rates for energy and capacity and with a contract term of sufficient length that the investment in the underlying QF projects is justified, not less than ten years;

4. Arbitrate the unresolved issues consistent with the position of the Complainant as set forth herein;

5. Set this matter on an expedited procedural schedule; and

6. Grant such other and further relief as this Commission may find just and reasonable.

Respectfully submitted, this 29th day of March, 2018.

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Attorneys for Cube Yadkin Generation LLC

VERIFICATION

The undersigned, being first duly sworn, deposes and says that he is the Secretary of Cube Yadkin Generation LLC. He furthers states that he has read the foregoing Complaint, Request for Declaratory Ruling, and Request for Arbitration ("Complaint") and that, to his personal knowledge and belief, the matters and statements contained therein are true, except as to those matters or statements made upon information and belief, and as to those, he believes them to be true; and that he verifies the foregoing Complaint on behalf of Complainant.

This the 28th day of March, 2018.

Eli Hopson

Sworn to and subscribed before me
this 28th day of March, 2018.
Notary Public
My Commission Expires: 11-14-2018

KRYSTAL ISVES NOTARY PUBLIC EXP. 11-14-18 DISTRICT OF COLUMBIA

EXHIBIT 1

From: John Collins
Sent: Tuesday, August 23, 2016 9:50 AM
To: regis.repko@duke-energy.com
Cc: Kristina Johnson <kjohnson@cubehydro.com>
Subject: Follow-up to Our Meeting

Regis,

I hope this email finds you well and enjoying the end of summer. I am emailing to follow-up on our discussions regarding the Yadkin hydroelectric assets that Cube Hydro is purchasing from Alcoa. As we discussed in our meeting, we plan of registering 3 of the assets, High Rock, Tuckertown and Falls, as Qualifying Facilities and would like to have further discussions with Duke regarding longer-term QF contracts for these facilities. In addition, we discussed the possibility of a long-term PPA arrangement for all four facilities including the Narrows plant with Duke that could provide additional flexibility for Duke to manage its grid due to the continuing impact of solar generation on the Duke network.

As a follow-up to the meeting you were going to put us in contact with the appropriate team members at Duke to begin discussions. I wanted to let you know that Kristian and I plan to be in North Carolina next Thursday, September 1st, and have some availability to meet with your team if their schedules permit.

Let me know if that will work or who we should contact to begin further discussion related to long-term PPAs for the Yadkin hydroelectric plants.

Look forward to hearing from you.

Regards,

John

John R. Collins
Executive Vice President and Managing Director – Business Development
Cube Hydro Partners
Two Bethesda Metro Center, Suite 1330
Bethesda, MD 20814
(240) 482-2703 (Work)
jcollins@cubehydro.com

EXHIBIT 2

DUKE ENERGY.

Duke Energy
299 First Avenue North
St. Petersburg, FL 33701

September 21, 2016

Cube Hydro Partners
Two Bethesda Metro Center, Suite 1330
Bethesda, MD 20814

Attn: John R. Collins
Executive Vice President and Managing Director – Business Development

Re: Inquiry concerning sale of output of Yadkin system to Duke Energy

Dear John:

This letter is a follow up to our conversation of September 16, 2016 during which I communicated to you Duke Energy Progress, LLC and Duke Energy Carolinas, LLC's (collectively/individually, "Duke") positions in response to your inquiry soliciting Duke's interest in purchasing the output of the Yadkin system. The "Yadkin System" consists of four hydro-electric units as follows: High Rock Station, approximately 33 MW; Tuckertown Station, approximately 39 MW; Falls Station, approximately 30 MW; and Narrows Station, approximately 119 MW.

The Yadkin system is currently owned and operated by Alcoa Inc., and is the subject of a potential purchase by Cube Yadkin Generation, LLC ("Cube Yadkin"). You informed me that Cube Yadkin does not currently own or operate the Yadkin system, but anticipates that it will close on the transaction to own and operate the facilities around November 1, 2016. As I communicated to you previously, Duke does not have any current needs for energy or capacity; however, if a need arises in the future, Duke would likely issue a request for proposals and Cube Yadkin can elect to submit a responsive bid. You further informed me that Cube Yadkin is considering certifying the three smaller units as qualifying facilities under the Public Utility Regulatory Policies Act of 1978 ("PURPA"). In that regard, I informed you that to the extent Cube Yadkin approached Duke under PURPA, that under PURPA's requirements, Duke would likely have no obligation to purchase any output of energy or capacity from the Yadkin system units that may be certified as qualified facilities.

Please feel free to contact me with any questions.

Sincerely,

Michael Keen
Business Development Manager
Duke Energy

EXHIBIT 3

Michael Keen
Business Development Manager
Duke Energy
299 First Avenue North
St. Petersburg, FL 33701

Dear Michael,

I am writing in response to your letter dated September 21, 2016 (the "September 21 Letter") regarding the discussions between Duke Energy Progress, LLC and Duke Energy Carolinas, LLC (individually and together, "Duke"), and Cube Hydro Partners, LLC ("Cube Hydro") with respect to the four hydroelectric projects on the Yadkin River (collectively, the "Yadkin Projects") that are currently owned by Alcoa Power Generating Inc. ("Alcoa").

As we discussed, Cube Hydro Carolinas LLC, an affiliate of Cube Hydro, has agreed to acquire the Yadkin Projects from Alcoa. The acquisition is anticipated to occur before the end of 2016. Alcoa has certified three of the four Yadkin Projects – the approximately 30 MW Falls project, the approximately 40 MW Tuckertown project, and the approximately 34 MW High Rock project – as qualifying small power production facilities ("QFs") under the Public Utility Regulatory Policies Act of 1978 ("PURPA") and the implementing regulations of the Federal Energy Regulatory Commission ("FERC").

As you may know, Section 210(m) of PURPA and FERC's regulations require electric utilities, including Duke, to purchase energy and capacity made available from QFs. *See* 16 U.S.C. § 824a-3(a)(2) (2012); 18 C.F.R. § 292.303(a) (2016). FERC's regulations further specify that a QF shall have the option of making sales to an electric utility pursuant to a legally enforceable obligation, or on an "as available" basis. *See* 18 C.F.R. § 292.304(d) (2016).

Given that three of the Yadkin Projects are now QFs, we recommend that we meet to discuss your concerns at your earliest convenience. We are happy to come to your offices in late October or early November to discuss the process for making sales from these projects to Duke pursuant to PURPA. We would anticipate that such discussions would, among other things, address the statement in the September 21 Letter that, "under PURPA's requirements, Duke would likely have no obligation to purchase any output of energy or capacity from the Yadkin system units that may be certified as [QFs]." While electric utilities may petition FERC to be relieved of their mandatory purchase obligations under PURPA, it does not appear that FERC has issued an order relieving Duke of such obligations, or that there are any other applicable exceptions or exemptions.

Thank you for your attention to this matter. We'll be contacting your office to find a mutually agreeable date to meet at your offices.

Sincerely,

John R. Collins
Executive Vice President and
Managing Director – Business
Development

Cc: Kristina Johnson
Dhiaa M. Jamil

EXHIBIT 4

DUKE ENERGY

Duke Energy
299 First Avenue North
St. Petersburg, FL 33701

October 14, 2016

Via Email and Priority Mail

Mr. John R. Collins
Executive Vice President and Managing Director – Business Development
Cube Hydro Partners, LLC
Two Bethesda Metro Center, Suite 1330
Bethesda, MD 20814

Re: Response to Undated Cube Hydro Letter Received October 11, 2016

Dear John:

This letter is a follow up to your undated letter to Duke Energy Carolinas, LLC and Duke Energy Progress, LLC ("Duke") which was received on October 11, 2016 (the "Cube letter").

In the Cube letter you inform Duke, as Cube Hydro Partners LLC, on behalf of Cube Hydro Carolinas, LLC (collectively, "Cube Hydro"), that Alcoa Power Generation, Inc. ("Alcoa") has certified three out of four units of the Yadkin system as qualifying facilities under PURPA. The "Yadkin system" consists of four hydro-electric units, as follows: High Rock Station, approximately 33 MW; Tuckertown Station, approximately 39 MW; Falls Station, approximately 30 MWs; and, Narrows Station, approximately 119 MW. You further inform us that Cube Hydro seeks to purchase the Yadkin system from Alcoa, and may be the actual owner and operator of the Yadkin system by the end of 2016. At this time, Cube Hydro neither owns nor is a qualifying facility with respect to the Yadkin system. Therefore, Cube Hydro has no potential rights to exert under PURPA. Although your letter fails to reference our discussions, we have previously and prior to your letter informed you of the PURPA provisions under which Duke would be exempted from PURPA with regard to the Yadkin system. Accordingly, this letter serves as Duke's formal notice under 292.309/310 that if in the future Cube Hydro is a qualifying facility with respect to the Yadkin system and it seeks to sell power to Duke, it is Duke's view that it is exempted from any purchase obligation under PURPA with respect to the Yadkin system.

Representations and warranties in applications made at FERC demonstrate that Cube Hydro has sought, and Alcoa currently has market-based rate authority on the basis of the ability and history of selling the output of the Yadkin system into competitive wholesale and organized markets. However, after you have closed on the transaction with Alcoa, if you seek to approach Duke under PURPA we will be glad to discuss this matter further.

Sincerely,

Michael Keen
Business Developer Manager, Duke Energy

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

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

DOCKET NO. E-2, SUB 1177 In the Matter of Cube Yadkin Generation, LLC, Complainant v. Duke Energy Progress, LLC, Respondent DOCKET NO. E-7, SUB 1172 In the Matter of Cube Yadkin Generation, LLC, Complainant v. Duke Energy Carolinas, LLC, Respondent	**JOINT MOTION OF DUKE ENERGY PROGRESS, LLC AND DUKE ENERGY CAROLINAS, LLC FOR EXTENSION OF TIME TO FILE RESPONSE TO COMPLAINT**

NOW COME Duke Energy Progress, LLC and Duke Energy Carolinas, LLC (collectively "the Companies") by and through counsel and pursuant to Rules R1-7 and R1-9 of the Rules and Regulations of the North Carolina Utilities Commission ("Commission"), and respectfully request that the Commission enter an order granting a three-week extension of time until May 7, 2018 for the Companies to answer or satisfy the complaint of Cube Yadkin Generation, LLC ("Complainant") at issue in this proceeding.

The Companies show the Commission the following:

1. On March 29, 2018, Complainant filed its Complaint ("Complaint") with the Commission.

2. On the same day, March 29, 2018, the Commission issued its *Order Serving Verified Complaint, Request for Declaratory Ruling, and Request for Arbitration* directing the Companies to either satisfy the demands of Complainant and so advise the Commission, or file a response to the Complaint on or before April 16, 2018.

3. The Complaint is complex in nature and requires significant time to review and analyze the issues presented by Complainants. The Companies' attorneys and staff responsible for answering the Complaint are also diligently working on other matters currently before the Commission.

4. Counsel for Complainant has authorized the Companies to state that Complainant does not oppose the requested extension.

WHEREFORE, the Companies respectfully request that the Commission grant an extension until May 7, 2018 to answer or satisfy the Complaint at issue in this proceeding and any such further relief as the Commission deems just and proper.

Respectfully submitted, this the 10th day of April, 2018.

Kendrick C. Fentress
Associate General Counsel
Duke Energy Corporation
P.O. Box 1551/NCRH20
Raleigh, North Carolina 27601
(919) 546-6733
Kendrick.Fentress@duke-energy.com

CERTIFICATE OF SERVICE

I certify that a copy of Duke Energy Progress, LLC and Duke Energy Carolinas, LLC's Joint Motion for Extension of Time to File Response to Complaint, in Docket Nos. E-2, Sub 1177 and E-7, Sub 1172 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 10th day of April, 2018.

Kendrick C. Fentress

Kendrick C. Fentress
Associate General Counsel
Duke Energy Corporation
P.O. Box 1551 / NCRH 20
Raleigh, NC 27602
Tel 919.546.6733
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Kendrick.Fentress@duke-energy.com

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,	)	ORDER GRANTING
Respondent	)	EXTENSION OF TIME
	)	
DOCKET NO. E-7, SUB 1172	)	
	)	
In the Matter of	)	
Cube Yadkin Generation, LLC,	)	
Complainant	)	
	)	
v.	)	
	)	
Duke Energy Carolinas, LLC,	)	
Respondent	)	

BY THE CHAIRMAN: 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 (DEP), and Duke Energy Carolina, LLC (DEC), (together, Respondents), which was served upon the Respondents by the Commission's Order issued on the same day. Pursuant to that Order, the Respondents are directed to either satisfy the demands of the Complainant or to file an answer with the Commission on or before April 16, 2018.

On April 10, 2018, the Respondents filed a motion for an extension of time to file a response to the Complaint's filing, requesting that the Commission allow the Respondents until May 7, 2018 to answer or satisfy the Complaint at issue in this proceeding. In support of their requested extension, the Respondents state that the complaint is complex in nature and requires significant time to review and analyze the issues presented by the Complainant. The Respondents further state that counsel for the

Complainant has authorized the Respondent to state that the Complainant does not oppose the requested extension.

Based upon the foregoing, the Chairman finds good cause exists to grant the Respondents' requested extension, thereby allowing the Respondents until May 7, 2018, to either satisfy the demands of Complainant or to file an answer with the Commission.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 13th day of April, 2018.

NORTH CAROLINA UTILITIES COMMISSION

Janice H. Fulmore, Deputy Clerk

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

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

DOCKET NO. E-2, SUB 1177 In the Matter of Cube Yadkin Generation, LLC, Complainant v. Duke Energy Progress, LLC, Respondent DOCKET NO. E-7, SUB 1172 In the Matter of Cube Yadkin Generation, LLC, Complainant v. Duke Energy Carolinas, LLC, Respondent	**RESPONDENTS' JOINT ANSWER AND MOTION TO DISMISS COMPLAINT OF CUBE YADKIN GENERATION, LLC**

NOW COME Duke Energy Progress, LLC ("DEP") and Duke Energy Carolinas, LLC ("DEC") (collectively "the Companies" or "Respondents") by and through counsel and pursuant to Rule R1-9 of the North Carolina Utilities Commission ("Commission") Rules and Regulations, and respond to the Complaint, Request for Declaratory Judgement, and Request for Arbitration filed by Cube Yadkin Generation, LLC ("Complainant" or "Cube Yadkin") on March 29, 2018. Respondents have reviewed the Complaint and reply to the allegations as set forth below. Any allegation not specifically admitted shall be deemed denied.

MOTION TO DISMISS

The Respondents move the Commission to dismiss the Complaint with prejudice because, for the reasons set forth herein, Cube Yadkin has failed to state a claim upon which relief can be granted.

SUMMARY OF ANSWER AND DEFENSES

The Respondents have acted in good faith and consistently with the requirements of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), the rules and regulations of the Federal Energy Regulatory Commission ("FERC"), N.C. Gen. Stat. § 62-156, and this Commission's previous orders implementing PURPA in their interactions, communications, and meetings with Cube Hydro Partners, LLC and its subsidiary, Cube Yadkin Generation, LLC ("Complainant" or "Cube Yadkin").

On February 1, 2017, Cube Yadkin completed its purchase of four hydroelectric facilities - High Rock, Tuckertown, Falls, and Narrows – from Alcoa Power Generating, Inc. ("Alcoa"). Cube alleges that it is entitled to sell to Respondents the output of three of those hydroelectric units along the Yadkin River - High Rock, Tuckertown, and Falls ("Yadkin facilities")[1] - under a PURPA power purchase agreement ("PPA"), incorporating fixed, levelized avoided cost rates for energy and capacity, for a period of not less than ten years at avoided cost rates established in accordance with the Commission's March 10, 2016 *Order Establishing Avoided Cost Rates* in Docket No. E-100, Sub 140. (Complaint at p. 24) Cube Yadkin's request is unavailing. First, this order does not apply to QFs, such as Cube Yadkin, that are not eligible for the Companies' standard offer. Second, and more significantly, this Order does not reflect

[1] As noted in the Complaint, fn. 5, the Narrows facility is not eligible to be a qualifying facility due to its size.

the Companies' current forecast of their respective avoided costs and is not the Commission's most up-to-date determination of the Companies' avoided costs or avoided cost rates. Put simply, the Respondents' position in this matter is that our customers should not be forced to pay Cube Yadkin stale, outdated avoided cost rates in excess of the Respondents' current forecasts of their respective avoided costs; nor should our customers be forced to bear the increased risk of overpayments of avoided cost rates due to a PPA extending for ten years or more. Such a result in inconsistent with PURPA, this Commission's recent avoided cost decisions in Docket Nos. E-100, Sub 140 and Sub 148, and House Bill 589.

Cube Yadkin's demand for a ten-year PURPA PPA at stale, out-of-date avoided cost rates comes against the backdrop of this Commission's and the North Carolina General Assembly's recent actions regarding PURPA implementation and the integration of renewable energy in North Carolina. On November 15, 2016, the Respondents filed their Joint Initial Statements in the 2016 Avoided Cost Proceeding, Docket No. E-100, Sub 148 ("2016 Avoided Cost Proceeding"). The Companies' proposed avoided cost rates and standard contract terms and conditions in that proceeding reflected the economic and regulatory circumstances facing the utilities and qualifying facilities ("QFs"), including the decline in fuel prices since the previous avoided cost proceeding as an input to the calculation of avoided energy rates. Based on those circumstances, the Companies had proposed several changes to the Commission's policies for implementing PURPA. One of the drivers of the Companies' proposed changes was the growing risk to customers of overpayment for power from QFs based on the mandated fifteen-year maximum lengths of standard offer contracts, when, among other things, fuel commodity

prices had been declining significantly over the last several years. *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities,* Docket No. E-100, Sub 148 (Oct. 11, 2017) ("*Sub 148 Order*") at 63, 71.

Approximately eight months after the commencement of the 2016 Avoided Cost Proceeding, on July 27, 2017, House Bill 589 was signed into law by Governor Cooper. Among other things, House Bill 589 revised N.C. Gen. Stat. § 62-156, which governs power sales by small power producers to public utilities. Significantly, N.C. Gen. Stat. § 62-156(c) now provides that:

> Rates to be paid by electric public utilities to small power producers not eligible for the utility's standard contract . . . shall be established through good-faith negotiations between the utility and small power producer, subject to the Commission's oversight as required by law. In establishing rates for purchases from such small power producers, the utility shall design rates consistent with the most recent Commission-approved avoided cost methodology *for a fixed five-year term.* Rates for such purchases shall take into account factors related to the individual characteristics of the small power producer . . . . Notwithstanding this subsection, small power producers that produce electric energy primarily by the use of any of the following renewable energy resources may negotiate for a fixed-term contract that exceeds five years: (i) swine or poultry waste; (ii) hydropower, if the hydroelectric power facility total capacity is equal to or less than five megawatts (MW); or (iii) landfill gas, manure digester gas, agricultural waste digester gas, sewage digester gas, or sludge digester gas.

(Emphasis added). Notably Complainant's Yadkin facilities are in excess of five MW and so are not subject to exemption to the five-year contract requirement.

Cube Yadkin acknowledges that the Commission's *Sub 148 Order* and House Bill 589 changed the methodology by which avoided costs are calculated and the terms and conditions for negotiated PPAs for QFs not eligible for the standard offer. (Complaint at ¶¶ 18, 33) Nevertheless, Cube Yadkin seeks to evade their application to its proposed

negotiated PPA with Respondents by alleging that it is entitled to avoided cost rates and PPA terms that have been superseded by the Commission's *Sub 148 Order* and House Bill 589. To make this argument, Complainant claims that it established a LEO prior to November 15, 2016, when the Companies filed their Joint Initial Statement at the Commission and when the revisions to PURPA implementation in North Carolina began. As shown by this Motion and Answer, however, Cube Yadkin has not followed the Commission's requirements for establishing a LEO (as it concedes) prior to November 16, 2016. Consequently, its argument in support of its requested relief must fail.

Under this Commission's implementation of PURPA, establishment of a LEO is a threshold issue, and QFs are entitled to PPAs with avoided cost rates calculated as of the date of their respective LEOs using data at the time the LEO was established. As discussed in more detail in this Response and Answer, the Commission's requirements for establishing a LEO prior to October 11, 2017 were simple and straightforward: (i) the QF has self-certified with FERC as a QF; (ii) the QF has made a commitment to sell the QF's output to a utility under PURPA using the approved Notice of Commitment form ("NoC form"); (iii) the QF has filed a report of proposed construction or been issued a certificate of public convenience and necessity ("CPCN"). *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities*, Docket No. E-100, Sub 140, issued December 17, 2015 ("*Sub 140 Order*") at 52.

As shown by the Complaint and this Motion and Answer, the following relevant facts not in dispute: (i) Cube Yadkin did not own the Yadkin facilities until February 1, 2017; (ii) Cube Yadkin did not self-certify as a QF with respect to the Yadkin facilities until March 9, 2017; (iii) Cube Yadkin has not submitted the required NoC form; and (iv)

Cube Yadkin does not have a certificate of public convenience and necessity ("CPCN"). Under these undisputed facts, Cube Yadkin has failed to meet the Commission's requirements for establishing a LEO prior to November 15, 2016, in particular, and has failed to establish a LEO in general. Cube Yadkin's Complaint should be dismissed, and its request for declaratory judgment should be denied.

Additionally, because Cube Yadkin has failed to establish a LEO to determine the avoided cost rates and terms and conditions that should be applied to it, there are no issues ripe for arbitration and its Complaint and petition for arbitration should be dismissed.

ANSWER

FIRST DEFENSE: RESPONSE TO THE COMPLAINT'S ALLEGATION

The Respondents deny each allegation of the Complaint not hereinafter specifically admitted and respond as follows to the allegations in the Complaint:

(Parties, Jurisdiction, and Venue)

1. The allegations contained in Paragraph 1 either require no response from the Respondents or are admitted upon information and belief.

2. With respect to allegations contained in footnote 4 to Paragraph 2 of the Complaint, Respondents admit that the Yadkin facilities are interconnected with DEC and DEP through Cube Yadkin's affiliate, Cube Yadkin Transmission, LLC. Respondents admit the remaining allegations contained in Paragraph 2 of the Complaint.

3. Respondents admit the allegations contained in Paragraph 3.

(Background on Cube Yadkin and Cube Yadkin QFs)

4. Respondents admit the allegations contained in Paragraph 4 upon information and belief.

5. With respect to the allegations contained in Paragraph 5, Respondents are without sufficient information to admit or deny when Cube Yadkin signed a contract to acquire the Yadkin facilities. Respondents admit the remaining allegations contained in Paragraph 5, including that Cube Yadkin completed its purchase of the Yadkin facilities on February 1, 2017.

6. Respondents admit that the Yadkin facilities are interconnected with DEC and DEP but deny that they are directly interconnected with DEC and DEP. Respondents admit the remaining allegations contained in Paragraph 6 upon information and belief.

7. With respect to the allegations contained in Paragraph 7, Respondents admit, upon information and belief, that the Yadkin facilities were placed into operation on the dates provided. Respondents admit that the Yadkin facilities were in operation prior to the enactment of the Electricity Act of 1965, but deny that they are not subject to certification by Cube Yadkin under N.C. Gen. Stat. ¶ 62-110.1 and Commission Rule R8-64. Respondents admit that the *Order Withdrawing Application* speaks for itself but deny it supports Cube Yadkin's allegations in Paragraph 7.

8. With respect to the allegations contained in Paragraph 8, Respondents respond as follows:

a. Respondents lack sufficient information to admit or deny whether the Yadkin facilities have undergone or will undergo further "substantial" modifications.

b. Respondents admit that the License speaks for itself.

c. Respondents deny that the Cube Yadkin facilities are "new capacity" under PURPA because they were constructed prior to November 9, 1978 and do not meet FERC's standard for determining whether such capacity that is refurbished may qualify as "new." *Brunswick Pulp and Paper Co., Small Power Prod. & Cogeneration Facilities-Qualifying Status*, 38 FERC ¶ 62,223 (1987).

d. Respondents deny the allegation that modifications required by the License to the existing Yadkin facilities pertaining to turbine/generator efficiency, water quality, protection of aquatic habitat, fish populations, wetlands, recreational opportunities, and aesthetics result in "new capacity" under PURPA. *Id.*

e. Respondents lack sufficient information to admit or deny the allegation about Cube Yadkin's current scope of work and budget for the modifications, but deny the scope of work and budget for these modifications establish "new capacity" under PURPA.

f. Respondents deny that any modification to the Narrows facility results in "new capacity" under PURPA because it is not a QF.

g. Respondents deny that this question has any relevance to whether Cube Yadkin has established a LEO.

9. Respondents deny they "suggested" that Cube Yadkin file for registration as new renewable energy facilities, but they admit they had discussions with Cube Yadkin about entering into a non-PURPA, market-based PPA. Respondents lack sufficient information to admit or deny Cube Yadkin's substantial investment in the modernization and renewal of the Yadkin facilities as the basis for its filing for the registration of the Yadkin facilities and the Narrows facility as new renewable energy

facilities under N.C. Gen. Stat. § 62-133.8(a)(5). Respondents admit that the registrations were filed on March 16, 2017 and remain pending.

10. With respect to the allegations contained in Paragraph 10, the Respondents deny that the Narrows facility is a QF; accordingly, the allegations pertaining to a PPA with all four hydroelectric facilities would not refer to a PURPA PPA; therefore, those allegations are not relevant to the issues before the Commission in this Complaint. Respondents admit that the Yadkin QF facilities are available 24 hours a day, but deny they are available 24 hours a day at full capacity on an annual basis. Respondents admit that the Cube Yadkin facilities can be scheduled during peak periods, subject to limitations associated with license obligations and drought conditions. Respondents deny that a PPA with all four facilities would provide significant incremental value to DEC's increased dispatched coordination with the Yadkin facilities; to the extent the Cube Yadkin assets were bid into a competitive RFP process, any incremental value that was created would then be considered relative to another asset that did not provide that value.

(Count One: Complaint and Declaratory Ruling)

11. Respondents admit the allegations contained in Paragraph 11.

12. Respondents admit the allegation of Paragraph 12 that Section 210 of PURPA obligates electric utilities to purchase the energy and capacity of cogeneration facilities and small power production facilities that meet the requirements of PURPA Section 201. Respondents deny, however, that this obligation is absolute. A public utility may petition the FERC pursuant to Section 292.309 of the FERC's regulations to terminate its obligation to purchase electric energy and capacity from QFs that have non-

discriminatory access to wholesale markets. *See e.g. City of Burlington, Vt*, Order Granting Application to Terminate Mandatory Purchase Obligation, 145 FERC ¶ 61,121 (Nov. 13, 2013) at ¶ 61,633.

13. Respondents admit the allegations contained in Paragraph 13.

14. In response to the allegations contained in Paragraph 14 of the Complaint, Respondents admit that FERC regulations speak for themselves.

15. With respect to Paragraph 15 of the Complaint, Respondents admit that the Commission's orders, including the January 26, 2011 *Order on Arbitration*, Docket No. E-2, Sub 966 (*EPCOR Order*), and FERC's decision in *J.D. Wind*, 129 FERC ¶ 61,148 (2009), *recon. denied* 130 FERC ¶ 61, 127 (2010) speak for themselves. Respondents deny that the *EPCOR Order* has any binding adjudicative effect on this proceeding. *See Order Establishing Date of Legally Enforceable Obligations*, Docket No. E-22, Sub 522, issued Sept. 22, 2015, at 7.

16. With respect to the allegations contained in Paragraph 16 of the Complaint, Respondents admit that FERC's 2010 *JD Wind* Order and the Commission's December 31, 2014, *Order Setting Avoided Cost Input Parameters*, Docket No. E-100, Sub 140 ("*Order Setting Parameters*") speak for themselves, but deny that either defines "long-term fixed rates" for purposes of this Complaint.

17. With respect to the allegations contained in Paragraph 17, Respondents admit that FERC has not specified maximum or minimum terms that must be offered to all QFs, but note that the State of North Carolina has specified that five years is the maximum term for a PURPA PPA for a QF such as Cube Yadkin that is not eligible for the standard offer. N.C. Gen. Stat. § 62-156(c) (negotiated PURPA PPAs are limited to

five years). Respondents note that FERC's "established policy" has been to "leave to state regulatory authorities . . . issues relating to the specific application of PURPA requirements to the circumstances of individual QFs." *See Cuero Hydroelectric Inc.*, 85 FERC ¶ 61, 124, at 61, 467 (1998) (internal citations omitted); *see also Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61, 304, at 61, 645 (1983) ("The Commission's regulations allow the States . . . a wide degree of latitude in establishing an implementation plan"). The Respondents admit that FERC has held that QFs are entitled to contracts "long enough to allow QFs reasonable opportunities to attract capital from potential investors." The Respondents are without sufficient information to admit or deny the allegation that a long-term PPA at fixed rates is the only practical way to provide sufficient certainty for QFs such as Cube Yadkin. Based on the history of the Yadkin facilities, Respondents deny any implication that Cube Yadkin cannot access wholesale or organized markets for the Yadkin facility's output. Respondents further deny the implication that their customers should pay Cube Yadkin avoided cost rates in excess of their current avoided costs or should bear the risk of overpayments that come with a PPA in excess of five years in order to justify Cube Yadkin's investment in the Yadkin facilities.

18. With respect to the allegations contained in Paragraph 18, Respondents admit that the Companies filed their Joint Initial Statement and Proposed Standard Avoided Cost Rate Tariffs with the Commission in Docket No. E-100, Sub 148 on November 15, 2016. The Respondents deny the characterization of their proposed changes as "sweeping," and further deny the characterization that proposed changes to

the methodology would have the impact of "dramatically" reducing the utilities' avoided costs and the rates offered to QFs. The Respondents note that since the first biennial avoided cost proceeding in 1981, the Commission has exercised its authority under PURPA to establish avoided cost rates based upon the then-existing economic and regulatory circumstances and did the same in the Sub 148 proceeding. *Sub 148 Order* at 16-18 (concluding that the current economic and regulatory circumstances with respect to QF development demonstrate that "moderating the financial impact on electric ratepayers" requires "refinements to the Commission's implementation of PURPA and adjustments in the Commission-approved avoided cost rates"). The Respondents admit that their proposal in the 2016 Avoided Cost Proceeding included reduced avoided cost rates, but further admit that declining fuel commodity prices, in addition to the proposed changes in the Commission's methodology, were drivers for that decline. *Sub 148 Order* at 63 (Testimony describing declining gas prices and coal prices).

19. With respect to the allegations contained in Paragraph 19, Respondents admit that their Joint Initial Statement speaks for itself. Respondents admit that the transcript from the evidentiary hearing in Docket No. E-100, Sub 148 speaks for itself. Respondents deny that five-year PPAs are short and not "long-term" under PURPA. Respondents deny the implication that there is a potential for "a rash" of complaints concerning the appropriate length of a non-standard PPA because N.C. Gen. Stat. § 62-156(c) made that issue moot by mandating five-year PPAs with QFs such as Cube Yadkin.

20. Respondents admit the allegations contained in Paragraph 20 of the Complaint. Respondents further admit that Alcoa, not Cube Yadkin, self-certified the

Yadkin facilities through the Form 556 filing at the FERC on September 28, 2016, and that Cube Yadkin consummated its purchase of the Yadkin facilities on February 1, 2017. Respondents admit that after the purchase of the Yadkin facilities, Cube Yadkin self-certified as QFs on March 9, 2017 by filing Form 566s at the FERC, as required by FERC's regulations to reflect the transfer of ownership of the facilities from Alcoa to Cube Yadkin.

21. As for the allegations contained in Paragraph 21 of the Complaint, Respondents admit that each of the Cube Yadkin QFs has a nameplate capacity in excess of the maximum size for which the Commission has approved standard contracts terms and conditions and that QFs must negotiate the terms and conditions of their respective PPAs, but deny that eligibility was determined by the Commission in its December 2015 *Sub 140 Order.* Instead, the *Sub 148 Order* and N.C. Gen. Stat. § 62-156, as amended by House Bill 589, require the Commission to approve a standard offer PPA for small power producers with a design capacity up to and including 1000 kilowatts.[2]

22. With respect to the allegations contained in Paragraph 22 of the Complaint, Respondents have insufficient information to admit or deny that Cube Yadkin reached out to them in March 2016, but generally admit that Cube Yadkin had reached out to them involving its purchase of Cube Yadkin. Respondents lack sufficient information to admit or deny the components of Cube Yadkin's due diligence efforts and whether a long-term PPA was a critical component of Cube Yadkin's business plan. Respondents lack sufficient information to admit or deny Alcoa's commitment to support

[2] N.C .Gen. Stat. § 62-156 actually limits eligibility further by additionally providing that when an electric public utility has entered into PPAs with small power producers from facilities (i) in the aggregate capacity of 100 MW or more and (ii) which established a LEO after November 15, 2016, the eligibility threshold for that utility's standard offer shall be reduced to 100 kW.

Cube Yadkin's efforts to enter into a long-term PPA with Respondents to sell energy and capacity or any agreement or understanding between Alcoa and Cube Yadkin.

23. With respect to the allegations contained in Paragraph 23, Respondents lack sufficient information to admit or deny whether Cube Yadkin contacted them *immediately* upon executing the purchase agreement with Alcoa, but they admit that they met with Cube Yadkin representatives in early August 2016, and they admit that the August 23, 2016 email attached to Cube Yadkin's complaint as Exhibit 1 speaks for itself. Respondents further admit that the August 23, 2016 email attached to Cube Yadkin's complaint as Exhibit 1 provides *in full* that in addition to discussing registering the Yadkin facilities as QFs, Cube and Respondents had discussed the possibility of a non-PURPA PPA with all four facilities, including the Narrows facility, which is not a QF. (Complaint, Exhibit 1) Respondents deny, however, that this communication and Cube Yadkin's plan to register the Yadkin facilities as QFs are relevant to meeting the Commission's LEO requirements because the Yadkin facilities would not become QFs until September 28, 2016; Cube Yadkin did not own them until February 1, 2017; and Cube Yadkin did not self-certify with respect to the Yadkin facilities until March 9, 2017.

24. With respect to the allegations contained in Paragraph 24, Respondents admit that Cube Yadkin contacted them to discuss the Companies purchasing the output of the Yadkin facilities on or about September 16, 2016. Respondents admit that they confirmed the conversation in a letter dated September 21, 2016 and that this letter is attached as Exhibit 2 to the Complaint. Respondents admit that the September 21, 2016 letter speaks for itself and, *in full*, confirms that the Yadkin facilities had not been self-certified as QFs and that Cube Yadkin did not own or operate the facilities as of

September 21, 2016. Respondents deny that this letter meets in part or in whole any of the Commission's LEO requirements.

25. With respect to the allegations contained in Paragraph 25, Respondents admit that Cube Yadkin transmitted an undated letter informing DEC and DEP that the Yadkin facilities had been self-certified as QFs. (Complaint, Exhibit 3) Respondents admit that the letter speaks for itself. Respondents further admit that the letter shows that Cube Yadkin did not own the Yadkin facilities at that time. Respondents deny that this letter meets in part or in whole any of the Commission's LEO requirements.

26. With respect to the allegations contained in Paragraph 26, Respondents admit that their October 14, 2016 letter speaks for itself and is attached to the Complaint as Exhibit 4. Respondents further admit that the letter provides *in full* that Cube Yadkin did not own or operate the Yadkin facilities and that Cube Yadkin had not self-certified as a QF as of October 14, 2016. Respondents deny that this letter meets in part or in whole any of the Commission's LEO requirements.

27. As for the allegations contained in Paragraph 27 of the Complaint, the Respondents respond as follows:

a. Respondents deny that an exchange of communications between the parties demonstrates that the LEO to purchase the output of each of the QFs was established as of September 16, 2016. Respondents did not own the Yadkin facilities and had not self-certified as QFs at that time. Respondents further deny that Cube Yadkin has established a LEO because Cube Yadkin has failed to submit the mandatory NoC form or to obtain the CPCN. *See Sub 140 Order* at 51-53 (Outlining the requirements for establishing a LEO).

b. Respondents deny that Complainant has established LEOs as of September 28, 2016, upon the filing of the FERC 556s, because Alcoa, and not Cube Yadkin, filed the self-certifications and because Cube Yadkin did not own the Yadkin facilities at that time. Respondents further deny that Cube Yadkin has established a LEO because it has failed to submit the mandatory NoC form or obtain a CPCN. *Id.*

c. Respondents deny that Complainant established a LEO by no later than October 11, 2016, because it did not own the Yadkin facilities at that time and had not self-certified as a QF. Additionally, Cube Yadkin has not submitted the required NoC form or obtained a CPCN. *Id.*

d. Respondents deny that the Companies' October 14, 2016 letter to Cube Yadkin supports Complainant's purported LEO; the October 14, 2016 letter attached as Exhibit 4 to the Complaint speaks for itself and does not support the allegations contained in Paragraph 27 of the Complaint.

e. With respect to the allegation that Cube Yadkin had signed a binding contract to purchase the facilities with only limited regulatory out clauses, Respondents do not have sufficient information on the legal enforceability of Cube Yadkin's contract to purchase to admit or deny. Respondents deny Cube Yadkin's conclusory allegation regarding its contract to purchase the Yadkin facilities is relevant to, or demonstrates compliance with, the Commission's clear and well-established requirements for establishing a LEO.

f. Respondents admit that Cube Yadkin had submitted an application to transfer the FERC license as early as July 26, 2016, but deny that this application to

transfer is related to or meets any of the Commission's requirements for establishing a LEO.

g. With respect to the allegation that in any event the obligation established under PURPA attaches to the facility, and not to the owner of the QFs, Respondents deny that a developer that has not self-certified as a QF may establish a LEO in North Carolina for that facility. *See Sub 140 Order* at 52 (Commission requires developers to have self-certified with FERC as a QF to establish a LEO). Additionally, self-certification is not the only requirement in North Carolina to establish a LEO. The Commission's LEO requirements additionally require the QF to submit a NoC form to the electric public utility and to obtain a CPCN, which the Complainant has not done.

h. With respect to the predicate for Complainant's acquisition of the facilities, the Respondents lack sufficient information to admit or deny the Complainant's reasons for, or due diligence efforts associated with, the purchase of the Yadkin facilities or the Narrows facility, which is not a QF.

28. With respect to the Complainant's allegations contained in Paragraph 28, Respondents respond as follows:

a. Respondents admit that they have not provided proposed contract terms, including pricing, for a long-term PURPA PPA or to otherwise enter into negotiations for such an agreement; but they have discussed entering into a non-PURPA PPA with Cube Yadkin. Respondents note that until March 9, 2017, Cube Yadkin was not self-certified as a QF and therefore not entitled to enforce PURPA rights. Respondents additionally note that they declined to enter into negotiations for a PURPA agreement throughout this process, in order to preserve, and not waive, their right to

petition FERC for authorization to terminate their obligation to purchase the output of the Yadkin facilities as QFs under 18 C.F.R. 292.309 and also because Cube did not own the Yadkin facilities until February 1, 2017. (Complaint, Exhibit 4) Respondents further admit that on March 22, 2017, Respondents sent a letter agreement to Cube Yadkin indicating their willingness to discuss the purchase of the output of the Yadkin facilities on a non-PURPA basis and further admit that they made reasonable non-PURPA offers to Cube Yadkin during discussions that took place between March 22, 2017, and February 23, 2018. Cube Yadkin declined these offers.

b. Respondents lack sufficient information to admit or deny Cube Yadkin's motivations for entering these non-PURPA discussions, but admit that Cube Yadkin entered into the finalized letter agreement with Respondents dated April 25, 2017, which stated that any such discussions would not be deemed to establish any LEO under or pursuant to PURPA.

29. With respect to the allegations contained in Paragraph 29, Respondents admit that they pursued an alternative path to a non-PURPA PPA with respect to all four facilities and that Cube Yadkin filed the currently pending registration statements for the Yadkin facilities and the Narrows facility in mid-March of 2017. With respect to Complainant's allegation that it delayed its enforcement of its rights as a QF because it was waiting, in good faith, on Respondents to engage in the alternative approach, Respondents lack sufficient information to admit or deny Complainant's motivations for its delay of enforcement of its rights as a QF. Respondents note they sent a letter agreement to Cube Yadkin on March 22, 2017 to indicate that they were willing to discuss non-PURPA PPAs. On April 25, 2017, the letter agreement was executed. A

confidentiality agreement between the parties was signed May 8, 2017. Respondents admit that, after seeking necessary responses from Cube Yadkin to perform their internal analysis and preparation of the offer, Respondents sent an offer to Cube Yadkin on August 10, 2017. Respondents deny the remaining allegations contained in Paragraph 29. Finally, Respondents note that Cube Yadkin has failed to pursue its right to establish a LEO under PURPA consistent with the Commission's LEO requirements.

30. With respect to the allegations contained in Paragraph 30, Respondents deny that there is no legal basis to support their claim that because Cube Yadkin has sought market-based rate authority, they are exempted from any purchase obligation under PURPA. Respondents admit that QFs may have market-based rate authority. Respondents further admit that Cube Yadkin is required to have market based rate authority under federal law because the three QFs are over the 30 MW threshold for the QF exemption from federal rate regulation. Respondents further admit that Alcoa and the Yadkin facilities have had competitive access to organized and wholesale markets and the Yadkin facilities have historically sold into these markets. Respondents admit that they have not sought from FERC, nor have been granted, an exemption from their obligations under PURPA. However, Respondents have properly reserved, and not waived, their entitlement to petition the FERC for authority to grant this exemption under 18 C.F.R. 292.309. After Cube Yadkin became the owner of the Yadkin facilities, Respondents and Cube Yadkin entered into negotiations with respect to a non-PURPA PPA. Respondents admit that without FERC authorization for the exemption, they are legally required to purchase the output of the Cube Yadkin facilities under PURPA, but not at a PPA term

and avoided cost rates that are inconsistent with PURPA, the Commission's recent avoided cost orders, and House Bill 589.

31. With respect to the allegations contained in Paragraph 31 of the Complaint, Respondents respond as follows:

a. Respondents deny that Complainant's Yadkin facilities had established a LEO prior to the Respondents filing their Joint Initial Statement in the 2016 Avoided Cost proceeding.

b. Respondents deny that in 2018 Cube Yadkin is entitled to enter into long-term PPAs with DEC or DEP for the purchase of the output of the Yadkin QFs at DEC's or DEP's avoided cost rates calculated in accordance with the Commission's *Order Setting Parameters*. Even *assuming arguendo* that Cube Yadkin had established a LEO prior to November 15, 2016, which the Respondents do not concede, Respondents deny that the 2014 *Order Setting Parameters* applies to Cube. The Commission's *Order Setting Parameters* primarily applies to QFs that are eligible for the standard offer; Cube's Yadkin facilities are not eligible for the standard offer. In its subsequent *Order on Clarification*, the Commission clarified that the *Order Setting Parameters* does not make the rates and terms of the standard contract available to all QFs up to 80 MW in size. *Order on Clarification*, Docket No. E-100, Sub 140, issued March 6, 2015, at 2.

c. With respect to the allegations contained in footnote 17 to Paragraph 31 of the Complaint, the Respondents deny that the "formal" LEO process established by the Commission in prior cases is not applicable to the facts and circumstances here. The Respondents deny that the Commission's LEO requirements have no applicability to QFs that "predate" the statutory certification process – the

requirement that a developer must self-certify as a QF and the requirement that a QF must submit the NoC form are separate and distinct prongs of the Commission's LEO test, regardless of whether the Complainant is required to obtain a CPCN.

d. Respondents deny that the Commission's LEO requirements should be waived under the circumstances, because Cube Yadkin has not justified a waiver, and a waiver of the LEO requirements would be discriminatory to other QFs that have complied with the Commission's mandatory requirements in establishing a LEO. Respondents have insufficient information to admit or deny whether the Complainant actually knew the LEO requirements in advance.

e. Finally, Respondents deny that Cube Yadkin has substantially complied with the substance of the LEO requirement in its communications with appropriate personnel at DEC and DEP because throughout the communications occurring before February 1, 2017, Complainant did not own the Yadkin facilities and had not self-certified as QFs. Moreover, Complainant has not submitted an NoC form or obtained a CPCN, which are requirements to establish a LEO.

32. With respect to the allegations contained in Paragraph 32, Respondents admit that N.C. Gen. Stat. § 62-156 speaks for itself.

33. With respect to the allegations contained in Paragraph 33, Respondents admit that House Bill 589 was signed into law on July 27, 2017. The Respondents admit that the North Carolina General Statutes speak for themselves. Respondents deny that the statutory revisions in House Bill 589 do not apply to Complainant's Yadkin's facilities and that Cube Yadkin's LEO predates House Bill 589 because Cube Yadkin has not yet

established a LEO. The Respondents admit that 18 C.F.R. § 292.304(d)(ii) and the *Order Setting Parameters* speak for themselves.

34. With respect to the allegations contained in Paragraph 34 of the Complaint, Respondents admit that N.C. Gen. Stat. § 62-73 speaks for itself.

35. With respect to the allegations contained in Paragraph 35, Respondents admit that the North Carolina Declaratory Judgment Act and N.C. Gen. Stat. § 62-60 speak for themselves.

(Count Two: Request for Arbitration)

36. The Respondents' responses to the allegations contained in paragraphs 1-35 of the Complaint are incorporated by reference.

37. Respondents deny that Cube Yadkin has established a LEO for any of the Yadkin facilities. Respondents deny that the rates, terms and conditions proposed by Cube Yadkin for a PURPA PPA reflect their respective avoided costs or the current terms and conditions of their negotiated PPAs. Respondents admit that they have declined to negotiate a PURPA PPA with Cube Yadkin, because Cube Yadkin did not own the facilities until February 1, 2017 and had not self-certified until March 9, 2017, and because the Yadkin facilities have access to sell their power in the wholesale markets and the Respondents believed that they should be able to seek FERC authorization to terminate their obligation to purchase from Cube Yadkin. Respondents further admit that they entered into negotiations with Cube Yadkin for a non-PURPA PPA after Cube Yadkin completed its purchase of the Yadkin facilities.

38. Respondents deny that there are any issues to be resolved by arbitration. Respondents deny that PURPA requires a long-term PPA to have a term of not less than 10 years.

39. Respondents do not agree or consent to arbitration because there are no issues ripe for arbitration. N.C. Gen. Stat. § 62-40 requires "all parties" to a controversy to agree in writing to submit the controversy to the Commission as arbitrator. *See e.g.*, *Order Serving Complaints and Requiring Responses*, Docket No. E-2, Sub 1050, Docket No. E-7, Sub 1060, Docket No. E-22, Sub 511, issued July 16, 2014 at 2 ("General Statute 62-40 requires that in order for the Commission to serve as arbitrator all parties to a controversy must agree in writing to submit the controversy to the Commission as arbitrator."); *Order Serving Petition for Arbitration and Requiring a Response,* Docket No. E-22, Sub 530, issued Feb. 5, 2016 at 2 (explaining that if both parties did not agree in writing to the arbitration as required by N.C. Gen. Stat. § 62-40, "the Commission will treat the filing as a complaint pursuant to G.S. 62-73 and proceed accordingly").

40. The allegations contained in Paragraph 40 require no response.

SECOND DEFENSE: COMPLAINANT HAS FAILED TO ESTABLISH A LEO AS REQUIRED BY THE COMMISSION

41. Cube Yadkin contends that DEC and DEP are legally obligated to purchase the output of the Yadkin facilities under a PPA with a term of not less than ten years pursuant to Cube Yadkin establishing a LEO on either September 16, 2016, September 28, 2016 or October 11, 2016. Cube Yadkin acknowledges that it has not complied with the Commission's "formal" LEO "process," but that failure notwithstanding, Cube Yadkin proffers these particular dates to support its argument that it is entitled to a ten-year PPA at outdated avoided cost rates that are in excess of the

Companies' current avoided costs. Cube Yadkin's assertions ignore both N. C. Gen. Stat. § 62-156 and the Commission's LEO requirements.

42. Establishing a LEO is a matter of state law, and the states determine: (i) whether and when a LEO is created and (ii) the procedures for obtaining approval of such an obligation. Order No. 588-A, 119 FERC ¶ 61,305 at p. 139 (2007); *see also, Power Res. Grp., Inc. v. Pub. Util. Comm'n*, 422 F.3d 231, 239 (5th Cir. 2005). The Commission's requirements to establish a LEO are simple and straightforward: prior to October 11, 2017, establishment of a LEO required a QF to meet a three-prong test: (i) the developer has self-certified with FERC as a QF; (ii) the QF has made a commitment to sell the QF's output to a utility under PURPA using the approved NoC form; and (iii) the QF has filed a report of proposed construction or been issued a CPCN pursuant to N.C. Gen. Stat. § 62-110.1. *Sub 140 Order* at 52.[3]

43. Prior to 2015, however, the Commission's LEO standard included less specificity. A QF established a LEO when it had: (i) obtained a CPCN or filed a report of proposed construction and (ii) indicated to the utility that it seeks to commit itself to sell its output to that utility. *Sub 140 Order* at 48. However, in the years leading up to the Sub 140 avoided cost proceeding, the Commission experienced "an increasing number of disputes over the date of an LEO," which resulted in the Commission clarifying and adding to its LEO requirements in order "to provide a standardized and clearly stated method to establish a LEO." *Sub 140 Order* at 52. To foster clarity and consistency with PURPA, the Commission concluded that "a developer must obtain QF status in order to

[3] In the Commission's *Sub 148 Order*, the Commission reaffirmed those requirements, but added a fourth prong - the QF has submitted a completed interconnection request pursuant to NCIP. *Sub 148 Order* at 106. Although Cube is not exempt from the LEO requirements, this prong of the LEO requirements is not at issue here.

establish a LEO." *Id.* The Commission also mandated the use of the NoC form to demonstrate that the QF has given notice of its commitment to sell its output to the utility. In requiring the use of the NoC form, the Commission expressly rejected recommendations by the North Carolina Sustainable Energy Association that use of the form to establish a LEO be "permissive." *Sub 140 Order* at 49. Instead the Commission determined that:

> the use 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 a LEO would provide clarity to both the 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. The revised form submitted by [Dominion North Carolina Power] . . . contains the information necessary to satisfy the second prong of the LEO test and should not be unduly burdensome for a QF to complete. As such, the Commission finds that use of the form should be mandatory.

Sub 140 Order at 51. These requirements have, without exception, applied to all QFs seeking to negotiate a PURPA PPA since they were outlined in the Commission's 2015 *Sub 140 Order.*

(i) Cube Yadkin did not own the Yadkin facilities until February 1, 2017 and did not have QF status prior to March 2017.

44. As an initial matter, Cube Yadkin could not assert its rights as a QF prior to February 1, 2017, when it completed its purchase of the Yadkin facilities. Additionally, and as noted above, the Commission has held that a developer must have QF status to satisfy the Commission's LEO test. *Sub 140 Order* at 52. Cube Yadkin, however, did not actually own the Yadkin facilities at any of the times it claims it established a LEO – September 16, 2016, September 28, 2016, and October 28, 2016.

Additionally, it had not self-certified as a QF on any of those dates. Cube Yadkin cannot enforce its LEO rights under PURPA prior to its March 9, 2017 self-certification. *Vote Solar Initiative and Montana Environmental Information Center v. Montana Public Serv. Comm'n.* 157 F.E.R.C. P 61,080 (Nov. 1, 2016). Cube Yadkin argues that because Alcoa had self-certified the facilities as QFs on September 28, 2016, it has complied with this first prong of the Commission's requirements for establishing LEOs. Cube Yadkin's argument is without merit.

45. The Commission's requirement that a developer self-certify as a QF, by its own terms, requires that the developer self-certify as a QF according to the FERC's rules for self-certification. FERC regulations require new owners of facilities that had previously been certified as QFs to re-certify those facilities to maintain their QF status. *See Order No. 732* (Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility), 130 FERC ¶ 61, 214 at P 58 (2010) (under FERC's QF ownership reporting requirement, a change in ownership triggers a recertification requirement). Therefore, Alcoa's self-certification of the Yadkin facilities as QFs in September 2016 does not meet even one prong of the Commission LEO test. Cube Yadkin cannot meet the Commission's QF requirement of the LEO test at any time prior to March 9, 2017, when it self-certified as a QF, reflecting the change in ownership of the Yadkin facilities. Therefore, Cube Yadkin cannot attempt to enforce PURPA obligations prior to this self-certification date. Additionally, Cube Yadkin has failed to meet the NoC requirement of the LEO test.

(ii) Cube Yadkin has failed to submit the mandatory NoC form.

46. Cube Yadkin also has failed to comply with the Commission's requirement that it submit a NoC form to establish a LEO. The Commission has expressly required the use of the NoC form to provide clarity to public utilities and QFs and to reduce the number of disputes on the establishment of LEOs before the Commission. *Sub 140 Order* at 51. Since its approval, the NoC form has had its desired effect in clarifying and standardizing the QF's notification of its commitment to sell its output to the utility. The number of disputes surrounding the establishment of the QF's notice of commitment prong of the Commission's LEO requirements appears to have declined since the 2013-2015 timeframe. Moreover, it has prevented the "gaming" of the LEO date through its required usage.

47. Notably, this Complaint presents the very circumstances that the Commission intended the NoC form to remedy – a QF alleges that it provided notice of its commitment to sell to the utility when it can maximize the avoided cost rates to be paid to it. This allegation then leaves the utility and, potentially, the Commission itself to later sift through various emails, letters, or meetings between the QF and the utility to determine whether or when the QF had actually provided such notice. Cube Yadkin has asked nothing less of the Commission in this Complaint, proposing a selection of self-serving LEO dates for the Commission to review, based on various actions by Alcoa, the previous owner of the Yadkin facilities, or letters and emails between Cube Yadkin (prior to its purchase of the Yadkin facilities and its self-certification as a QF at FERC) and Respondents.

48. In contrast, the Commission's mandatory NoC form provides a clear, non-discriminatory method for all QFs to unequivocally provide the required notice of

commitment to sell its output to the utility in a manner that reduces disputes between the parties and before the Commission. Cube Yadkin has presented no compelling argument why the Commission should abandon its well-considered and effective determination that an NoC form is mandatory.

49. Cube Yadkin argues, however, that because the Yadkin facilities were constructed prior to the enactment of the statutory obligation, and because the facilities have "long-standing" relationships with the Respondents, the Commission's LEO requirements are "simply not applicable to the facts and circumstances here." (Complaint at ¶ 31, fn. 17) These arguments have no merit. Even assuming that Cube Yadkin is not required to obtain a CPCN to operate the existing Yadkin facilities (which the Respondents do not concede as explained below), this does not relieve Cube Yadkin from meeting the other LEO requirements. The Commission has previously determined that the CPCN requirement and the notice of commitment to sell requirement are separate and distinct. *See Order Establishing Date of Legally Enforceable Obligation*, Docket No. E-22, Sub 522, issued Sept. 22, 2015, at 9-10 (Explaining that even though a CPCN application indicated the QF's "general plan" to sell power to a utility, the QF still had to provide a distinct notice of commitment to sell to the utility). The fact that the Yadkin facilities existed prior to the CPCN requirement is not a substitute for meeting the Commission's requirement that Cube Yadkin provide notice of its commitment to sell the output of the Yadkin facilities by submitting the required NoC to establish a LEO.

50. Additionally, the Commission has likewise previously concluded that a request to interconnect was not a notice of a QF's commitment to sell the output of a facility to the utility. *Id.*; *Sub 140 Order* at 49, 52. Although the Commission added a

new requirement to the LEO test that pertained to those QFs in the interconnection queue in the *Sub 148 Order*, the Commission has never concluded that existing interconnections or relationships exempted QFs from complying with the LEO requirements.

(iii.) Cube Yadkin has failed to obtain a CPCN.

51. Cube Yadkin also claims that it is not required to obtain a CPCN because the Yadkin facilities were constructed and began operation prior to the Electricity Act of 1965. Cube Yadkin's assertion is inconsistent with Commission precedent.

52. In October of 1996, Duke Power Company ("Duke Power") and Northbrook Carolina Hydro, LLC ("Northbrook") filed a joint petition for the transfer of CPCNs for four hydroelectric facilities from Duke Power to Northbrook. The hydroelectric facilities had been in existence since the early 1900s. Northbrook was not a public utility, but was instead a small power producer seeking to operate the facilities as QFs under N.C. Gen. Stat. § 62-156. Therefore, Northbrook sought the transfer of the CPCNs from Duke Power. The Commission then transferred to Northbrook the CPCNs that were "issued or *deemed to have been issued* to Duke Power Company." *Order Approving Transfer of Certificates*, Docket No. SP-122, issued Dec. 3, 1996, at 2-3 (emphasis added).

53. Additionally, Commission Rule R8-64 establishes filing requirements for obtaining a CPCN for persons other than public utilities, who: (1) own a renewable energy facility that is participating in the Competitive Procurement of Renewable Energy Program; (2) are QFs seeking the benefits under N.C. Gen. Stat. § 62-156 or 16 U.S.C. 824a-3, or (3) own or operate a small power production facility under 16 U.S.C. 769. Cube Yadkin is a QF that seeks the benefits of N.C. Gen. Stat. § 62-156. (Complaint at ¶

32) Accordingly, Cube Yadkin is not exempt from the Commission's requirement that it obtain a CPCN for the Yadkin facilities in order to establish a LEO.

(iv.) Cube Yadkin has failed to justify a waiver of the Commission's LEO Requirements

54. Finally, Cube Yadkin argues that, if the Commission finds that the LEO requirements do apply to it, the Commission should waive the requirements because Cube Yadkin "could not have known that in advance." (Complaint, at ¶ 31, fn. 17) This alleged ignorance of the Commission's LEO requirements does not justify a waiver. First, Cube Yadkin is not a small, unsophisticated QF, but instead is a sophisticated market participant, "in the business of owning, developing and modernizing hydroelectric facilities." (Complaint at ¶ 1) Second, Cube Yadkin's communications with Respondents evince its familiarity with PURPA's requirements as early as August 2016. Notably, the Commission's *Sub 140 Order* implementing PURPA and including the mandatory requirement of the NoC form was publicly issued at the end of 2015. The NoC form has been widely used by even small, unsophisticated QFs to establish a LEO. Finally, submission of the NoC form is hardly burdensome, as the Commission itself noted in the *Sub 140 Order*. *Sub 140 Order* at 51. Cube Yadkin's claim of ignorance of the LEO requirements fails to justify any waiver of the Commission's requirements.

55. Moreover, the Commission's grant of a waiver under these circumstances would likely result in opening the floodgates of disputes and complaints before the Commission from QFs that would, like Cube Yadkin, seek to establish backdated LEOs prior to the commencement of the 2016 Avoided Cost Proceeding and passage of House Bill 589. Such a result would lead to regulatory uncertainty and completely negate the recognized benefits of the standard NoC form in: (i) providing an administratively

simple, fair, and nondiscriminatory process for QFs to establish LEOs and (ii) reducing the number of complaints and disputes surrounding establishment of LEO dates brought before the Commission. For the foregoing reasons, Cube Yadkin has failed to justify any waiver of the LEO requirements.

THIRD DEFENSE: CUBE YADKIN IS NOT ENTITLED TO A PURPA PPA WITH A TERM OF NOT LESS THAN TEN YEARS AT AVOIDED COST RATES ESTABLISHED IN ACCORDANCE WITH THE OUTDATED AVOIDED COST ORDERS

56. Even if assuming *arguendo* that Cube Yadkin established a LEO prior to November 2016 or the passage of House Bill 589, which the Respondents do not concede, this would still not require DEC or DEP to purchase the output of the Yadkin facilities pursuant to a PURPA PPA with a term of not less than ten years.

57. The Companies have the obligation to negotiate avoided cost rates that are non-discriminatory to QFs, consistent with the public interest and, most importantly, just and reasonable for our customers. Neither PURPA nor the FERC's regulations implementing PURPA specify maximum or minimum terms for PURPA contracts. Further, prior to the passage of House Bill 589, the Commission had not specified a maximum or minimum term for negotiated PURPA contracts. See *Order on Clarification,* Docket No. E-100, Sub 140, issued March 6, 2015 (Commission declines to require standard offer contract durations to negotiated PPAs).

58. Second, as the *Order on Clarification* provides, only limited portions of the Commission's *Order Setting Parameters* applied to negotiated PPAs. *Order on Clarification* at 3. Additionally, the Commission mandated that the Companies use "up-to-date data" in determining inputs for negotiated avoided cost rates. *Id.* Therefore, the

determination of inputs, such as fuel prices, for calculating avoided cost rates for negotiated PPAs would include data that was up-to-date in the September–October 2016 timeframe. Those avoided cost rates would not, therefore, be the same as those approved in the Commission's Sub 140 docket for the standard offer.

59. Based on the foregoing, therefore, even assuming *arguendo* that Cube Yadkin were able to establish a LEO in September or October of 2016, it has failed to show that it is entitled to a ten-year PPA or to the outdated avoided cost rates approved for standard offer QFs in Sub 140.

WHEREFORE, the Respondents respectfully pray as follows:

1. That the Commission dismiss the Complaint with prejudice.

2. That the Commission deny Cube Yadkin's request for declaratory judgment that DEC and DEP are legally obligated to purchase the output of Cube Yadkin's Yadkin facilities.

3. That the Commission deny Cube Yadkin's request to direct DEC and/or DEP to enter into a PPA with each of Cube Yadkin's Yadkin facilities.

4. That the Commission deny Cube Yadkin's request for arbitration under N.C. Gen. Stat. § 62-40.

5. That the Commission deny Cube Yadkin's request for an expedited procedural schedule; and

6. That the Commission grant such other relief as the Commission deems just, equitable, and proper.

Respectfully submitted, this the 7th day of May, 2018.

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BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

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

In the Matter of Cube Yadkin Generation, LLC, Complainant v. Duke Energy Carolinas, LLC and Duke Energy Progress, LLC, Respondents	)	**VERIFICATION**

Michael T. Keen, having been first duly sworn, deposes and says that he is a Business Development Manager with Duke Energy Business Services, LLC; that he has read the foregoing Answer and Motion to Dismiss Complaint of Cube Yadkin Generation LLC and knows its contents; that the same is true of his own personal knowledge, except for those matters alleged on information and belief, and as to those matters, he is informed and believes them to be true.

This is the 1st day of May, 2018.

Michael T. Keen

Sworn to and subscribed before me
this the 1st day of May, 2018.

Dara Tribiano
Notary Public

My Commission Expires:

October 26, 2020

DARA TRIBIANO
Notary Public – State of Florida
Commission # GG 007113
My Comm. Expires Oct 26, 2020

CERTIFICATE OF SERVICE

I certify that a copy of Duke Energy Progress, LLC and Duke Energy Carolinas, LLC's Joint Answer and Motion to Dismiss Complaint of Cube Yadkin Generation, LLC, in Docket Nos. E-2, Sub 1177 and E-7, Sub 1172 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 7th day of May, 2018.

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STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

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

CUBE YADKIN GENERATION LLC, Complainant, v. DUKE ENERGY CAROLINAS, LLC, and DUKE ENERGY PROGRESS, LLC Respondents.	)	**COMPLAINANT'S RESPONSE TO RESPONDENTS' JOINT ANSWER AND MOTION TO DISMISS**

COMES NOW Complainant Cube Yadkin Generation LLC ("Cube Yadkin" or "Complainant"), pursuant to N.C. Gen. Stat. § 62-73 and § 1-253 and Rule R1-9 of the Rules and Regulations of the North Carolina Utilities Commission, and the Commission's Order dated May 8, 2018, and files this Response to the Joint Answer and Motion to Dismiss of Duke Energy Carolinas, LLC ("DEC"), and Duke Energy Progress, LLC ("DEP") (collectively, "Duke") in the above-captioned proceedings.

RESPONSE

Cube Yadkin respectfully informs the Commission that it is not satisfied with Duke's substantive response, as contained in its Joint Answer and Motion to Dismiss, and Cube Yadkin therefore requests a hearing to present evidence and offer argument in this matter. In further reply to Duke's Joint Answer and Motion to Dismiss, as permitted by the Commission's Order Serving Joint Answer and Motion to Dismiss, Cube Yadkin shows the Commission as set forth below.[1]

[1] The following reply is offered in response to the Commission's permissive invitation in its Order Serving Joint Answer and Motion to Dismiss (May 8, 2018) ("The Commission advises

COMPLAINANT'S REPLY
TO DUKE'S JOINT ANSWER AND MOTION TO DISMISS

This action arises from Duke's unilateral refusal to negotiate with Cube Yadkin concerning entry into long-term Qualifying Facility ("QF") purchase power agreements ("PPAs") under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), N.C. Gen. Stat. § 62-156, the Commission's rules, and Duke's own tariffs and schedules. As Complainant alleged in its Verified Complaint initiating this matter, each of the three Cube Yadkin hydroelectric facilities in issue is certified as a QF under PURPA[2]; each has established a legally enforceable obligation ("LEO") with respect to the sale of energy and capacity to Duke prior to November 16, 2016; and 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.

Contrary to its obligations under the law, Duke has not negotiated in good faith the terms of a long-term QF PPA with each of the Cube Yadkin QFs. As set out in Cube Yadkin's Complaint and admitted by Duke in its Answer, Duke has "not provided proposed contract terms, including pricing, for a long-term PURPA PPA or to otherwise enter into negotiations for such an agreement." *See* Answer at ¶ 28a. To the contrary, in its October 14, 2016 letter to Cube, Duke unilaterally and summarily rejected Cube's assertion of PURPA rights, citing "provisions under which Duke would be exempted from PURPA

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that the Complainant may file a reply to the Answer and Motion to Dismiss."), at 2. The following preliminary arguments and authorities are provided for the convenience of the Commission, without waiving Complainant's right to fully brief and argue the legal issues raised by Duke at the appropriate point in the proceeding as directed by the Commission.

[2] *See* Letter dated September 30, 2016 from Serena A. Rwejuna of Bracewell LLP on behalf of Alcoa Power Generating, Inc. transmitting FERC Form 556, Notice of Self-Certification of Qualifying Facility Status for FERC Docket Nos. QF16-1309-000 (Falls), QF16-1310-000 (High Rock), and QF16-1311-000 (High Rock), NCUC Docket No. SP-8651 (Company Folder) (filed Oct. 24, 2016) (collectively, the "FERC Form 556s").

with regard to the Yadkin system." *See* Complaint, at Exh. 4; Answer at ¶ 30. Duke further gave unequivocal "formal notice under 292.309/310" stating that "if in the future Cube Hydro is a qualifying facility with respect to the Yadkin system and it seeks to sell power to Duke, it is Duke's view that it is exempted from any purchase obligation under PURPA with respect to the Yadkin system." *Id.* In other words, regardless whether Cube was a QF, had properly asserted rights under PURPA, or had provided Duke with a Notice of Commitment ("NoC") form, the parties were destined to end up where they are now—with Cube Yadkin forced to defend its federal rights before the Commission—given Duke's clearly stated legal position that "it is exempted from any purchase obligation under PURPA with respect the Yadkin system."

Duke's Answer clearly establishes that it made only non-PURPA offers and indicated willingness to negotiate only on a non-PURPA basis even after the consummation of Cube's purchase of the facilities; i.e., between February 1, 2017, and February 23, 2018. *See* Answer at ¶ 28a. Duke's Answer further admits that Respondents have not sought from FERC, nor have been granted, an exemption from their obligations under PURPA. Their only defense appears to be that refusing to negotiate on a PURPA basis somehow was necessary to properly reserve and not waive their entitlement to petition the FERC for authority to grant this exemption under 18 C.F.R. 292.309. *See* Answer at ¶ 28a. But Duke has never pursued FERC exemption, and Duke now concedes its claim of blanket "exemption" was erroneous and legally unsupportable and that "without FERC authorization for the exemption, [the Duke entities] are legally required to purchase the output of the Cube Yadkin facilities under PURPA ...." *Id.*

Thus, even if one were to flip the motion to dismiss standard on its head and view the facts in the light most favorable to Duke, Duke has admitted that, for over a year during which its legally questionable reasons for claiming Cube was not entitled to a PURPA PPA had been removed by the consummation of Cube's purchase, Duke continued to refuse to negotiate a PURPA PPA.[3] Respondents' position apparently is that they could refuse to negotiate on a PURPA basis indefinitely for no other reason than they wanted to preserve and not waive their right to petition FERC for the termination of their PURPA obligation. This failure to negotiate in good faith with Cube is a flagrant violation of the federal PURPA requirements and of the Commission's long-standing requirement that North Carolina utilities negotiate in good faith with QFs not eligible for standard rates and contracts. *See, e.g.*, Docket No. E-100, Sub 140, at p. 11; Docket No. E-100, Sub 87, at p. 8; and Docket No. E-100, Sub 57, at p. 10 (requiring DEC to offer QFs not eligible for the standard long-term levelized rates the option of "contracts and rates derived by free and open negotiations"). Moreover, Duke's posture vis-à-vis a federal "exemption" has the effect of forcing a QF like Cube Yadkin to initiate a proceeding at the Commission to enforce its federal rights. This is precisely the sort of burden that PURPA sought to avoid. *See Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61187, 61894 (Mar. 15, 2013) (finding that the Idaho Commission's requirement that a QF file a meritorious complaint to the Idaho Commission

[3] The well-established standard on a motion to dismiss for failure, generally applicable in North Carolina courts, and recognized by the Commission, requires the court to construe the complaint liberally and prohibits dismissing the complaint unless it appears to a legal certainty that the plaintiff is not entitled to relief under any state of facts which could be proved in support of the claim. *See, e.g., BellSouth Telecomms., Inc. v. HALO Wireless, Inc.*, Order Denying Halo's Motion to Dismiss, Docket No. P-55, Sub 1841 (June 27, 2012), at 3 (quotations and citations omitted). For purposes of a motion to dismiss, any written instrument attached as an exhibit to a pleading is treated as part of the pleading and may be considered without converting a motion to dismiss into a motion for summary judgment. *Id.*

before obtaining a legally enforceable obligation "would both unreasonably interfere with a QF's right to a legally enforceable obligation and also create practical disincentives to amicable contract formation."). Moreover, Duke's position, if not reined in, will have the effect of further clogging the Commission's dockets with disputes that should be negotiated rather than litigated.

During two years of negotiations entered into by Complainant in good faith, Duke took the preemptive position—now exposed as lacking any legal basis—that Cube Yadkin was only entitled to negotiate outside of the PURPA context and refused to entertain PURPA negotiations. While Complainant tried diligently to obtain PPAs through negotiations with Duke, the long, drawn-out, and, ultimately, unsuccessful process Duke required left Cube Yadkin with no choice but to ask the Commission to compel Duke to fulfill its legal obligations. Duke now protests that this delay—which it caused—results in application of a regulatory approach that is no longer available to QFs. But having caused the delay by denying Cube Yadkin the option to negotiate under PURPA—based on the assertion of a legal immunity that Duke now concedes was, and is, not available to it—Duke cannot be heard to complain of this delay. Accordingly, Complainant is asking the Commission to compel DEP and DEC to enter into financially viable long-term PPAs with the Cube Yadkin QFs at rates that reflect Duke's avoided cost as of the date that the LEOs were established, and not reward Duke for its delay tactics, and admittedly false statements regarding its obligations under the law. Cube Yadkin also 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. Finally, Cube Yadkin seeks arbitration of all unresolved issues between the parties concerning the PPAs.

In its Joint Answer and Motion to Dismiss, Duke asserts that (1) Cube Yadkin has failed to establish a legally enforceable obligation ("LEO") as required by the Commission's rules; and (2) even if Cube Yadkin has established a LEO, it is not entitled to a ten-year PPA as a result of House Bill 589. These arguments are wrong as a legal matter, and in any event, premature. Cube Yadkin has pled facts establishing its entitlement to long-term PPAs with Duke pursuant to PURPA, and Duke's arguments to the contrary cannot and should not be resolved until a hearing, with the benefit of testimony, briefing, and argument, has occurred.

I. Cube Yadkin Has Pled Facts Establishing the Existence of a LEO Under PURPA Prior to November 16, 2016, and Is Entitled to Discovery and a Hearing on its Claims.

Duke grounds much of its defense in this case in the legal argument that Cube Yadkin has failed to establish a LEO prior to November 16, 2016, which is the operative date entitling a QF to avoided costs under the 2014 Sub 140 Order. (Ans. pp. 23-31). Because Cube Yadkin has pled facts establishing the existence of all of the necessary preconditions for establishing a LEO prior to November 16, 2016, Duke's argument should be rejected. *See, e.g., BellSouth Telecomms., Inc. v. HALO Wireless, Inc.,* Order Denying Halo's Motion to Dismiss, Docket No. P-55, Sub 1841 (June 27, 2012), at 3.

Under the Commission's implementation of PURPA, QFs are entitled to PPAs with avoided cost rates calculated as of the date of their respective LEOs were established. The Commission's requirements for establishing a LEO prior to October 11, 2017, were: (i) the QF has self-certified with FERC as a QF; (ii) the QF has filed a report of proposed construction or been issued a certificate of public convenience and necessity ("CPCN"); and (iii) the QF has made a commitment to sell the QF's output to a utility under PURPA

using the approved Notice of Commitment form ("NoC form"). *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities*, Docket No. E-100, Sub 140, issued December 17, 2015 ("*Sub 140 Order*") at 52.

Here, Cube Yadkin has properly pled all of the necessary elements in its Verified Complaint for the establishment of a LEO prior to November 16, 2016, or otherwise explained why those elements are either inapplicable or should be waived. Duke's artificial construction, were it accepted by the Commission, would eliminate the environmental and transmission system benefits offered by Cube Yadkin's QFs, frustrating a clearly articulated Congressional policy to the detriment of the consuming public, the environment, and the public interest.

(a) PURPA obligations attach to the QF, not to the owner, and the hydroelectric facilities in question had been self-certified in September 2016.

As to the first element, the Verified Complaint shows that "[t]he Cube Yadkin QFs have self-certified by filing Form 556s with the FERC on September 28, 2016." (Compl. ¶ 20). Duke seeks to thwart Cube Yadkin's assertion of rights by claiming that Cube could not assert QF rights prior to the consummation of ownership of the facilities, but this argument is based on a strained and unwarranted interpretation of applicable regulations. The plain language of PURPA makes clear that a PURPA obligation or right attaches to the *facility*, not to the owner of the facility. *See, e.g.*, 16 U.S.C. § 824a-3 (describing obligation of public utilities to purchase electric energy from "facilities"); 18 C.F.R. § 292.303(a) ("Each electric utility shall purchase ... any energy and capacity which is made available from a qualifying *facility*") (emphasis supplied). Cube is unaware of any authority for the proposition that a QF purchaser is prohibited from relying on prior periods

of QF certification in asserting its rights under PURPA, and Duke has cited no such authority. Duke's position would, if adopted, frustrate the core Congressional purpose underlying PURPA, which mandates that FERC, and, by extension, the States foster the development of small electrical generation facilities such as those owned and operated by Cube Yadkin. 16 U.S.C. § 824a-3.

Cube Yadkin has invested hundreds of millions of dollars in efficient, clean, hydroelectric power, including a multi-million-dollar upgrade to replace all of the existing equipment with aerating turbines at the High Rock facility that will improve the environmental quality of the Yadkin River and benefit the citizens of North Carolina. It is precisely the type of qualifying facility that Congress had in mind when it mandated that FERC "encourage . . . small power production." 16 U.S.C. § 824a-3.

As stated in its Complaint, Cube Yadkin committed to purchase and upgrade the Yadkin facilities in reliance, at least in part, upon the QF status of three of the facilities. To this end, the sale of the QF energy and capacity to Duke was an integral component of Complainant's business plan in proceeding with the acquisition of the Yadkin facilities and committing to the facility upgrades required by the FERC in connection with the acquisition. (Compl., at p. 2). Cube Yadkin's plan to sell QF energy and capacity to Duke was known and supported by Alcoa, as evidenced by Alcoa's submittal of the Form 556s to establish QF rights and, but for Duke's unilateral refusal to enter into PURPA negotiations, Alcoa might have entered into the PPA with Duke and assigned that agreement to Cube as part of the underlying transaction. (Compl. ¶ 22). In the context of this transaction, the date of the consummation of the transaction simply is not relevant to the PURPA rights in issue, and Duke has cited to no authority that suggests otherwise.

(b) The Cube Yadkin QFs were constructed prior to the CPCN requirement being enacted, and Cube Yadkin had no reason to believe any filing by it was required by North Carolina law or the Commission's rules and regulations.

As to the second element, while the current LEO test assumes the relevance of a CPCN, Cube Yadkin has explained why that process does not apply to it, or why the CPCN requirement should otherwise be waived under the circumstances. In particular, all of Cube Yadkin's hydroelectric facilities were "constructed prior to the enactment of the statutory obligation to secure a CPCN pursuant to G.S. § 62-110.1." (Compl. p. 21 n. 17). Cube Yadkin has further pled that the current LEO test—or at least the portion of the test requiring the procurement of a CPCN "has no applicability to the instant situation involving QFs that predate the statutory certification processes." (*Id.*)

Duke cites the Commission's *Order Approving Transfer of Certificates* in Docket No. SP-122, but fails to explain how that decision has any bearing on the question of whether a CPCN is required under the present circumstances. In that proceeding, DEC and Northbrook Carolina Hydro, LLC ("Northbrook"), filed a petition seeking approval of the transfer of certificates from DEC to Northbrook in conjunction with a filing in Docket No. SP-100, Sub 11, for a declaratory ruling that Northbrook would be entitled to capacity payments for the pre-1978 North Carolina hydroelectric facilities DEC proposed to remove from rate base and sell to Northbrook. The parties in Northbrook apparently concluded that certificates were required under G.S. § 62-110.1(a), which, by its terms, requires a certificate for the construction of generation capacity. Given that the hydro facilities in issue in Northbrook had been operated by DEC historically, possibly without certification, the Commission approved the transfer to Northbrook of the certificates "issued or deemed to have been issued" to DEC for the four facilities. This decision lends no support for

DEC's claim here that Cube Yadkin was required to obtain a CPCN in connection with its PURPA request, where Cube Yadkin is not a public utility, no new construction was required to operate the facilities, and no transfer of certificates was envisioned.[4]

Duke also cites Commission Rule R8-64 in support of its contention that Cube Yadkin is required to obtain a CPCN. Subsection (a)(3) of this rule states that the construction of a facility for the generation of electricity includes the building of a new building, structure or generator, as well as the renovation or reworking of an existing building, structure or generator in order to enable it to operate as a generating facility. Nowhere does the rule establish any applicability to an operational generation facility, such as is the case here. Cube Yadkin bought *operational* hydroelectric facilities that needed substantial investment in turbine efficiency and water quality to comply with the terms of its new FERC license (as discussed in ¶ 8 of the Complaint), but no renovations or reworkings were required in order for those generating facilities to operate. For this reason, Rule R8-64 has no application to the present circumstance.

As set forth in the Complaint, there are multiple reasons supporting Cube Yadkin's belief that the CPCN requirement expressed as a component of the LEO test has no application to it and, instead, merely illustrates how the applicable test was designed for circumstances not applicable to Cube.

First, the Commission has recognized that the certificate requirement imposed in connection with the PPA process is merely intended to establish procedures "to assist the

[4] To the contrary, the Northbrook case shows that, were a CPCN required here, the appropriate course of the action would be for the Commission to simply conclude that any required certificates were "deemed granted" in connection with the operation of the facilities. *See also* Order Granting Judgment on Pleadings, Docket No. E-7, Sub 1000 (May 31, 2012) (finding failure to obtain CPCN by party to PPA was cured by later events).

supplier in complying with the requirements of obtaining a CPCN." *Green Energy Trans, LLC v. Duke Energy Carolinas, LLC,* Order Granting Judgment on the Pleadings, Docket No. E-7, Sub 1000 (May 31, 2012), at 5. Where there is no underlying statutory requirement to obtain a certificate, the policy has no application. In any event, Duke itself has not consistently enforced the policy. *See id.* (accepting DEC's argument that PPA was not invalidated where party to PPA had failed to obtain a CPCN).

Second, as stated, because each of the QFs was in operation prior to the enactment of the Electricity Act of 1965, Session Law 1965-287, these facilities are not subject to certification under N.C. Gen. Stat. § 62-110.1(a).

Third, Cube Yadkin is not a "public utility" under applicable law because it is not furnishing electricity to or for the public for compensation under G.S. § 62-3(23) and this Commission's decisions. Of particular relevance, the Commission has expressly concluded in connection with an intra-corporate reorganization by Cube Yadkin's predecessor—Alcoa—that the proposed corporate reorganization and transfer of the assets did not make Alcoa a "public utility". *See* Order Withdrawing Application, Docket No. E-56, Sub 1 (Dec. 2, 1999) (concluding that Alcoa, Tapoco and Yadkin, "by virtue of their current activities, their proposed reorganization and their proposed activities" should not be considered "public utilities" under North Carolina law).

Finally, it bears noting that Cube Yadkin filed for registration of the QFs as new renewable energy facilities on March 16, 2017, which remain pending before the Commission. At no time following these filings was Cube Yadkin advised, including subsequent to meeting with the Public Staff, that CPCN applications were advisable or required.

Because the statutory CPCN requirement clearly did not apply to Cube Yadkin, it reasonably and in good faith believed that the NoC form requirement addressing CPNC status was addressed to other types of QFs, particularly those constructing new generation capacity, which were the specific facilities of concern to the Commission in establishing the NoC requirement in the first place. Again, the NoC form's focus on conditions which are inapplicable to Cube further supports the conclusion that the NoC form is simply inapplicable to facilities such as Cube Yadkin's.

(c) The use of the NoC form is not applicable to Cube's circumstances and/or should be waived, particularly given the evidence showing Cube communicated clearly to Duke that it was committing itself to sell the output of the three QFs to Duke.

As to the third, and final, element of the LEO test, Cube Yadkin has pled that it made a commitment to sell its output to under PURPA as of September 16, 2016, based on its communications with Duke on that subject matter. (Compl. ¶ 27). All of its communications with Duke were clear that Cube Yadkin was ready to, and desired to, commit, albeit on terms that complied with PURPA. Because of Cube's unique circumstances, no harm results from either concluding that Cube is exempt from the NoC requirement or waiving the form requirement upon the specific facts of this case.

Cube Yadkin asserts that the use of the NoC is not applicable to a QF in Cube's circumstances, or that if it is, Cube Yadkin should be relieved of that obligation under the unique circumstances of this case. As Cube Yadkin alleged in its Verified Complaint:

> The formal LEO process established by the Commission in prior cases is simply not applicable to the facts and circumstances here, which include hydroelectric facilities constructed prior to the enactment of the statutory obligation to secure a CPCN pursuant to G.S. § 62-110.1 that have had long-standing relationships with the electric utilities in question seeking to invoke their rights under PURPA. The

> Commission's recently-articulated LEO test—which requires that a QF (1) be certified as a QF, (2) have a CPCN (or have filed a report of proposed construction), and (3) have provided to the utility a Notice of Commitment form—has no applicability to the instant situation involving QFs that predate the statutory certification processes. Because this formal LEO process does not by its own terms apply to the Cube Yadkin QFs, its applicability should be waived if the Commission were to determine that it was otherwise applicable to Cube Yadkin, given that Cube Yadkin could not have known that in advance. In any event, Cube Yadkin substantially complied with the substance of the requirement in its communications with appropriate personnel at Duke.

(Compl. p. 21, n. 17). The inflexible application of the form requirement here—where the facts clearly show that Duke was well aware that Cube was asserting PURPA rights—would only serve to frustrate the purposes of PURPA and unfairly deny Cube the benefits of federal law. *See, e.g., Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61187, 61894 (Mar. 15, 2013) (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 both unreasonably interfere with a QF's right to a legally enforceable obligation and also create practical disincentives to amicable contract formation."); *Hydrodynamics Inc. et al.*, 146 FERC ¶ 61193, 61845 (Mar. 20, 2014) (finding that that a State utilities commission rule requiring a QF to win a competitive solicitation as a condition to obtaining a long-term contract imposed an unreasonable obstacle to obtaining a legally enforceable obligation in violation of PURPA's regulations). Having conceded that it unilaterally refused PURPA negotiations based on a false assertion that it was "exempted"—and having further sent Cube Yadkin on a fruitless and time-consuming wild goose chase seeking to negotiate non-PURPA rates—Duke can hardly be heard now to claim that it was not aware that Cube was seeking to invoke PURPA rights or to otherwise protest the assertion of rights back to the

date of Duke's initial misrepresentation. Such a result would be inequitable and only encourage similar gamesmanship by Duke in the future.

Examination of the form itself demonstrates its futility in these circumstances. *See* Exhibit A, attached hereto. Of principal concern, the form requires the Seller to select among four options relating to the status of the party's CPCN—(i) the party has a CPCN under G.S. § 62-110.1 and Rule R8-64; (ii) the party is exempt from CPCN requirement under G.S. § 62-110.1(g) and has filed a report of proposed construction with the Commission; (iii) the party has applied or will apply for a CPCN for the construction of its facility; or (iv) the party is exempt from the CPCN requirements under G.S. § 62-110.1(g) and will file a report of proposed construction with the Commission. These options illustrate the problem, as the form assumes that the party invoking rights under PURPA is subject to the CPNC requirement or that the facility qualifies for an exemption under G.S. § 62-110.1(g) because the facility is either (a) a nonutility owned facility fueled by renewable resources under two MWs, (b) is new construction intended primarily for the person's own use, or (c) a solar facility subject to Article 6B. None of these options apply for an existing generator such as Cube, and the problem is compounded for Cube because the NoC form ties the LEO date to CPCN date or report of proposed construction date. In other words, if Cube had used the form it would have found itself in the exact same situation as is presented here, where Duke is contending Cube has no rights under PURPA, and Cube's problem would have been compounded by the NoC form's circular LEO data loop which conveniently (for Duke) has the effect of preventing Cube from ever establishing a LEO date.

Use of the form, under these circumstances, would literally and directly serve to deny Cube Yakin's rights under federal law, a result which is not permitted under PURPA. *See, e.g., Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61187, 61894 (Mar. 15, 2013)

As demonstrated by the foregoing, Cube Yadkin has properly pled its entitlement to relief based on the claims in its Verified Complaint. Whether Duke disagrees with these contentions is beside the point. What matters is that Cube Yadkin has sufficiently pled claims for relief under PURPA against Duke, and this matter should therefore proceed past the pleading stage, through discovery, and ultimately to a hearing on these matters of great public and private importance. Because of Duke's failure to negotiate in good faith with Cube Yadkin's QFs, Cube Yadkin has been harmed in the pursuit of its business objectives, including its substantial investment in upgrading the Cube Yadkin facilities and has been denied its rights under federal law.

II. Duke's Other Claims and Arguments Are Insubstantial and Should Be Rejected.

In their Answer, the Respondents state that G.S. § 62-40 requires all parties to a controversy to agree in writing to submit the controversy to the Commission as arbitrator and that they do not agree or consent to arbitration. (Answer at ¶ 39.) This overlooks the fact that Cube Yadkin also requested that the Commission act pursuant to its avoided cost orders, which do not, and cannot, require the utility to consent.

The Commission adopted the arbitration process for the first time in Docket No. E-100, Sub 96, as an alternative to the filing of a complaint by a QF not eligible for the standard rates and contract. It has discussed this arbitration option in subsequent orders, and the only limitation imposed by the Commission has been that the QF be prepared to commit its capacity to the utility for a period of at least two years. *See* Order Establishing

Standard Rates and Contract Terms for Qualifying Facilities, Docket No. E-100, Sub 100 (September 29, 2005), at pp. 16-17; Order Establishing Standard Rates and Contract Terms for Qualifying Facilities, Docket No. E-100, Sub 140 (December 17, 2015), at p. 12.

When the Commission implements and enforces Section 210 of PURPA, it is acting pursuant to federal law. As the United States Supreme Court made clear in *FERC v. Mississippi*, 456 U.S. 742 (1982), a state commission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules. *Id.*, at 751. It may not contravene a QF's rights by imposing a requirement that a utility consent to an action taken by a QF to enforce its PURPA rights.

Duke also argues that the Commission's avoided cost orders do not apply to QFs that are not eligible for Duke's standard offer. More specifically, Duke states in the Summary of Answer and Defenses section of its Joint Answer and Motion to Dismiss that Cube Yadkin's request for a PPA established in accordance with the Commission's Order Establishing Avoided Cost Rates in Docket No. E-100, Sub 140, is unavailable because this order does not apply to QFs that are not eligible for Duke's standard offer. (Answer at p. 2) To the contrary, the Commission has made clear that, under PURPA, a larger QF is just as entitled to full avoided costs as a smaller QF and has stated that the exclusion of larger QFs from the long-term levelized rates in the standard rate schedules was never intended to suggest otherwise. *See* Order Establishing Standard Rates and Contract Terms for Qualifying Facilities, Docket No. E-100, Sub 100, issued September 29, 2005, p. 16.

In addition, the Commission more recently has held that while in a bilateral negotiation the specific characteristics of a particular QF can be taken into consideration, the method by which avoided costs are calculated should, to the extent possible, remain consistent in both standard and negotiated contracts. If a method is not applicable to calculating the avoided costs of a QF smaller than five MW, the fact that a QF is greater than five MW does not validate such a method. The Commission in fact went so far as to state that the utilities were not authorized when negotiating contracts with QFs that are not eligible for standard contracts to employ methods found by the Commission to be inappropriate in the application of the peaker method when calculating standard contract rates. *See* Order Setting Avoided Cost Input Parameters, issued December 31, 2014, p. 21.

Finally, it must be noted that if the Commission's generic avoided cost orders do not apply to QFs that are not eligible for Duke's standard offer, then the NoC requirement established in such orders do not apply to Cube Yadkin.

CONCLUSION

WHEREFORE, Complainant respectfully requests that the Commission grant the following relief:

1. Treat this matter as a formal Complaint against DEP and DEC pursuant to Section 62-73 of the North Carolina General Statutes and the Commission Rules of Practice and Procedure, and as a request for a declaratory judgment pursuant to Section 1-253 of the North Carolina General Statutes;

2. Declare that DEP and DEC are legally obligated to purchase the output of the Cube Yadkin QFs under PURPA, that the legally enforceable obligations arose as of September 16, 2016 (or, at the latest, October 11, 2016), that the formal processes adopted

by the Commission in its avoided cost orders respecting the establishment of a LEO were not intended to and do not apply to the Cube Yadkin QFs, and that the Cube Yadkin QFs are entitled to avoided cost rates established in accordance with the Commission's Order Establishing Avoided Cost Rates for DEC and DEP issued March 10, 2016, in Docket No. E-100, Sub 140;

3. Deny Duke's Motion to Dismiss and issue an Order directing DEP and/or DEC to enter into a PPA with each Cube Yadkin QF incorporating fixed, levelized avoided cost rates for energy and capacity and with a contract term of sufficient length that the investment in the underlying QF projects in compliance with the license granted by the Federal Energy Regulatory Commission is justified, not less than ten years;

4. Arbitrate the unresolved issues consistent with the position of the Complainant as set forth herein;

5. To the extent the Commission needs evidence beyond that provided in the Verified Complaint, set this matter for hearing on an expedited procedural schedule; and

6. Grant such other and further relief as this Commission may find just and reasonable.

Respectfully submitted, this 23rd day of May, 2018.

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Attorneys for Cube Yadkin Generation LLC

Certificate of Service

I hereby certify that a copy of the foregoing *Complainant's Response to Respondents' Joint answer and Motion to Dismiss* 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 23rd day of May, 2018.

BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, LLP

By: _____

EXHIBIT A

NOTICE OF COMMITMENT FORM

Kendrick C. Fentress
Associate General Counsel

Mailing Address:
NCRH 20 / P.O. Box 1551
Raleigh, NC 27602

o: 919.546.6733
f: 919.546.2694

Kendrick.Fentress@duke-energy.com

January 8, 2016

VIA ELECTRONIC FILING

Ms. Gail L. Mount
Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4300

Re: Duke Energy Carolinas, LLC and Duke Energy Progress LLC's Joint Motion to Deem Revised LEO Form Timely Filed & LEO Form Docket No. E-100, Sub 140

Dear Ms. Mount:

Please find enclosed for filing in the above-referenced docket the Duke Energy Carolinas, LLC and Duke Energy Progress, LLC's Joint Motion to Deem Revised LEO Form Timely Filed and LEO Form.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Kendrick C. Fentress

Enclosure

cc: Parties of Record

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-100, SUB 140

In the Matter of	)	
	)	DUKE ENERGY CAROLINAS AND
Biennial Determination of Avoided Cost	)	DUKE ENERGY PROGRESS' JOINT
Rates for Electric Utility Purchases from	)	MOTION TO DEEM REVISED LEO
Qualifying Facilities – 2014	)	FORM TIMELY FILED
	)	

NOW COME Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (collectively, the "Movants") and, pursuant to Commission Rule R1-7, respectfully move the North Carolina Utilities Commission (the "Commission") to deem timely filed the Movants' revised form to establish a legally enforceable obligation ("Revised LEO Form") in the above-captioned docket. In support of this motion, the Movants show the following:

1. The Commission issued its *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities* on December 17, 2015, wherein it mandated the use of a simple form clearly establishing a qualifying facility's commitment to sell its electric output to a utility and the date of the legally enforceable obligation. Further, the Commission approved the format submitted by Dominion North Carolina Power ("DNCP") in its reply comments and required Movants to adapt the contents of the DNCP form for their use and to submit a Revised LEO Form for approval within 15 days of the issuance of the order, *i.e.*, January 1, 2016.[1]

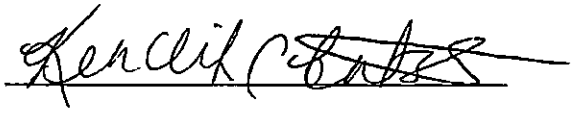
2. Due to the press of other business, the Movants were not able to file the Revised LEO Form by January 1, 2016. The Revised LEO Form has been prepared and

[1] See page 52 of the December 17, 2015 *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities*, Docket No. E-100, Sub 140.

is ready for Commission review. The Movants apologize for the delay and respectfully request that the Commission accept the Revised LEO Form as timely filed.

WHEREFORE, the Movants respectfully request that the Commission deem the Revised LEO Form as having been timely filed.

Respectfully submitted, this the 8th day of January, 2016.



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Counsel for DUKE ENERGY CAROLINAS, LLC
and DUKE ENERGY PROGRESS, LLC

NOTICE OF COMMITMENT TO SELL THE OUTPUT OF A QUALIFYING FACILITY TO Duke Energy Carolinas, LLC or Duke Energy Progress, LLC

Instructions to QF: The QF shall deliver, via certified mail, courier, hand delivery or email, its executed Notice of Commitment to:

Director – Power Contracts
400 South Tryon Street
Mail Code: ST 13A
Charlotte, North Carolina 28202
Attn.: Wholesale Renewable Manager
DERContracts@duke-energy.com

Any subsequent notice that a QF is required to provide to Company pursuant to this Notice of Commitment shall be delivered to the same address by one of the foregoing delivery methods.

1. [_____] ("Seller") hereby commits to sell to Duke Energy Carolinas, LLC or Duke Energy Progress, LLC (the "Company") all of the electrical output of the Seller's qualifying facility ("QF") described in Seller's self-certification of QF status filed with the Federal Energy Regulatory Commission in Docket No. QF_____ (the "Facility").

2. The name, address, and contact information for Seller is:

_____ Telephone: _____

_____ Email: _____

3. By execution and submittal of this commitment to sell the output of the Facility (the "Notice of Commitment"), Seller certifies as follows:

(Select the applicable certification below)

i. ____ Seller has received a certificate of public convenience and necessity ("CPCN") for the construction of its ____ kW (net capacity ac) Facility from the North Carolina Utilities Commission ("NCUC") pursuant to North Carolina General Statute § 62-110.1 and NCUC Rule R8-64, which CPCN was granted by NCUC on [insert date] in Docket No. _____.

ii. ____ Seller is exempt from the CPCN requirements pursuant to North Carolina General Statute § 62-110.1(g) and has filed a report of proposed construction for its ____ kW (net capacity ac) Facility with the NCUC pursuant to NCUC Rule R8-65 ("Report of Proposed Construction") on [insert date] in Docket No. _____.

iii. ____Seller has applied or will apply for a CPCN for the construction of its____ kW (net capacity ac) Facility on [insert date] in Docket No. _____. If the Seller does not know the docket number on the date of submission of this Notice of Commitment, Seller shall notify the Company of the docket number when it is assigned by the NCUC. Seller shall notify the Company upon issuance of an order by the Commission granting the CPCN.

iv. ____ Seller is exempt from the CPCN requirements pursuant to North Carolina General Statute § 62-110.1(g) and will file a Report of Proposed Construction for its ____ kW (net capacity ac) Facility with the NCUC pursuant to NCUC Rule R8-65 and shall notify the Company at the address specified in paragraph 1 of the docket number of such filing when it is assigned by the NCUC.

4. This Notice of Commitment shall take effect on its "Submittal Date" as hereinafter defined. "Submittal Date" means (a) the receipted date of deposit of this Notice of Commitment with the U.S. Postal Service for certified mail delivery to the Company, (b) the receipted date of deposit of this Notice of Commitment with a third-party courier (e.g., Federal Express, United Parcel Service) for trackable delivery to the Company, (c) the receipted date of hand delivery of this Notice of Commitment to the Company at the address set forth in paragraph 1, above, or (d) the date on which an electronic copy of this Notice of Commitment is sent via email to the Company if such email is sent during regular business hours (9:00 a.m. to 5:00 p.m.) on a business day (Monday through Friday excluding federal and state holidays). Emails sent after regular business hours or on days that are not business days shall be deemed submitted on the next business day.

5. By execution and submittal of this Notice of Commitment Seller acknowledges that:

a. The legally enforceable obligation date ("LEO Date") for the Facility will be determined in accordance with subsections (c) or (d) below. For QFs of 5 MW or less, the LEO Date will be used to determine Seller's eligibility for the rates, terms and conditions of the Company's currently effective Schedule PP. If the Seller's Facility does not qualify for Schedule PP, rates for purchases from the Facility will be based on the Company's avoided costs as of the LEO Date, calculated using data current as of the LEO Date.

b. If on the Submittal Date, Seller has a CPCN from or has filed a Report of Proposed Construction with NCUC for the Facility, the LEO Date will be the Submittal Date.

c. If on the Submittal Date, Seller does not have a CPCN for the Facility or has not filed a Report of Proposed Construction with the NCUC for the Facility, the LEO Date will be the date on which the NCUC issues a CPCN for the Facility or the filing date of the Report of Proposed Construction for the Facility, as applicable.

6. This Notice of Commitment shall automatically terminate and be of no further force and effect in the following circumstances:

   a. Upon execution of a PPA between Seller and Company.

   b. For a seller eligible for Schedule PP, if such Seller does not execute a PPA within thirty (30) days of the Company's delivery of an "executable" PPA. An executable PPA shall mean a PPA delivered to the QF by the Company that contains all information necessary for execution and that the Company has requested that the QF execute and return.

   c. For a Seller that is not eligible for Schedule PP, if such Seller does not execute a PPA within six months (as such period may be extended by mutual agreement of Seller and Company) after the Company's submittal of the PPA to the QF, provided, however, that if no interconnection agreement for the Facility has been tendered to Seller prior to the expiration of such deadline, the deadline for execution of the PPA shall be automatically extended until the date that is five days after the date that the interconnection agreement is tendered to the Seller. Notwithstanding the foregoing, if the PPA proposed by the Company becomes the subject of an arbitration or complain proceeding, the six month deadline for execution of the PPA shall be tolled upon the filing of the pleading commencing such proceeding and thereafter the deadline for execution of the PPA will be as directed by the NCUC.

The undersigned is duly authorized to execute this Notice of Commitment for the Seller:

_____
[Name]

_____
[Title]

_____
[Company]

_____
[Date]

CERTIFICATE OF SERVICE

I certify that a copy of Duke Energy Carolinas and Duke Energy Progress' Joint Motion to Deem Revised LEO Form Timely Filed, in Docket No. E-100, Sub 140, 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 8th day of January, 2016.

Kendrick C. Fentress
Associate General Counsel
Duke Energy Corporation
NCRH 20/P.O. Box 1551
Raleigh, NC 27602-1551
Telephone: 919.546.6733
Kendrick.Fentress@duke-energy.com

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. DUKE ENERGY CAROLINAS, LLC, and DUKE ENERGY PROGRESS, LLC Respondents.	)	**COMPLAINANT'S REQUEST FOR APPROVAL OF PROCEDURAL SCHEDULE**

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 they 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

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

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

DOCKET NO. E-2, SUB 1177 In the Matter of Cube Yadkin Generation, LLC, Complainant v. Duke Energy Progress, LLC, Respondent DOCKET NO. E-7, SUB 1172 In the Matter of Cube Yadkin Generation, LLC, Complainant v. Duke Energy Carolinas, LLC, Respondent	**RESPONDENTS' JOINT RESPONSE IN OPPOSITION TO COMPLAINANT'S REQUEST FOR APPROVAL OF PROCEDURAL SCHEDULE**

NOW COME Duke Energy Progress, LLC ("DEP") and Duke Energy Carolinas, LLC ("DEC") (collectively "the Companies" or "Respondents") by and through counsel and pursuant to Rule R1-9 of the North Carolina Utilities Commission ("Commission" or "NCUC") Rules and Regulations, and respond to Complainant's Request for Approval of Procedural Schedule ("Request"), which was filed by Cube Yadkin Generation, LLC ("Complainant" or "Cube Yadkin") on June 6, 2018. Cube Yadkin's Request is premature, as the Respondents' Joint Answer and Motion to Dismiss ("Motion to

Dismiss"), filed in these dockets on May 7, 2018 remains pending before the Commission. Cube Yadkin has filed a Complaint on March 29, 2018 and a Response to Respondents' Joint Answer and Motion to Dismiss ("Response") on May 23, 2018, wherein it has both set forth its arguments in support of its contentions and responded to the Answer and Motion to Dismiss of the Respondents. Nothing in the Response alters the Respondents' Motion to Dismiss or compels them to consent in writing to arbitration under N.C. Gen. Stat. § 62-40. In short, the arguments of the parties are before the Commission, and the matter is ripe for the Commission's review and determination. Accordingly, Cube Yadkin's Request should be denied. In support, the Companies respectfully show the following:

RESPONDENTS' RESPONSE IN OPPOSITION TO REQUEST FOR PROCEDURAL SCHEDULE

1. Cube Yadkin claims that it has established a legally enforceable obligation ("LEO") for three hydroelectric facilities - the High Rock, Tuckertown, and Falls facilities ("Yadkin Facilities") – in either September 2016 or October 2016 such that Cube Yadkin is entitled to a long-term (10 years or more) power purchase agreement ("PPA") at avoided cost rates calculated as of those alleged LEO dates. The uncontroverted facts before this Commission, however, show that Cube Yadkin has not established a LEO and is not entitled to a 10-year PPA at outdated avoided cost rates.

2. As Respondents noted in their Motion to Dismiss (hereby incorporated by reference), the Commission's requirements for establishing a LEO (prior to October 11, 2017) are well-established and clear:

> Beginning with the mandatory use of the LEO Form (40 days from the issuance of this Order), a developer will be required to: (1)

> have self-certified 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 construction of the facility.

Order Establishing Standard Rates and Contract Terms for Qualifying Facilities, Docket No. E-100, Sub 140, issued Dec. 17, 2015 at 52.

3. The undisputed facts before this Commission demonstrate without question that Cube Yadkin has failed to comply with any of these requirements to establish a LEO on any of the dates it has offered as potential LEO dates. The undisputed facts are: (i) Cube Yadkin did not own the Yadkin Facilities until February 1, 2017; (ii) Cube Yadkin did not self-certify as a QF with respect to the Yadkin Facilities until March 9, 2017;[1] (iii) Cube Yadkin has not submitted the mandatory "LEO" or Notice of Commitment ("NoC") form; and (iv) Cube Yadkin does not have a certificate of public convenience and necessity ("CPCN") for any of the Yadkin Facilities.

4. Having failed to establish a LEO either in 2016 as it alleges, or at the present time, Cube Yadkin is not entitled to a PPA that is inconsistent with N.C. Gen. Stat. § 62-156(c) and that includes avoided cost rates in excess of the Respondents' current forecasts of their respective avoided costs.

5. Because the Commission has the necessary relevant, uncontested facts before it to make a determination on Cube Yadkin's Complaint, a bifurcated, months-

[1] Cube Yadkin filed its self-certifications at the Federal Energy Regulatory Commission ("FERC") with the NCUC on March 16, 2017 in Docket Nos. SP-9172, Subs 0-2. In the transmittal letters to the NCUC, Cube Yadkin notes it made these filings pursuant to 18 C.F.R. 292.207(c)(1), which requires that an applicant filing a self- certification, self-recertification, application for Commission certification or application for Commission recertification of the qualifying status of its facility must concurrently serve a copy of such filing on each electric utility with which it expects to interconnect, transmit or sell electric energy to, or purchase supplementary, standby, back-up or maintenance power from, and the State regulatory authority of each state where the facility and each affected electric utility is located.

long discovery and hearing process, as proposed by Cube Yadkin (Request at ¶¶ 9-10), is not necessary.

6. In its Request, Cube Yadkin lists a series of "legal issues" that the Commission should consider "in advance of any consideration of the specific PPA terms and conditions." (Request at ¶ 7) The "legal issues" listed in sub-paragraphs 7.(b)-(e), however, are essentially the allegations from Cube Yadkin's Complaint restated as questions. Respondents respectfully submit that the legal arguments and the uncontroverted facts already set forth in the Complaint, the Respondents' Motion to Dismiss, and the Response fully address these issues and are sufficient for the Commission to determine that Cube Yadkin has failed to: (i) establish a LEO; (ii) show that the Commission should abandon its well-established LEO requirements for Cube Yadkin; and (iii) demonstrate that Cube Yadkin is entitled to evade application of N.C. Gen. Stat. § 62-156(c) (maximum term of negotiated PPAs is five years) to sign a 10-year PPA at avoided cost rates in excess of the Respondents' current forecast of their avoided costs.

7. With respect to the legal issue that Cube Yadkin presents in sub-paragraph 7.(a), Respondents state that they do not dispute that they sent the letters attached as Exhibit 2 and Exhibit 4 to the Complainant prior to the Complainant closing on the transaction with Alcoa Power Generation, Inc. ("Alcoa"). *See also* Motion to Dismiss at ¶¶ 28-30. With respect to Exhibit 4, the Respondents note that the October 14, 2016 letter from Respondents to Cube Yadkin indicates that:

> You further inform us that Cube Hydro seeks to purchase the Yadkin system from Alcoa, and *may be the actual owner and operator of the Yadkin system by the end of 2016. At this time,* Cube Hydro neither owns nor is a qualifying facility with respect to the Yadkin system. Therefore, Cube Hydro has no potential rights to

> exert under PURPA. Although your letter fails to reference our discussions, we have previously and prior to your letter informed you of the PURPA provisions under which Duke would be exempted from PURPA with regard to the Yadkin system. Accordingly, this letter serves as Duke's formal notice under 292.309/10 that if in the future Cube Hydro is a qualifying facility with respect to the Yadkin system and it seeks to sell power to Duke, it is Duke's view that it is exempted from any purchase obligation under PURPA with respect to the Yadkin system.
>
> Representations and warranties in applications made at FERC demonstrate that Cube Hydro has sought, and Alcoa currently has market-based rate authority on the basis of the ability and history of selling the output of the Yadkin system into competitive wholesale and organized markets. However, *after you have closed on the transaction with Alcoa*, if you seek to approach Duke under PURPA we will be glad to discuss the matter further.

Complaint at Exhibit 4 (emphasis added); see also Motion to Dismiss at ¶ 28-29 (explaining how after Cube Yadkin closed on the transaction with Alcoa, it and Respondents pursued a non-PURPA PPA that included the Narrows facility). Moreover, with respect to the legal issue that Cube Yadkin presents in sub-paragraph 7.(g), Respondents respectfully note that the Commission does not have the legal authority to preempt N.C. Gen. Stat. § 62-156(c) on the basis of PURPA. *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 336 N.C. 657, 674, 446 S.E.2d 332, 342-43 (1994). With respect to the issue presented in sub-paragraph 7.(f), it is premature to consider or brief the issue of "new capacity" due to the Respondents' pending Motion to Dismiss the Complaint on the grounds that it has not established a LEO at this time.

8. Additionally, Cube Yadkin seeks to divert the attention from the legal issues before the Commission by listing a series of what it terms "factual issues in dispute." These factual issues alleged "in dispute," however, are not germane to the issues of whether Cube Yadkin established a LEO or is entitled to a PPA at the term and avoided cost rates it seeks. With respect to Cube's assertions regarding Respondents seeking a waiver of its obligation to purchase from the Yadkin Facilities, Respondents do

not dispute the facts set forth in the September 21, 2016 letter from Respondents to Cube Yadkin (attached to the Complaint as Exhibit 2) and the October 14, 2016 letter to Cube Yadkin, which is quoted in the preceding paragraph and attached to the Complaint as Exhibit 4. Furthermore, whether Respondents "suggested" that Cube Yadkin register the facilities as new renewable energy facilities or Cube Yadkin did so as a result of the conversations with Respondents is immaterial. The material, undisputed fact is that less than eight weeks after Cube Yadkin closed on the transaction with Alcoa (February 1, 2017), Respondents sent Cube Yadkin a letter agreement dated March 22, 2017, in which they offered to discuss purchase of the output of the Yadkin Facilities and the Narrows facility on a non-PURPA basis, which potentially would include terms and conditions that were contingent upon Commission approval of the Yadkin Facilities and the Narrows facility as new renewable energy facilities. (Motion to Dismiss at ¶¶ 28-29). The letter agreement was finalized on April 25, 2017. (Complaint at ¶ 28-29). Finally, contrary to Cube Yadkin's assertion, a review of the scope of the "regulatory out" provisions contained in the contract to purchase the Yadkin Facilities and Narrows facility between Cube Yadkin and Alcoa is not relevant to the issue of whether, for example, Cube Yadkin has submitted the mandatory NoC form that QFs are required to submit to establish a LEO in North Carolina.

9. Cube Yadkin argues that approximately two months of discovery is necessary to "uncover further facts" that may bear on the Commission's analysis of these issues. The facts that are relevant and material to this Complaint, however, are already sufficiently developed and uncontested before the Commission. Based on the foregoing

and their Motion to Dismiss, Respondents respectfully request that the Commission deny Cube Yadkin's Request for a Procedural Schedule.

WHEREFORE, in addition to the relief sought in Respondents' Motion to Dismiss, Respondents respectfully pray as follows:

1. That the Commission issue an order denying Cube Yadkin's Request for Approval of Procedural Schedule;

2. That the Commission grant such other relief as the Commission deems just, equitable, and proper.

Respectfully submitted, this the 8th day of June, 2018.

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CERTIFICATE OF SERVICE

I certify that a copy of Duke Energy Progress, LLC's and Duke Energy Carolinas, LLC's Joint Response in Opposition to Complainant's Request for Approval of Procedural Schedule, in Docket Nos. E-2, Sub 1177 and E-7, Sub 1172 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 8th day of June, 2018.

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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

[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,

[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

[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.

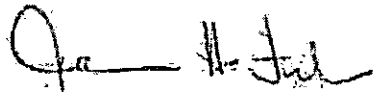
dismiss should be granted. Finally, the Commission concludes that Complainant's other pending requests are rendered moot by this order and, therefore, should be denied.

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.

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

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.

[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

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.	)	
	)	ORDER GRANTING EXTENSION
Duke Energy Progress, LLC,	)	OF TIME TO FILE NOTICE OF
Respondent	)	APPEAL AND EXCEPTIONS
	)	
DOCKET NO. E-7, SUB 1172	)	
	)	
In the Matter of	)	
Cube Yadkin Generation, LLC,	)	
Complainant	)	
	)	
v.	)	
	)	
Duke Energy Carolinas, LLC,	)	
Respondent	)	

BY THE CHAIRMAN: On July 16, 2018, in the above-captioned proceedings, the Commission issued an Order Granting Motion to Dismiss, granting the motion to dismiss filed by Duke Energy Progress, LLC and Duke Energy Carolina, LLC in response to the complaint filed by Cube Yadkin Generation, LLC, (Complainant).

On August 1, 2018, Complainant filed a Motion for Extension of Time pursuant to N.C.G.S. § 62-90(a), requesting that the Commission extend the time within which to file notice of appeal and exceptions to the Commission's July 16 Order from August 15, 2018, to September 14, 2018. In support of its motion, Complainant states that it needs additional time to fully evaluate the Order, its impact on Complainant's business operations, and Complainant's legal and business options.

Based upon the foregoing and the entire record herein, and pursuant to N.C.G.S. § 62-90(a), the Chairman finds good cause to grant Complainant 30 additional

days in which to file with the Commission its notice of appeal and exceptions to the Commission's July 16 Order.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 2nd day of August, 2018.

NORTH CAROLINA UTILITIES COMMISSION

A. Shonta Dunston

A. Shonta Dunston, Acting Deputy Clerk

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	)	**NOTICE OF APPEAL AND EXCEPTIONS BY COMPLAINANT CUBE YADKIN GENERATION, LLC**
DOCKET NO. E-7, SUB 1172 In the Matter of Cube Yadkin Generation, LLC, Complainant v. Duke Energy Carolinas, LLC Respondent	)	

Cube Yadkin Generation, LLC ("Cube Yadkin" or "Complainant"), acting through undersigned counsel and pursuant to N.C. Gen. Stat. § 62-90, Rule 18 of the North Carolina Rules of Appellate Procedure and the *Order Granting Extension of Time to File Notice of Appeal and Exceptions*, hereby respectfully gives Notice of Appeal to the North Carolina Court of Appeals from the N.C. Utilities Commission's ("Commission") Order Granting Motion To Dismiss ("Order") in the above referenced dockets, issued on July 16, 2018.

Cube Yadkin filed a Verified Complaint, Request for Declaratory Ruling, and Request for Arbitration (the "Complaint") against Duke Energy Carolinas, LLC and Duke Energy Progress

LLC (collectively, "Duke" or "Respondents") after Duke wrongfully refused to enter into long-term Qualified Facility ("QF") Power Purchase Agreements ("PPAs") for Cube Yadkin's three clean energy hydroelectric power facilities. Cube Yadkin alleged facts sufficient to demonstrate that Duke's conduct violated the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3, *et seq.* ("PURPA"), N.C. Gen. Stat. § 62-156, and the rules of this Commission.

The well-pleaded facts of the Complaint, taken in the light most favorable to Cube Yadkin, are as follows. Cube Yadkin operates the Yadkin Project, a series of four hydroelectric stations, dams, and reservoirs along a 38-mile stretch of the Yadkin River. Cube Yadkin signed a contract to acquire the Yadkin Project from Alcoa on June 30, 2016, and formally consummated its agreement to purchase the Yadkin Project on February 1, 2017. Three of the Yadkin Project's hydroelectric facilities (collectively, the "Yadkin River Facilities") self-certified as QFs under PURPA. The purpose of the underlying case, and of this appeal, is for Cube Yadkin to vindicate its right under federal law to commit the output and capacity of these QFs to Duke at avoided cost rates determined as of the date that Complainant first established a legally enforceable obligation to provide such energy and capacity to Duke.

The QFs are interconnected with Duke and are components of hydroelectric operations well known to Duke. As part of Cube Yadkin's pre-acquisition due diligence activity, Cube Yadkin initiated discussions with Duke in March 2016 concerning the purchase of the Yadkin River Facilities' energy and capacity. The sale of the QF energy and capacity to Duke was an integral component of Cube Yadkin's business plan in proceeding with the acquisition of the Yadkin Project and committing to the facility upgrades required by the Federal Energy Regulatory Commission ("FERC") in connection with the acquisition. Cube Yadkin had multiple meetings and communications with Duke between August and October 2016 to discuss Cube Yadkin's

intention to enter into long-term PPAs to sell the energy and capacity provided by the Yadkin Project. In an October 11, 2016 letter, Cube Yadkin further apprised Duke of the status of its QFs and the utilities' obligation, under the law, to purchase the energy and capacity of those facilities. In an October 14, 2016, Duke gave notice to Cube Yadkin that it would not honor Cube Yadkin's assertion of rights under PURPA at that time or in the future.

Part of Duke's putative rationale for this decision is that Cube Yadkin did not submit to Duke the notice of commitment form ("NoC") recognized by the Commission in its avoided cost orders, and had therefore failed to establish Legally Enforceable Obligations ("LEOs") required to trigger Duke's obligation to purchase their output under PURPA. However, because the Cube Yadkin QFs are existing facilities that are not subject to the certificate of public convenience and necessity ("CPCN") requirement in N. C. Gen. Stat. § 62-110.1(a) and have had longstanding relationships—including existing interconnections—with the electric utilities in question, the commitment form by its own terms does not apply to the Cube Yadkin QFs.

Cube Yadkin established LEOs no later than October 11, 2016, to sell the energy and capacity from the three QFs to Duke, because: (1) the construction of the hydroelectric QFs pre-dated the CPCN statute; (2) Cube Yadkin committed to purchase and upgrade the facilities in reliance in part upon the QF status of the Yadkin River Facilities; and (3) multiple communications between the Cube Yadkin and Duke confirmed Cube Yadkin's intention to "put" its PURPA-qualifying energy and capacity to Duke, as acknowledged by Duke in its purported anticipatory rejection of Cube Yadkin's assertion of PURPA rights.

Duke sought to avoid substantively defending its improper treatment of Cube Yadkin by claiming in the Joint Answer and Motion to Dismiss Complaint (the "Motion to Dismiss") that Cube Yadkin had not established a LEO as defined under PURPA and implementing rules and

Orders of the FERC, because Cube Yadkin had not submitted a NoC to Duke or obtained a CPCN from the Commission. The Complaint alleged the factual basis for Cube Yadkin's contention that it was not required to (and could not) submit a NoC to Duke, or, in the alternative should be granted a waiver from the burden of submitting a NoC under the specific facts and circumstances giving rise to the dispute between Cube Yadkin and Duke.

The Commission's Order dismisses Cube Yadkin's Complaint requesting relief in the form of: (1) treating the 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 PPAs with Cube Yadkin 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 any unresolved issues; and (5) setting this matter for consideration on an expedited procedural schedule.

The Commission dismissed the Complaint on the grounds that Cube Yadkin failed to establish a LEO because it did not to submit a NoC to Respondents; and because the Commission, after weighing legal, factual, and equitable considerations, concluded that Cube Yadkin's request for a waiver of the NoC requirement should be denied. The Commission issued 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 or drawing reasonable inferences in Complainant's favor.

Cube Yadkin appreciates the Commission's consideration of these matters, but respectfully submits that the Commission's Order incorrectly decides the substantive and procedural issues raised by Complainant's Verified Complaint, Request for Declaratory Ruling, and Request for

Declaratory Ruling. Consistent with the exceptions asserted below and pursuant to N.C. Gen. Stat. § 62-90(a), Cube Yadkin respectfully submits that the Commission's Order should be reversed because it is unlawful, unjust, unreasonable and unwarranted as the Commission's Order is in excess of statutory authority, affected by errors of law, unsupported by competent, material and substantial evidence, and is arbitrary and capricious.

EXCEPTION NO. 1

Cube Yakin respectfully submits that the Commission erred by applying an incorrect standard of decision in ruling on Duke's motion to dismiss. As indicated on page 3 of the Commission's Order, and throughout, the Commission premised its dismissal of the Complaint on the conclusion that "the facts material to the resolution of this matter are undisputed." However, under the law, the proper standard of decision is whether, taking the facts alleged in the Complaint in the light most favorable to Cube Yadkin and drawing all permissible inferences in Cube Yakin's favor, the Complaint stated a claim upon which relief could be granted. *Tully v. City of Wilmington*, 370 N.C. 527, 532, 810 S.E.2d 208, 213 (2018) (noting that for both a motion for judgment on the pleadings and motion to dismiss "[t]he trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party."). To prevail on its motion to dismiss, Duke was required to demonstrate that, applying this standard, Cube Yadkin could not show any set of facts that would entitle it to recovery. *Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) ("We consider the allegations in the complaint true, construe the complaint liberally, and only reverse the trial court's denial of a motion to dismiss if plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim.") (citation omitted)). The Commission failed to hold Duke to this standard. Instead, the

Order improperly converted Duke's Motion to Dismiss into an evaluation of the merits of Cube Yadkin's claims based on the Commission's own assessment of evidence, which had not been presented. This evaluation occurred without the Commission providing notice to Cube Yadkin of any of the Commission's concerns, without Cube Yadkin having the opportunity to conduct discovery on relevant facts, without affording Cube Yadkin the opportunity to brief the dispositive legal issues, and without the Commission conducting a hearing at which Cube Yadkin would be permitted to make arguments and present evidence – all of which was required by applicable law and by due process. If the Commission had applied the proper standard, it could not have permissibly dismissed Cube Yadkin's Complaint. As a result of its reliance on an erroneous standard of decision, the Commission's Order is in excess of statutory authority, affected by errors of law, unsupported by competent, material and substantial evidence, and is arbitrary and capricious in contravention of N.C. Gen. Stat, § 62-90(a).

EXCEPTION NO. 2

The Commission erred by prematurely resolving disputed factual issues and disposing of the Complaint without providing the Complainant a full and fair opportunity to develop the record or to test Respondent's evidence at a hearing, in violation of due process. Cube Yadkin's claims raised factual issues regarding, *inter alia*, whether and when a Cube Yadkin established LEOs for the Yadkin River Facilities; whether the unique circumstances presented entitled Cube Yadkin from relief from the Notice of Commitment form requirement, when such relief would advance and support PURPA and its underlying purposes and policies; and whether Duke manifested a lack of good faith in negotiating with Cube Yadkin. These fact-dependent issues are not the type that are fairly subject to summary resolution, particularly where, as the Commission itself concedes,

the case presents a "novel issue" not previously addressed. (Order at 6.) Due process requires access to reasonable discovery, pre-hearing exchanges of documents and taking of depositions, and a hearing with the opportunity to present evidence and to test the opposition's case through cross-examination. *See e.g., California v. Green*, 399 U.S. 149, 158 (1970) (describing the importance of cross examination in addressing factual disputes). The proceedings in this case deprived Cube Yadkin of all of these essential rights, as the Commission's Order erroneously terminated this case before any such rights could be exercised. As a result of this error, the Commission's Order is in excess of statutory authority, affected by errors of law, unsupported by competent, material and substantial evidence, and is arbitrary and capricious in contravention of N.C. Gen. Stat, § 62-90(a).

EXCEPTION NO. 3

The Commission erred by adjudicating Cube Yadkin's Complaint using procedures that violated North Carolina statutory restrictions on the manner and means of resolving disputes before the Commission. This violation of statutory authority in turn violated state and federal constitutional principles. Section 62-73 of the North Carolina General Statutes provides, in pertinent part, that:

> Unless the Commission shall determine, upon consideration of the complaint or otherwise, and after notice to the complainant and opportunity to be heard, that no reasonable ground exists for an investigation of such complaint, the Commission shall fix a time and place for hearing, after reasonable notice to the complainant and the utility complained of, which notice shall be not less than 10 days before the time set for such hearing.

The Commission failed to afford Cube Yadkin the statutorily required notice and opportunity to be heard under N.C. Gen. Stat. § 62-73. The Commission also unlawfully deprived Cube Yadkin

of the constitutionally-protected interest in "property" conferred by this section. *Vitek v. Jones*, 445 U.S. 480, 490-491, n.6, 100 S.Ct. 1254, 1262-1263 n.6 ("'While the legislature may elect not to confer a property interest, . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. . . . [T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.'") (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167, 94 S.Ct. 1633, 1650 (opinion concurring in part)). Specifically, by enacting N.C. Gen. Stat. § 62-73, the General Assembly created entitled each complainant to a forum and certain procedures for the resolution of a Complaint against a public utility. That entitlement is a property right protected by the federal and North Carolina Constitutions – a right that includes the ability for a complainant to avail itself of "procedures essential to the realization of the parent right." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009). Cube Yadkin was entitled to a full and fair resolution of its Complaint as mandated by Chapter 62, which include "notice and an opportunity to be heard" and a determination by the Commission "no reasonable ground exist[ed]" for the investigation demanded by Cube Yadkin's Complaint. The Commission erred by failing to observe this governing procedural statute. As a result of this error, the Commission's Order is in excess of statutory authority, affected by errors of law, unsupported by competent, material and substantial evidence, and is arbitrary and capricious.

EXCEPTION NO. 4

The Commission erred in finding and concluding, on page 3 of the Order, that the facts material to the resolution of this matter are undisputed. As indicated above in Exception No. 1, the pertinent question is not whether the facts are undisputed but instead whether the facts alleged in the Complaint, taken in the light most favorable to Cube Yadkin, are sufficient to state a claim

upon which relief may be granted. But even if that were the appropriate standard, Cube Yadkin's Complaint still presents numerous, substantial, and material questions of fact that require consideration at a hearing on the merits. These factual questions include, *inter alia*, the following: (1) whether, based on consideration of the context of the parties' oral and written communications, Cube Yadkin had communicated its commitment to sell the output of its facilities to Duke; (2) whether, based on the unique facts and circumstances presented in this matter, Cube Yadkin could have submitted a NoC or should have been deemed required to do so; (3) whether Cube Yadkin knew or should have known that the Commission might require a CPCN under N.C. Gen. Stat. § 62-110.1; (4) whether, under the facts presented to Cube Yadkin, it was required to submit a NoC when it could not complete Section 3 of that form; (5) whether by November 2016 each of Cube Yadkin's three hydroelectric QFs had committed itself to sell its electric output to Duke, so as to establish a LEO under FERC regulations and guidance; and (6) whether Duke acted in good faith in its contractual negotiations with Complainant. Additional factual issues are recited in the dissenting Commissioners' Opinions. Cube Yadkin respectfully submits that the Commission erred by disregarding these and factual issues presented by Cube Yadkin's Complaint, or by resolving those issues against Cube Yadkin notwithstanding the procedural posture of the case. As a result of this error, the Commission's Order is in excess of statutory authority, affected by errors of law, unsupported by competent, material and substantial evidence, and is arbitrary and capricious.

EXCEPTION NO. 5

The Commission erred in finding and concluding, on page 4 of the Order, that Cube Yadkin 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. As noted in its Complaint and throughout Cube Yadkin's filings, Cube Yadkin substantially complied with of the prerequisites for establishing a LEO prior to November 16, 2016; namely, that the Yadkin River Facilities have self-certified with FERC as QFs (Compl. ¶ 20); the QFs were constructed prior to the enactment of the statutory obligation to secure a certificate of public convenience and necessity ("CPCN") (Compl. ¶ 21, n. 17); and the QFs have made a commitment to sell the QF's output to a utility under PURPA based on its communications with Duke (Compl. ¶ 27). The Commission erred by failing to recognize that, based on these allegations, Cube Yadkin was entitled to proceed to hearing. As a result of this error, the Commission's Order is in excess of statutory authority, affected by errors of law, unsupported by competent, material and substantial evidence, and is arbitrary and capricious.

EXCEPTION NO. 6

The Commission erred in dismissing Cube Yadkin's alternative request for waiver of the general rule requiring submittal of an NoC as a prerequisite to establishing a LEO, without allowing the parties to develop a factual record, notwithstanding Cube Yadkin's assertion that the NoC submission requirement should be waived as to the QFs based on the unique facts and circumstances of this case. (Order at 6-11). 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) ("We caution that '[t]he waiver determination is fact-specific . . .'" (quoting *Cotton v. Slone*, 4 F.3d 176, 180 (2d Cir. 1993)); *In Re Bellsouth Telecommunications, Inc.*, Order Granting Force Majeure Waiver, Docket No. P-100, Sub 98 (Jan. 31, 2005) (finding good cause to justify waiver "based on the specific facts of this case").

Accordingly, allegations of waiver are generally unsuitable for preliminary disposition on the pleadings and instead generally require a fact-specific, fully-developed record. The Commission acted improperly by determining the issue summarily notwithstanding the substantial facts alleged in support of this allegation. These include the fact that Cube Yadkin made a commitment to sell its output to Duke under PURPA as of September 16, 2016 (Compl. ¶ 27), and that the formal process for establishing a LEO (which generally requires submittal of the NoC) did not and could not apply because the Yadkin River Facilities' construction predate the advent of the statutory CPCN application process (Compl. ¶ 21, n. 17). As a result of this error, the Commission's Order is in excess of statutory authority, affected by errors of law, unsupported by competent, material and substantial evidence, and is arbitrary and capricious.

EXCEPTION NO. 7

The Commission erred by denying Cube Yadkin's request for a waiver of the NoC requirement based on the conclusion that the Yadkin River Facilities should have obtained a CPCN under N.C. Gen. Stat. § 62-110.1. The CPCN requirement did not apply to Cube Yadkin for the following reasons: (1) there is no underlying statutory requirement to obtain a certificate for an operational facility that has been in operation prior to the enactment of the Electricity Act of 1965, Session Law 1965-287, and the policy of "assist[ing] the supplier in complying with the requirements of obtaining a CPCN" did not apply (*Green Energy Trans, LLC v. Duke Energy Carolinas, LLC*, Order Granting Judgment on the Pleadings, Docket No. E-7, Sub 1000 (May 31, 2012) at 5); and (2) Cube Yadkin is not a "public utility" under applicable law because it is not furnishing electricity to or for the public for compensation under N.C. Gen. Stat. § 62-3(23) and this Commission's decisions. The Commission impermissibly disregarded these circumstances,

which were alleged in the Complaint and to be taken as true. As a result of this error, the Commission's Order is in excess of statutory authority, affected by errors of law, unsupported by competent, material and substantial evidence, and is arbitrary and capricious.

EXCEPTION NO. 8

The Commission erred in finding and concluding, on page 8 of the Order, that Cube Yadkin has not substantially complied with the substance of the requirement for establishing a LEO. The existence (or nonexistence) of a LEO is based on questions of fact that are in dispute in this case. Under federal law, the existence of a LEO turns on whether a QF has "commit[ed] itself" to sell its electrical output to the utility. *J.D. Wind*, 129 FERC ¶ 61,148 (2009), *recon. denied*, 130 FERC ¶ 61,127 (2010). Here, Cube Yadkin alleged sufficient facts to establish that it had made clear to Duke that it was committed to producing power and making its power output available to the utility for purchase such that a LEO would exist under federal law, without regard to the NoC, through multiple communication with Duke. (Compl. ¶ 22 (noting that "[c]onversations with Duke concerning the purchase of QF capacity began over a year a half ago [from the date of the Complaint]"); Compl. ¶ 23 (noting that there were "in-person meetings in early August 2016 to discuss a potential long-term PPA for the QFs"); Compl. ¶¶ 24-26 (noting numerous communications between Cube Yadkin and Duke concerning the purchase of the output of the QFs)). The Commission disregarded these allegations and the need to hold a full hearing to address disputed issues of fact. As a result of this error, the Commission's Order is in excess of statutory authority, affected by errors of law, unsupported by competent, material and substantial evidence, and is arbitrary and capricious.

EXCEPTION NO. 9

The Commission erred in finding and concluding on pages 8 and 9 of the Order that Cube Yadkin's commitment to sell the output of the Yadkin River Facilities to Duke was "anticipatory" and therefore invalid. The Complaint alleges a definite commitment by Cube Yadkin on behalf of the Yadkin River Facilities, and supports this allegation with several specific additional allegations, including a number of allegations of communications, both in person and through letters and electronic means, directly related to the establishment of PPAs for the QFs. (Compl. ¶¶ 22-27). The Commission impermissibly disregarded these allegations, and moreover inferred (without any basis, and to the detriment of Complainant) that Cube Yadkin had no authority to bind the Yadkin River Facilities. As a result of this error, the Commission's Order is in excess of statutory authority, affected by errors of law, unsupported by competent, material and substantial evidence, and is arbitrary and capricious.

EXCEPTION NO. 10

The Commission erred in finding and concluding, on page 9 of the Order, that Duke had acted in good faith in dealing with Cube Yadkin when Cube Yadkin alleged and was able to prove that Duke had acted in bad faith by refusing to negotiate a long-term PPA with Cube Yadkin. Questions of good faith or bad faith are questions of fact that are to be resolved by a fact-finder on the basis of evidence and not upon the mere allegation by a responding party that it acted in good faith. *Johnson v. Metro. Life Ins. Co.*, 219 N.C. 445, 14 S.E.2d 405, 407 (1941) ("[G]ood faith is a question of fact. Mere allegation of good faith is not proof thereof."); *Farndale Co., LLC v. Gibellini*, 176 N.C. App. 60, 67, 628 S.E.2d 15, 19 (2006) ("Whether a party has acted in good faith is a question of fact for the trier of fact," and "the standard by which the party's conduct is to

be measured is one of law."). Here, Cube Yadkin's allegations are more than sufficient to create a question of fact to be determined on a fully developed record. The Complaint sets out with specificity Cube Yadkin's substantial efforts to obtain a long-term PPA for the Yadkin River Facilities with Duke and alleges that Duke had not acted in good faith but had engaged in conduct "designed to discourage Cube Yadkin from pursuing its rights under PURPA." (Compl. ¶ 29). In its Answer, Duke admitted that it had "not provided proposed contract terms, including pricing, for a long-term PURPA PPA or to otherwise enter into negotiations for such an agreement." (Answer ¶ 28a). The Complaint further alleges that Duke rejected Cube Yadkin's PURPA rights to a PPA via letter stating that Respondents were exempt from PURPA purchase requirements with respect to the Yadkin River Facilities, despite never having filed a petition with FERC for relief from its obligation to purchase from the Yadkin River Facilities – a legal position that was patently wrong under the relevant provisions of PURPA and FERC regulations. (Compl., Ex. 4; 16 U.S.C. § 824a-3(m); 18 C.F.R. §§ 309-310). Indeed, Respondents ultimately reversed their position and acknowledged their legal responsibility to purchase the output of the Projects pursuant to PURPA. The Commission disregarded the well-pleaded allegations of the Complaint and erroneously concluded that "the pleadings demonstrate a good faith basis for Respondents having asserted their position" that Duke was not obligated by PURPA to purchase the output of the Yadkin River Facilities and that Complainant's further attempts to negotiate with Duke post-2016 "tend to demonstrate the good faith basis" of Duke's refusal to deal. It was improper for the Commission to deviate from the standard of decision, which required it to take the allegations of the Compliant as true, and to make factual findings without affording the parties the opportunity to develop a factual record.

The Commission's improper and premature factual determinations are compounded by legal errors. The Commission's erroneously concluded first that Duke may have been legally justified in refusing to purchase the output of the Yadkin River Facilities based on their alleged historical sales into competitive wholesale markets, and second, that "Respondents are equally entitled to stand on their right to refuse to purchase power from the Yadkin River Facilities . . . as Complainant is entitled to stand on its rights to sell such power." Order at 9. These conclusions are incorrect as a matter of law. It is well-established and uncontroversial that Respondents are obligated by PURPA to purchase power from QFs such as the Yadkin River Facilities. PURPA Section 210(h), 16 U.S.C. § 824a-3(h); 18 C.F.R. § 292.303(a). Only if Respondents were to *successfully* petition FERC for relief from their purchase obligation based on Complainants' alleged access to wholesale markets would Respondents have the "right to refuse to purchase power from the Yadkin River Facilities." 16 U.S.C. § 824a-3(m); 18 C.F.R. § 292.310 (establishing procedures for filing and hearing of PURPA 210(m) petitions); FERC Order No. 688 (Oct. 20, 2006) at P 5, 8 (refusing to promulgate rules that would terminate purchase obligation without a commission finding that QF has nondiscriminatory market access). Given that the law did not remotely support Duke's position on this issue, and that the net effect of Duke's refusal was to frustrate and delay Cube Yadkin's assertion of its PURPA rights, the only reasonable inference to be drawn from the Complaint – and the inference *required* by the operative standard of decision – is that Duke's refusal was in bad faith. Duke's bad faith was a substantial factor supporting Cube Yadkin's request for a waiver of the NoC requirement (Complainants' Response to Respondents' Joint Answer and Motion to Dismiss at 13), and the Commission's disregard of that bad faith justifies reversal of its opinion on that issue as well.

As a result of these errors, the Commission's Order is in excess of statutory authority, affected by errors of law, unsupported by competent, material and substantial evidence, and is arbitrary and capricious.

EXCEPTION NO. 11

The Commission erred in finding and concluding, on page 10 of the Order, that the *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187 (Mar. 15, 2013) and *Hydrodynamics Inc.*, 146 FERC ¶ 61,193 (Mar. 20, 2014), cases do not support the granting of a waiver of the required use of the NoC Form. Contrary to the Commission's Order, the *Grouse Creek Wind Park and Hydrodynamics* cases both stand for the proposition that the Commission cannot impose conditions for obtaining a LEO that would interfere with a QF's rights to a LEO, create practical disincentives to formation of PPAs, or create unreasonable obstacles to obtaining a LEO in violation of PURPA. As a result of this error, the Commission's Order is in excess of statutory authority, affected by errors of law, unsupported by competent, material and substantial evidence, and is arbitrary and capricious.

EXCEPTION NO. 12

The Commission erred in finding and concluding, on page 10 of the Order, that requiring the use of the NoC Form under these circumstances does not constitute an unreasonable interference with, nor an unreasonable obstacle to, the establishment of a LEO, even where, as in this case: (1) the NoC Form did not provide a selection that exactly described these QF's situation; and (2) Responded allegedly engaged in bad-faith behavior designed to discourage Complainant from exercising their PURPA rights. Contrary to the Commission's Order, the *Grouse Creek Wind*

Park and *Hydrodynamics* cases establish that the creation of a barrier to obtaining a LEO, such as the NoC form when applied to the Yadkin River Facilities which are established QFs without the need for a CPCN, unreasonably interferes with the ability of Cube Yadkin to establish a LEO. As to this error, the Commission's Order is in excess of statutory authority, affected by errors of law, unsupported by competent, material and substantial evidence, and is arbitrary and capricious.

EXCEPTION NO. 13

The Commission erred by prematurely disposing of the Complaint based on procedural requirements created for facts and circumstances that are markedly different from the case *sub judice*, resulting in a denial of Cube Yadkin's rights under state and federal law. PURPA and its implementing regulations are designed to encourage the development of small power production facilities using renewable fuel sources, such as hydroelectric energy. PURPA charges the FERC with implementing mandatory purchase and sell obligations, requiring electric utilities to purchase electric power from, and sell power to, qualifying cogeneration and small power production facilities. State regulatory authorities are, in turn, required to implement PURPA in a way that gives effect to FERC's regulations implementing PURPA. PURPA mandates that every QF "shall have the option . . . [t]o provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term." 18 C.F.R. § 292.304(d). State regulations that frustrate this mandate through the creation of unreasonable obstacles to the formation of a LEO are invalid. The Commission's adoption of the NoC form was a means of implementing PURPA requirements and FERC regulations. Neither of those authorities requires or depends upon the completion and transmittal of NoC form itself. Here, however, the Order dismissing this case interpreted and applied the NoC form requirement as an indispensable element to the

formation of a LEO under PURPA, thereby violating the letter and spirit of PURPA, which seeks to encourage the formation of such obligations and the purchase of output from small cogeneration and power production facilities. Moreover, Cube Yadkin's Complaint demonstrates that the NoC form is drafted in such a way to effectively deny Cube Yadkin's ability to ever establish a LEO, contrary to Cube Yadkin's rights under the law. It was error for the Commission to interpret use or non-use of the form in such a way as to conflict with federal law and to apply the requirement in such a way to thwart Cube Yadkin's rights under PURPA. As a result of this error, the Commission's Order is in excess of statutory authority, affected by errors of law, unsupported by competent, material and substantial evidence, and is arbitrary and capricious.

EXCEPTION NO. 14

The Commission erred, on pages 10 and 11, by weighing the equitable considerations presented by the Complaint without a fully developed record. Equitable determinations involve a case- and fact-specific inquiry and are generally unsuitable for early disposition on the pleadings. The Commission improperly determined the issue summarily, including by ignoring the allegations of the Complaint which established that Cube Yadkin made a commitment to sell its output to Duke under PURPA as of September 16, 2016 (Compl. ¶ 27) and the inapplicability of the formal LEO process encapsulated in the NoC did not apply because the QFs predate the statutory QF certification process (Compl. ¶ 21, n. 17). As a result of this error, the Commission's Order is in excess of statutory authority, affected by errors of law, unsupported by competent, material and substantial evidence, and is arbitrary and capricious.

EXCEPTION NO. 15

The Commission erred in weighing, on page 10 of the Order, equitable considerations, state policy, and considerations of judicial economy to determine that Cube Yadkin should not be granted a waiver of the required use of the NoC Form. As the Commission acknowledged, this case presents a novel question of whether Cube Yadkin, 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. Accordingly, the public policy and equitable considerations noted in the Commission's analysis, when applied to the facts asserted in the Complaint, favored Cube Yadkin's position. Accordingly, the motion to dismiss should have been denied. As to this error, the Commission's Order is in excess of statutory authority, affected by errors of law, unsupported by competent, material and substantial evidence, and is arbitrary and capricious.

CONCLUSION

For the reasons set forth above, the Order is arbitrary and capricious; is affected by errors of law; is unsupported by competent, material, and substantial evidence in light of the entire record; and is beyond the Commission's statutory power and jurisdiction. The Court of Appeals should, therefore, reverse that Order and remand the case to the Commission with instructions that Cube Yadkin be permitted to proceed with its Complaint and that the Commission address Cube Yadkin's pending requests.

Respectfully submitted this 13th day of September, 2018.

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing Notice of Appeal and Exceptions by Complainant Cube Yadkin Generation, LLC on all parties of record in accordance with Commission Rule R1-39, by United States mail, postage prepaid, first class; by hand delivery; or by means of facsimile or electronic delivery upon agreement of the receiving party.

This the 13th day of September, 2018.

Phillip A. Harris, Jr.
Attorney for Cube Yadkin Generation, LLC

STIPULATIONS SETTLING THE RECORD ON APPEAL

Counsel for the Appellant and Appellees stipulate as follows:

1. The North Carolina Utilities Commission was at all times duly constituted during the pendency of these Dockets and had jurisdiction over all parties.

2. Appellant's Notice of Appeal and Exceptions was duly and timely filed and served.

3. Appellant timely served the proposed record on appeal on 18 October 2018.

4. The parties came to an agreement regarding which documents are to be included in the printed record. The record on appeal was timely settled by agreement for purposes of Appellate Rules 12(a) and 18(d) on 26 November 2018.

5. Under Appellate Rule 12(a), the deadline for filing the record on appeal is 11 December 2018.

6. The parties stipulate that the agreed upon record on appeal to be filed with the Clerk of the Court of Appeals consists of this printed Record on Appeal, consisting of pages 1 to 208.

PROPOSED ISSUES ON APPEAL

Pursuant to Rule 10, Appellant states that it intends to present the following issues on appeal:

1. Did the Commission err by applying an incorrect standard of decision in ruling on Respondents' motion to Dismiss? (Exception No. 1, R pp 179-80)

2. Did the Commission err by prematurely resolving disputed factual issues and disposing of the Complaint without providing the Complainant a full and fair opportunity to develop the record or to test Respondent's evidence at a hearing, in violation of due process? (Exception No. 2, R pp 180-81)

3. Did the Commission err by adjudicating Cube Yadkin's Complaint using procedures that violated North Carolina statutory restrictions on the manner and means of resolving disputes before the Commission? (Exception No. 3, R pp 181-82)

4. Did the Commission err in finding and concluding that the facts material to the resolution of this matter are undisputed? (Exception No. 4, R pp 182-83)

5. Did the Commission err in finding and concluding that Cube Yadkin 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? (Exception No. 5, R pp 183-84)

6. Did the Commission err in dismissing Cube Yadkin's alternative request for waiver of the general rule requiring submittal of a Notice of Commitment ("NoC") form as a prerequisite to establishing a Legally Enforceable Obligation ("LEO"), without allowing the parties to develop a factual record, notwithstanding Cube Yadkin's assertion that the NoC submission requirement should be waived as to the Qualifying Facilities ("QFs") based on the unique facts and circumstances of this case? (Exception No. 6, R pp 184-85)

7. Did the Commission err by denying Cube Yadkin's request for a waiver of the NoC requirement based on the conclusion that the Yadkin River Facilities should have obtained a Certificate of Public Necessity and Convenience ("CPCN") under N.C. Gen. Stat. § 62-110.1? (Exception No. 7, R pp 185-86)

8. Did the Commission err in finding and concluding that Cube Yadkin has not substantially complied with the substance of the requirement for establishing a LEO? (Exception No. 8, R pp 186-87)

9. Did the Commission err in finding and concluding that Cube Yadkin's commitment to sell the output of the Yadkin River Facilities to Duke was "anticipatory" and therefore invalid? (Exception No. 9, R p 187)

10. Did the Commission err in finding and concluding that Duke had acted in good faith in dealing with Cube Yadkin when Cube Yadkin alleged and was able to prove that Duke had acted in bad faith by refusing to negotiate a long-term PPA with Cube Yadkin? (Exception No. 10, R pp 187-90)

11. Did the Commission err in finding and concluding that the *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187 (Mar. 15, 2013) and *Hydrodynamics Inc.*, 146 FERC ¶ 61,193 (Mar. 20, 2014), cases do not support the granting of a waiver of the required use of the NoC form? (Exception No. 11, R p 190)

12. Did the Commission err in finding and concluding that requiring the use of the NoC form under these circumstances does not constitute an unreasonable interference with, nor an unreasonable obstacle to, the establishment of a LEO, even where, as in this case: (1) the NoC form did not provide a selection that exactly described these QF's situation; and (2) Responded allegedly engaged in bad-faith behavior designed to discourage Complainant from exercising their PURPA rights? (Exception No. 12, R pp 190-91)

13. Did the Commission err by prematurely disposing of the Complaint based on procedural requirements created for facts and circumstances that are markedly different from the case *sub judice*, resulting in a denial of Cube Yadkin's rights under state and federal law? (Exception No. 13, R pp 191-92)

14. Did the Commission err by weighing the equitable considerations presented by the Complaint without a fully developed record? (Exception No. 14, R p 192)

15. Did the Commission err in weighing equitable considerations, state policy, and considerations of judicial economy to determine that Cube Yadkin should not be granted a waiver of the required use of the NoC Form? (Exception No. 15, R p 193)

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CERTIFICATE OF SERVICE OF FINAL RECORD ON APPEAL

This is to certify that, on the date set out below, I caused the RECORD ON APPEAL to be filed at the Court of Appeals, and I served true copies of the same upon Appellees by email, hand delivery and/or First Class Mail sent to the following counsel of record for Appellees as follows:

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