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VIA FEDERAL EXPRESS

November 21, 2008

FILED

NOV 21 2008

Clerk's Office
N.C. Utilities Commission

Ms. Renne C. Vance, Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4325

RE: Docket No. E-7, Sub 856


Dear Ms. Vance:

As I discussed with Pat this morning, enclosed are the following items in connection with the referenced cause:

1. The original Post-Hearing Brief Of Wal-Mart Stores East, LP, and Sam's East, Inc. This was inadvertently omitted from my previous transmittal; and
2. A CD with an MS Word copy of the Post-Hearing Brief Of Wal-Mart Stores East, LP, and Sam's East, Inc.

Please accept these items for filing.

Sincerely,



RICK D. CHAMBERLAIN

Enclosures

(21)
Full Comm.

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BEFORE THE NORTH CAROLINA UTILITIES COMMISSION NOV 21 2008

DOCKET NO. E-7, SUB 856

Clerk's Office
N.C. Utilities Commission

Application of Duke Energy Carolinas, LLC)	
For Approval of Solar Photovoltaic)	POST-HEARING BRIEF OF
Distributed Generation Program)	WAL-MART STORES EAST, LP,
And for Approval of Proposed Method of)	AND SAM'S EAST, INC.
Recovery of Associated Costs)	

Pursuant to the directive of the North Carolina Utilities Commission ("Commission") in open hearing on October 23, 2008, and its Notice Of Due Date For Proposed Orders, Wal-Mart Stores East, LP, and Sam's East, Inc., (hereinafter collectively "Wal-Mart") respectfully submit their post-hearing brief ("Post-Hearing Brief") in the above-captioned proceeding. In support of this Post-Hearing Brief Wal-Mart states as follows:

ARGUMENTS

On June 6, 2008, Duke Energy Carolinas, LLC, ("Duke Energy") filed an application herein seeking approval of a solar photovoltaic distributed generation program and recovery of the corresponding investment. Duke Energy's application recites that it was filed pursuant to Sections 62-110.1 and 62-133.8 of the North Carolina General Statutes.

Section 62-110.1 requires a finding by the Commission "that public convenience and necessity requires, or will require, such construction." Section 62-133.8 imposes certain renewable energy and energy efficiency portfolio standards ("REPS") on Duke Energy. Specifically, Section 62-133.8(d) requires that at least 0.2% of the total electric power in kilowatt hours sold by Duke Energy to its retail electric customers must be supplied by a combination of new solar electric facilities and new metered solar thermal energy facilities.

Section 62-133.8 does not, however, eliminate the requirement of Section 62-110.1 that the construction of any facilities to meet the REPS requirements must be required by the public's convenience and necessity. Section 62-133.8 does not require that the new solar facilities be constructed and owned by Duke Energy. In fact, it is clear from Section 62-133.8(b)(2) that the intent of the section is to encourage a variety of sources and suppliers of renewable energy, in addition to the incumbent electric utility.

Duke Energy's application and evidence in this cause fail to prove that the public convenience and necessity will be better served by its proposal in which most, if not all, of the solar facilities in Duke Energy's service territory are owned by Duke Energy. Further, Duke Energy has failed to provide sufficient details to show that its customers will be protected.

I. DUKE ENERGY HAS FAILED TO MEET ITS BURDEN OF PROVING THAT ITS PROPOSAL SATISFIES THE PUBLIC'S CONVENIENCE AND NECESSITY.

A. Duke Energy's proposed program focuses exclusively on utility-owned renewable energy facilities and may well preempt the field of solar generation in its service territory.

As pointed out in the Responsive Testimony of Ken Baker on behalf of Wal-Mart (10/23/08 p.m. tr. pp. 93-100), Duke Energy's proposal in this docket focuses exclusively on utility-owned renewable energy facilities. It makes absolutely no provision for the development or encouragement of such facilities by any party other than Duke Energy.

In fact, as proposed the program contains significant disincentives and disadvantages to customers interested in developing their own renewable energy

facilities. As proposed, Duke Energy's program may well preempt the field of solar generation in its service territory and extend Duke Energy's monopoly to include that industry.

Duke Energy's proposal provides its customers with only two options: 1) allow Duke Energy to construct utility-owned facilities on the customer's premises without allowing the customer to utilize any of the electricity or renewable energy certificates ("RECs") generated from the facility, or 2) require the customer to construct its own facilities and compete with Duke Energy's solar facilities. These stark alternatives are clearly inconsistent with Section 62-133.8(b)(2), which envisions a variety of renewable energy suppliers.

It is important to understand that S.B. 3 was enacted to encourage the development of renewable energy in North Carolina. Duke Energy's proposal in this docket will promote Duke Energy's business while discouraging development of other potential renewable participants.

In essence, Section 62-133.8(b)(2) adds a new consideration to the public's convenience and necessity. That is, the North Carolina General Assembly has determined that it is in the public's interest to require electric utilities to meet a certain percentage of their needs from solar energy, *and* to encourage a variety of solar suppliers to meet the REPS requirements. Duke Energy's has failed to meet its burden of proving that its proposal in this cause will satisfy and is required by this new public convenience and necessity.

B. Duke Energy's proposal fails to provide sufficient details to ensure the protection of its customers.

As also pointed out in the Responsive Testimony of Ken Baker on behalf of Wal-Mart (10/23/08 p.m. tr. pp. 93-100), Duke Energy's proposal in this docket fails to provide sufficient detail to ensure the protection of its customers. For example, Duke Energy has failed to submit a standardized lease contract that includes such terms as: 1) the proposed lease rate that will be paid to the host of any facility, 2) the indemnities – if any – that will be provided to site owners, 3) the type of access to the host facility that will be required, 4) the type of warranties – if any – that Duke Energy will give regarding the host roof, and 5) the type of structural studies – if any – Duke Energy intends to perform before installation.

Instead of a standardized lease contract addressing these and other terms to protect Duke Energy's customers, those customers are simply left to "fend for themselves." While Duke Energy implies that customers will be able to negotiate these types of protections, the reality is that customers will have no real negotiating leverage under Duke Energy's proposal.

In addition, under Duke Energy's proposal there will apparently be no opportunity for customers hosting photovoltaic facilities to utilize any portion of the RECs or the renewable electricity generated by the facilities. This is a significant disincentive to Duke Energy customers pursuing their own renewable energy initiatives. Further, moving energy from customer rooftops to Duke Energy's transmission and distribution system and then back to the customer simply adds unnecessary cost.

Allowing a customer to take a portion of the power and the RECs generated

would not only help the host become more energy efficient, it would also be more cost effective than Duke Energy's proposal in this cause. Again, the proposal in this docket would serve to increase Duke Energy's business at the expense of the other goals of S.B. 3.

Another omitted detail in the current application is how Duke Energy intends to purchase solar panels at \$5,000.00 per KW. The economic projections of the proposal are based upon this figure, and yet Duke Energy has given no explanation of how it intends to purchase panels at that cost and has rejected any efforts to "lock-in" that cost figure. Instead the Commission and Duke Energy's customers are, apparently, being asked to accept the figure as a matter of faith.

If it turns out that Duke Energy is unable to purchase solar panels at \$5,000.00 per KW, the economics of the proposal will change and customers will be responsible for the extra cost. This is why Wal-Mart's Ken Baker recommended that the Commission cap Duke Energy's cost recovery at \$5,000.00 per KW.

C. Duke Energy, not Wal-Mart bears the burden of proof in this proceeding.

At the hearing on the merits in this docket, Duke Energy appeared to suggest that Wal-Mart was somehow remiss in not serving data requests to fill in the details of Duke Energy's proposal. See 10/23/08 p.m. tr. pp. 101-103. However, this criticism is unfounded.

Duke Energy bears the burden of proof in this proceeding, not Wal-Mart. See N.C. Gen. Stat. § 62-75. More specifically, Duke Energy bears the burden of

affirmatively proving its case; there is no presumption of entitlement to the relief being requested. Wal-Mart has no obligation to disprove Duke Energy's case.

Further, Duke Energy was given an opportunity to provide the additional information requested by Wal-Mart, but chose not to do so. Wal-Mart's questions were posed in its responsive testimony filed October 8, 2008. Duke Energy could have provided the requested information in its rebuttal testimony filed October 20, 2008. Instead, Duke Energy's rebuttal testimony simply dismissed Wal-Mart's concerns.

As discussed previously, Duke Energy has failed to bear its burden of proof in this cause.

CONCLUSION

WHEREFORE, Wal-Mart Stores East, LP, and Sam's East, Inc., request that the Commission deny the relief requested in this docket. In the alternative, Wal-Mart Stores East, LP, and Sam's East, Inc., request that any certificate of convenience and necessity be conditioned upon the following conditions:

- 1) Require Duke Energy to submit for review, comment and approval a standardized lease contract that includes terms such as the lease rate Duke Energy plans to pay to the host of the facility, what indemnities will Duke Energy provide to the owner of the host facilities, what access to the host facility will be required, what type of warranty will Duke Energy give with regards to the host roof and what type of structural studies Duke Energy intends to perform before installation. The terms and conditions for

these items should be specified in a form contract and the provisions should be thoroughly evaluated and discussed during this proceeding.

- 2) As part of the standardized lease contract, Duke Energy should be required to allow the host of a photovoltaic facility to retain a portion of RECs generated by the facility as compensation.
- 3) Also as part of the standardized lease contract, Duke Energy should be required to allow the host of a photovoltaic facility the option to take some portion of the renewable electricity generated by the facility, rather than all of it going to Duke Energy's system only to be repurchased by the facility host.
- 4) Require Duke Energy to give further detailed explanation of how it intends to purchase solar panels at \$5,000.00 per KW. It would be very useful if the Commission would require Duke Energy to produce evidence of firm offers for the panels before approval of their application is considered.

Wal-Mart also recommends that the Commission require Duke Energy to give an estimate of the point in time that the price of solar panels will be reduced due to the achievement of economies of scale. Additionally, given Duke Energy's assertion that it will be able to purchase panels at \$5,000.000 per KW, Wal-Mart asks the Commission to consider capping the cost of panels supplied by Duke Energy at \$5,000.00. If economies of scale allow Duke Energy to acquire panels at a lesser price, that savings should be passed on to customers. In order to assure that

these panels are acquired in the most cost effective manner possible,
Duke Energy should also be required to request bids for their solar
installation in a very transparent manner that assures they are acquiring
the best deal possible for ratepayers.

Respectfully submitted,

By 

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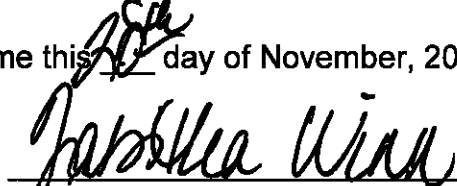
POST-HEARING BRIEF OF
WAL-MART STORES EAST, LP,
AND SAM'S EAST, INC.
Docket No. E-7, Sub 856

VERIFICATION

Rick D. Chamberlain, first being duly sworn, deposes and says that he is the attorney for Wal-Mart Stores East, LP ("Wal-Mart") and Sam's East, Inc. ("Sam's"); that he has read the foregoing Post-Hearing Brief Of Wal-Mart Stores East, LP, and Sam's East, Inc., and the same is true of his personal knowledge, except as to any matters and things therein state on information and belief, and as to those, he believes them to be true; and that he is authorized to sign this verification on behalf of Wal-Mart and Sam's.


Rick D. Chamberlain

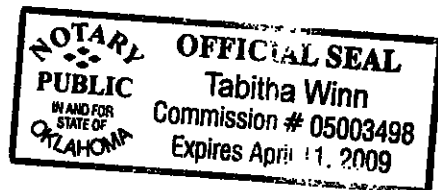
Subscribed and sworn to before me this 12 day of November, 2008, by Rick D. Chamberlain.


Notary Public

My Commission No.: 05003498


My Commission Expires: 4/11/09

(SEAL)



CERTIFICATE OF SERVICE

I hereby certify that a copy of the Post-Hearing Brief Of Wal-Mart Stores East, LP, and Sam's East, Inc., in Docket No. E-7, Sub 856, has been served by electronic mail (e-mail), hand delivery or by depositing a copy in the United States mail, postage prepaid, addressed to the parties of record.


Rick D. Chamberlain