

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

**NOTICE OF APPEAL AND  
EXCEPTIONS BY  
COMPLAINANT CUBE YADKIN  
GENERATION, LLC**

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 predated 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 13<sup>th</sup> day of September, 2018.

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By: \_\_\_\_\_

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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 13<sup>th</sup> day of September, 2018.

A rectangular box containing a handwritten signature in cursive script that reads "Phillip A. Harris, Jr." Below the box is a horizontal line.

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