

DOCKET NO. E-100, SUB 127  
DOCKET NO. E-100, SUB 136

**Clerk's Office  
N.C. Utilities Commission**

## RESPONSE OF THE PUBLIC STAFF TO PEC'S MOTION TO SUSPEND LONG- TERM AVOIDED COST RATES

1. On November 1, 2012, Carolina Power & Light Company, d/b/a Progress Energy Carolinas, Inc. (PEC), filed a motion requesting that the Commission (a) suspend as of December 1, 2012, the availability of the long-term rates in PEC's Schedule CSP-27 approved in Docket No. E-100, Sub 127, and (b) authorize PEC to offer to purchase energy, capacity, or both from eligible qualifying facilities (QFs) that have not entered into a purchase power agreement (PPA) with PEC as of December 1, 2012, based upon the variable rates approved in Docket No. E-100, Sub 127 (Sub 127), until the Commission approves new long-term rates in Docket No. E-100, Sub 136 (Sub 136).

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2. On November 6, 2012, the North Carolina Sustainable Energy Association (NCSEA) filed a brief in opposition to PEC's motion asking that it be denied or, in the alternative, granted on a qualified basis subject to the qualifications and conditions previously adopted by the Commission and as discussed in the brief. Finally, NCSEA requested that PEC's motion be set for oral argument or at least made subject to deadlines for interested parties to file briefs or comments.

3. By Order issued November 8, 2012, the Commission established Wednesday, November 21, 2012, as the due date for parties to the above-captioned dockets to file initial comments on PEC's motion and Wednesday, December 5, 2012, as the due date for PEC and all other parties to file reply comments.

4. In support of its motion, PEC states, among other things, that the current avoided cost rates were approved by Commission Order issued on July 27, 2012, in the Sub 127 proceeding, and PEC filed new, proposed avoided cost rates on November 1, 2012. PEC further states that the new, proposed Schedule CSP-29 long-term rates are lower than the existing rates because of declining cost projections. Thus, PEC contends that the proposed lower rates may prompt QFs to try to "lock in" at the higher current rates before the Commission issues an order addressing the new lower rates. PEC's proposed solution is the suspension of the long-term avoided cost rates in Schedule CSP-27 as of December 1, 2012, so that eligible QFs that have not entered into PPAs with PEC as of December 1, 2012, would only be allowed to receive the variable rates approved in Sub 127. For QFs

that execute contracts containing the variable rates after the December 1, 2012, expiration, PEC proposes that they be allowed to amend their contracts to select one of the long-term rates for which they are eligible once new avoided cost rates are approved by the Commission.

5. Given the declines that appear to have occurred in current projections of fuel costs and the potential effect such declines may have on avoided energy rates, the Public Staff shares PEC's concern that the currently approved avoided cost rates should not remain available until the Commission's final order in the Sub 136 proceeding. However, the Public Staff does not believe PEC's proposed solution is consistent with the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3 (PURPA), and the implementing regulations of the Federal Energy Regulatory Commission (FERC).<sup>1</sup> In addition, the Public Staff believes that the proposed solution is not fair to QFs that have incurred the expense of pursuing applications for certificates of public convenience and necessity (CPCN) prior to PEC's filing of proposed avoided cost rates on November 1, 2012.

6. In two relatively recent orders on arbitration involving QFs,<sup>2</sup> the Commission addressed a QF's right to long-term avoided cost rates and the circumstances that give rise to a legally enforceable obligation in a utility to pay such long-term avoided cost rates. Of considerable importance to the Commission's

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<sup>1</sup> *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policy Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128 (1980), reported at 45 Fed. Reg. 12,214 (Order No. 69).

<sup>2</sup> Order dated June 18, 2010, in Docket No. SP-467, Sub 1, involving Economic Power and Steam, LLC (Economic Power); and Order dated January 26, 2011, in Docket No. E-22, Sub 966, involving EPCOR USA North Carolina, LLC (EPCOR)(referred hereafter collectively as Arbitration Orders).

decision-making in those cases were the FERC's relatively recent orders in *J.D. Wind 1, LLC*.<sup>3</sup>

7. Specifically, in the J. D. Wind Orders, the FERC found that, under its regulations, a QF has the option to commit itself to sell all or part of its output to an electric utility, which may be done through a contract. However, if the utility refuses to sign a contract, the QF may seek state regulatory authority assistance to enforce the PURPA-imposed obligation on the utility to purchase from the QF. In such a case, the FERC stated, "... 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."<sup>4</sup> In addition, the FERC stated that, under 18 C.F.R. § 292.304(d) of its regulations, the QF has the option of selling energy on an "as available" basis or energy and capacity pursuant to a legally enforceable obligation over a specified term. If it chooses the latter, it has the further option of choosing a rate based on avoided costs calculated at the time the obligation is incurred.<sup>5</sup>

8. The FERC went on to say that it has consistently affirmed the QF's right to long-term avoided cost contracts or other legally enforceable obligations 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.

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<sup>3</sup> 129 FERC ¶ 61,148 (2009)(November 19 Order), *reconsideration denied*, 130 FERC ¶ 61,127 (2010)(February 19 Order)(collectively referred to as the J.D. Wind Orders)

<sup>4</sup> November 19 Order, at ¶ 25.

<sup>5</sup> November 19 Order, at ¶ 27.

9. The Commission recognized in the Arbitration Orders that the FERC's regulation that provides for the creation of a legally enforceable obligation gives a QF two important options and a utility must work with the QF's choices. A QF has the option to choose to sell power "as available" or to sell pursuant to a legally enforceable obligation over a specified term. If a QF chooses the latter option, it then has the option of choosing rates based upon avoided costs calculated at the time the obligation is incurred. Thus, PEC's proposal that no long-term avoided cost rates be available during the pendency of the Sub 136 proceeding is inconsistent with the Commission's interpretation of PURPA and unlawful under PURPA.

10. Turning now to PEC's proposal that the determining factor be whether or not a QF has signed a PPA, it has been the FERC's long-standing practice to leave to state commissions the issue as to when and how a legally enforceable obligation is created.<sup>6</sup> The date at which a legally enforceable obligation was created was a major issue in the Economic Power and EPCOR proceedings. In both cases, the Commission held that the prerequisites for a legally enforceable obligation to have occurred or been created were the QF having a CPCN and having made it sufficiently clear to the utility that it wanted to commit itself to sell its output pursuant to a legally enforceable obligation over a specified term.

11. Thus, PEC's proposal to limit the availability of the currently approved long-term avoided cost rates to QFs that have signed PPAs by December 1, 2012,

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<sup>6</sup> ¶ 24 of the February 19 Order. As noted by the FERC in its February 19 Order, however, this does not mean that a state commission is free to ignore the requirements of PURPA or the FERC's regulations. Congress required such rules to encourage QF development. PURPA, in turn, directs the states to implement the rules adopted by the FERC. (16 U.S.C. § 824a-3(f).)

is inconsistent with the Commission's Arbitration Orders. In any event, using the signing of a PPA as the determining factor is inappropriate because it leaves a QF's options entirely in the hands of the utility. As noted by the Commission in its Order on Arbitration in EPCOR, the FERC wrote the concept of a legally enforceable obligation into its PURPA rules knowing that a utility might try to frustrate a QF's exercise of its PURPA rights.<sup>7</sup>

12. The Public Staff is aware that the current avoided cost tariffs of Duke Energy Carolinas, LLC (Duke), and Virginia Electric & Power Company, d/b/a Dominion North Carolina Power (DNCP), provide a process that is similar to PEC's proposal. The Public Staff believes these tariff provisions are inconsistent with PURPA and therefore must be changed. It is the Public Staff's intention to address these tariff provisions in its initial comments to be filed in the Sub 136 proceeding, unless directed by the Commission to address them earlier.

13. In this regard, it is important for the Commission to recognize the current changed circumstances. Prior to the effective date of S.B. 3, relatively little solar generation was proposed. For most QFs, the time between the granting of a CPCN and the completion of construction is significant and generally longer than the time period during which long-term rates would not be available. Even though the Public Staff believes that denying long-term fixed avoided cost rates to QFs even for six months is unlawful because of the resulting negative effect on the

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<sup>7</sup> *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policy Act of 1978*, 45 Fed. Reg. 12,214, at 12,224.

availability of financing at a crucial time,<sup>8</sup> a solar QF's shorter construction window causes an immediate denial of payment of long-term avoided cost rates to which the QF is entitled.

14. The effects of such unavailability are exacerbated if the avoided cost proceeding involves numerous parties and issues. In a relatively undisputed proceeding, it typically takes six to seven months from the filing of proposed avoided cost rates and the issuance of an order approving new rates. In relatively recent cases with a significant number of contested issues, the time between the filing of proposed avoided cost rates and the issuance of an order establishing such rates has been 13 and a half months (Docket No. E-100, Sub 106) and 11 months (Docket No. E-100, Sub 100).

15. The Public Staff believes that the Commission's Arbitration Orders, PURPA, and the FERC's implementing regulations all require that the following standard be approved: For QFs that filed their applications for CPCNs no later than November 1, 2012, and receive CPCNs by Orders issued by January 16, 2013, they are entitled to any of the avoided cost rate options in the currently approved Schedule CSP-27, including the long-term options (assuming they are otherwise eligible in terms of size and such factors). The proposed date of January 16, 2013, allows for the processing of QF applications filed by November 1, 2012, recognizing the Christmas holidays and the need for timely processing through placement on the agenda for the Commission's regular Staff Conference. PEC should be required to sign contracts at whichever of its new, proposed rates the QF chooses,

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<sup>8</sup> This negative effect was recognized explicitly by the FERC in the J.D. Wind Orders.

subject to an upward adjustment if the Commission ultimately approves avoided cost rates that are higher.

16. The foregoing is consistent with the Commission's treatment of a comparable motion to suspend filed by Duke in the 1994 PURPA proceeding in Docket No. E-100, Sub 74. In that case, as in this one, the proposed avoided cost rates were substantially lower than those approved in the prior proceeding. Duke proposed that it be allowed to sign contracts at the new, proposed avoided cost rates. The Commission, citing Section 292.304(d) of the FERC's regulations, ruled that Duke must sign contracts at the 1992 rates with any QF that wanted those rates and already had a CPCN by the date of the Commission's Order so ruling. The date of that Order was February 13, 1995, which was approximately four and a half months from the filing of the new, proposed avoided cost rates and two and a half months from the filing of Duke's motion to suspend the currently approved rates. For QFs that did not meet the cut off, the Commission allowed the signing of contracts at the proposed rates, subject to adjustment upward if the Commission ultimately approved avoided cost rates that were higher.

17. An issue that was not involved in previous proceedings is how to treat QFs that are under two megawatts (MW) in size that are now exempted from the certification requirement in G.S. 62-110.1. A report of construction is now the only filing required of such facilities. The appropriate standard to be applied to these QFs is whether or not they filed their reports of construction by November 1, 2012. The QFs that meet this deadline should be entitled to any of the avoided cost rate



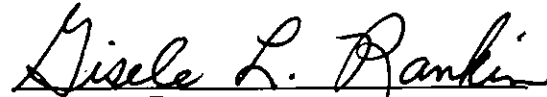
options in the currently approved Schedule CSP-27, including the long-term options (assuming they are otherwise eligible). For otherwise eligible QFs that do not meet this deadline, PEC should be required to sign contracts at whichever of its new, proposed rates the QF chooses, subject to an upward adjustment if the Commission ultimately approves avoided cost rates that are higher.

WHEREFORE, the Public Staff respectfully requests that the Commission take the foregoing into consideration in its decision-making and issue an Order denying PEC's motion and adopting the above-described standards and deadlines.

Respectfully submitted, this the 21<sup>st</sup> day of November, 2012.

PUBLIC STAFF  
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Chief Counsel



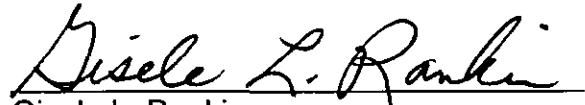
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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served a copy of the foregoing upon each of the parties of record in this proceeding or their attorneys of record by causing a copy of the same to be properly addressed to each and sent by email or deposited in the United States Mail, postage prepaid.

This the 21<sup>st</sup> day of November, 2012.

  
Gisele L. Rankin