STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1170
DOCKET NO. E-7, SUB 1169

In the Matter of: **Petition of Duke Energy Progress, LLC, and Duke Energy Carolinas, LLC, Requesting Approval of Green Source Advantage Program and Rider GSA to Implement G.S. 62-159.2**	**COMMENTS OF THE NORTH CAROLINA CLEAN ENERGY BUSINESS ALLIANCE**

NCCEBA'S COMMENTS ON DUKE ENERGY CAROLINAS, LLC'S AND DUKE ENERGY PROGRESS, LLC'S GREEN SOURCE ADVANTAGE PROGRAM COMPLIANCE FILING

I. BACKGROUND

On February 1, 2019, the North Carolina Utilities Commission ("Commission") issued its *Order Modifying and Approving Green Source Advantage Program, Requiring Compliance Filing, and Allowing Comments* ("Order") in the above-captioned dockets. In the Order, the Commission instructed Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP") (collectively, "Duke") to file a revised Green Source Advantage Program ("GSA Program") that complies with the conclusions reached in the Order.

On March 18, 2019, Duke filed its Green Source Advantage Program Compliance Filing ("Compliance Filing") that includes a GSA Service Agreement, GSA Purchase Power Agreements ("GSA PPAs"), Rider GSA-1 Green Source Advantage ("Rider GSA-1"), GSA Application, and GSA Term Sheet ("Revised GSA Program").

In accordance with the Commission's Order, the North Carolina Clean Energy Business Alliance ("NCCEBA") submits the following comments that address aspects of Duke's Revised GSA Program that do not comply with the requirements of the Order. As will be discussed in more detail below, NCCEBA requests that the Commission (1) reject Duke's new proposal that it be allowed to recover any unamortized value of Duke-owned GSA facilities in base rates, and reconsider Duke's previous "market-based cost recovery" proposal; (2) instruct Duke to include more detailed protocol for submission of GSA applications and subscription of GSA capacity; (3) direct Duke to provide uniform post-COD financial assurance in the GSA PPAs; (4) require Duke to provide information as to interconnection and grid upgrade costs early in the application process; (5) provide ongoing oversight as to Duke's allocation of GSA Unreserved Capacity; and (6) not allow Duke to modify the Renewable Energy Supplier's GSA PPA when the GSA customer breaches its GSA Service Agreement with Duke and not require the supplier to pursue GSA customers for the resulting damages to the supplier.

II. DUKE'S COMPLIANCE FILING FAILS TO COMPLY WITH THE COMMISSION'S ORDER IN SEVERAL KEY ASPECTS

In the Commission's Order, the Commission concludes that Part III of House Bill 589 as enacted by N.C. Gen. Stat. § 62-159.2 ("GSA Statute") placed an emphasis on Duke's obligations to purchase renewable energy and capacity and the GSA customers' ability to choose how Duke procures that energy and capacity. *Commission Order,* p. 41. The Commission further concludes that the appropriate structure of the GSA Program should attract participation from eligible GSA customers because the North Carolina General Assembly did not intend to establish a program that would be unsuccessful in

attracting participation from eligible customers. *Id.* It its Order, the Commission addressed the concerns and objections of Duke's initially proposed GSA Program, and instructed Duke to file a revised GSA Program that complies with its conclusions. Despite clear guidance from the Commission as to the revisions Duke needs to make to the GSA Program, Duke's revised program fails to comply with the Commission's conclusions in a number of key provisions. If Duke's GSA Program is not corrected, there could be limited participation from GSA customers in contradiction to the intent of the GSA Statute.

A. DUKE SHOULD NOT BE ENTITLED TO RATE BASE DUKE-OWNED GSA FACILITIES AND THE COMMISSION SHOULD REVISIT ITS DECISION NOT TO ALLOW DUKE TO SEEK MARKET-BASED COST RECOVERY FOR DUKE-OWNED GAS FACILITIES

In its original Petition for approval of its proposed GSA Program, filed on January 23, 2018, Duke discussed (at page 28) the situation where Duke itself serves as the Renewable Supplier for a GSA customer. Duke suggested that in this scenario it would recover its annualized "GSA investment" through the fuel factor, but did not explain what this annual investment would be, or for that matter, explain how overall cash flows would work when Duke is acting as the Renewable Energy Supplier. For example, it remains unclear whether what Duke envisioned recovering from ratepayers in this scenario was the Bill Credit paid to the GSA Customer (as it proposes in the case of third-party Renewable Suppliers) or something else. Presumably, Duke should not be allowed to recover from ratepayers the costs of constructing and operating renewable facilities under

the GSA Program while it is being paid an annual fee equivalent to a PPA payment by the GSA customer. This confusion aside, the main point of Duke's request on this issue was to confirm that it had the right to seek additional market-based recovery for the cost of a GSA Facility beyond the term of the GSA Agreement.

Leaving aside the question of whether Duke should be allowed to participate as a Renewable Energy Supplier,[1] which was not expressly authorized the GSA Statute and is fraught with many administrative and anti-competitive problems, if Duke is allowed to do so, it is critical that Duke be required as much as possible to compete on a level playing field with the independent suppliers. In order to participate in the GSA Program, an independent supplier must negotiate a PPA price and contract term with an eligible GSA customer. That supplier will only be guaranteed project revenue for the life of its GSA PPA. With respect to the period after that contract expires, the supplier must manage the risk and uncertainty regarding the availability of any future revenues (the only current possibilities being the continued availability of a five-year PURPA contract or the possibility that CPRE and/or GSA will be extended). The assumption that the supplier makes about the availability and amount of such future revenues will determine the price it can quote in seeking to do business with an eligible GSA customer. The uncertainty surrounding those future revenues unquestionably requires independent suppliers to quote higher pricing for a GSA PPA than if they had certainty about post-PPA revenues. Indeed, NCCEBA can attest that its utility-scale developers must apply a substantially higher discount rate to projected, uncontracted post-PPA revenue than to contracted revenue.

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[1] Contrary to Duke's assertion in its Compliance Filing, the Commission's Order does not authorize Duke affiliates to participate as Renewable Energy Suppliers, and the GSA Statute does not provide any statutory authority for Duke affiliates to do so.

Under Duke's original request, it appears that Duke was appropriately seeking to be treated like other GSA suppliers with whom they intend to compete. Under that original proposal, Duke would recover a defined annual amount over the life of the GSA PPA Duke did want to ensure that, as with CPRE, it would have the opportunity to recover additional project revenues on a market basis after the expiration of the GSA PPA. With all due respect, the Commission seems to have misunderstood Duke's request and this dynamic, and therefore concluded in its Order that Duke was seeking some sort of extraordinary treatment that was only appropriate in the unique context of CPRE. Since a main element of the Order was to reject Duke's proposed coupling of GSA to CPRE, the Commission ruled that Duke-owned GSA assets should be rate based. The Order is unclear, however, as to whether this mean that the assets should be rate-based from the outset or, as Duke now proposes, after the end of the GSA PPA term. Neither is appropriate. If the asset were to be fully rate-based, it is unclear why Duke would be able to charge a PPA price to the GSA Customer at all, as that would appear to result in double recovery by Duke. As Duke presumably recognizes this problem, Duke is not proposing that the asset be fully rate-based. Rather, Duke proposes to charge the GSA customer a PPA price over the term of the PPA, and then recover any unamortized portion of the asset costs after the end of the PPA term. In contrast to the post-PPA uncertainty faced by independent GSA suppliers, this guaranteed cost recovery for Duke allows them to discount its PPA pricing to GSA Customers and thereby unfairly compete for the business of those customers with independent suppliers.

In response to the Commission's unclear guidance on this issue, and no doubt recognizing the problems it presents, Duke proposes that Duke-owned GSA facilities be

entitled to cost of service-based recovery on the remaining Net Book Value of the assets after the expiration of the term of the GSA PPA. *See Duke Compliance Filing*, pp. 20-21. For good reason, Duke recognizes that this is a new concept and that the Commission's Order might not have contemplated such rate recovery.[2] Duke has therefore requested guidance from the Commission about how rate recovery for Duke-owned GSA facilities should be handled.

How recovery for Duke-owned assets is allowed is a critical issue for the GSA customers and the Renewable Energy Suppliers, and as such, is of great importance for the GSA Program as a whole. NCCEBA believes that Duke should not be allowed to rate-base the unamortized value of Duke-owned GSA facilities for several reasons. First, if Duke is allowed to recover the remaining Net Book Value of a Duke-owned GSA facility in base rates, Duke will be able to recover the full cost of a generating facility without the Commission ever having determined that the public convenience requires the construction of the facility and without approval of the estimated construction costs, as required by N.C. Gen. Stat. § 62-110.1. Duke would thus be permitted to do what electric public utilities have never been allowed to do: include the full cost of a new generating facility in the utility's rate base without Commission approval of the estimated construction costs and with no oversight as to whether the facility is consistent with the Commission's plan for expansion of the electric generating capacity. *See* N.C. Gen. Stat. § 62-110.1. Also, it is possible that non-participating GSA customers would ultimately

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[2] In Duke's Compliance Filing, Duke states: "The Companies understand these statements establish a reasonable expectation that any Duke-owned GSA facilities will be entitled to cost of service-based recovery on the remaining Net book Value of such assets post-term. To the extent the Commission's intent was different from this expectation, the Companies respectfully request the Commission provide clarification of its intent of how the Companies should plan to recover the cost of Duke-owned GSA facilities after the term of the GSA Program PPA expires. *See Duke Compliance Filing,* p. 21 (emphasis added).

pay more if Duke were allowed to pursue cost of service-based recovery for Duke-owned GSA facilities after the term of the GSA PPA expires than if Duke were able to recover revenues based upon an updated market-based mechanism after the initial term of the GSA PPA expires.

Furthermore, as discussed above, there would be an unintended, and unfair, consequence if Duke were allowed to include the unamortized value of Duke-owned GSA facilities in base rates. Duke would receive an unfair competitive advantage over third-party Renewable Energy Suppliers that have no ability to recover the unamortized value of their facilities in base rates after expiration of the GSA PPA. Unlike Duke tha will have absolute guarantee of remaining cost recovery, third-party suppliers will have no assurance as to pricing terms after the expiration of the GSA PPA. Again, unlike Duke, third-party suppliers will have to make assumptions regarding their ability to renew GSA Service Agreements or sell their output as Qualifying Facilities.

Nothing in the GSA Statute suggests that Duke should have an (unfair) ability to offer artificially low price terms to GSA customers to the detriment of third-party Renewable Energy Suppliers that are also offering prices to GSA customers. However, that it precisely what is likely to occur—Duke, but not third-party Renewable Energy Suppliers, would be able to offer artificially low price terms to the GSA customer because only Duke would have revenue certainty after the term of the GSA PPA expires. Indeed, the Fair Market Value (FMV) of a renewable energy facility is substantially correlated with the extent of its contracted revenue. In other words, all else being equal, any given facility's FMV is higher to the extent that its total projected revenue is contracted (and therefore certain), and lower to the extent that its projected revenue is

uncontracted (and therefore uncertain) and exposed to merchant market conditions in the post-PPA period. For this reason alone, Duke would have an inherently unfair competitive advantage over third-party Renewable Energy Suppliers.

For those reasons, NCCEBA requests that the Commission revisit the Cost Recovery portion of its Order and reconsider Duke's proposal for an appropriate cost recovery mechanism in its initial GSA Program plan. As noted, Duke had proposed that it be allowed to recover costs from Duke-owned GSA facilities on a "market-based cost recovery" after the initial term of the GSA PPA expires. NCCEBA believes that Duke's initial market-based cost recovery proposal is the most appropriate—and fair—mechanism for recovery for Duke-owned GSA assets. While NCCEBA recognizes that the GSA Statute does not expressly allow Duke to recover costs from Duke-owned facilities on a market basis, there is nothing in the GSA Statute that prohibits that method of cost recovery. NCCEBA believes that the market basis approach for cost recovery allowed under N.C. Gen. Stat. § 62-110.8(g) (for CPRE) would be equally appropriate for the GSA Program and would ensure equity between Duke and third-party Renewable Energy Suppliers. NCCEBA respectfully submits that ensuring fairness between Duke and third-party Renewable Energy Suppliers is a compelling justification from departing from the "general rule in the case" (*i.e.,* public service companies are "generally entitled to recover the costs of service, plus a reasonable return on capital invested to serve the utility's customers"). *See Order,* p. 63. Absent this modification, Duke participation as a Renewable Supplier on the terms now proposed would be so unfair and inappropriate that Duke should not be allowed to participate at all.

B. DUKE'S APPLICATION PROCESS FAILS TO INCLUDE A

SUFFICIENT DETAILED PROCESS FOR SUBMISSION OF GSA APPLICATIONS

In Duke's proposed Rider GSA-1 (attached to Duke's GSA Compliance Filing as Exhibit F and Exhibit H), Duke states that GSA customers seeking to participate in the GSA Program have the option to either (1) request Duke to develop a GSA facility, or (2) identify and propose to Duke a GSA facility developed by a third-party Renewable Energy Supplier. NCCEBA agrees that this option for the customers complies with the Commission's Order that allows GSA customers to choose to have Duke procure energy and capacity from a Duke-owned facility or from a third-party supplier. *See Order,* p. 53. However, Duke's Application Process in its Rider-GSA-1 is deficient in that it fails to include a process that will ensure fairness for both Duke and the third-party Renewable Energy Suppliers in the allocation of GSA program capacity. Since capacity in the GSA Program is limited to 250 megawatts for eligible GSA customers other than UNC and the military, there needs to be a transparent and fair allocation process. Duke's Rider GSA-1 states that Program reservations will be accepted on a "first-come-first-served" basis based upon the date and time of receipt of the customer's completed application and application fee. To the extent that any customers are interested in participating in the GSA Program, this "first-come-first-served" approach could result in an electronic submittal "race" that will not benefit GSA customers or the Program and will likely advantage Duke, given its knowledge of server locations and access to faster internet connection speeds. The GSA Program would work more efficiently (and with less confusion) if Duke provided a specific deadline for submission of Program reservations. In the event that the GSA Program was oversubscribed as of the date of the deadline,

GSA reservations should be awarded on a lottery basis.[3] Moreover, if the applications include GSA Customers who propose to utilize Duke as their Renewable Supplier, some party other than Duke must administer the lottery to avoid any appearance of impropriety. If the Program is not fully subscribed, then there is no problem processing applications received on and after the initial submittal deadline on a "first-come-first-served" basis.

C. DEFAULT BY GSA CUSTOMER

In its original GSA Program documents, Duke appropriately envisioned that in the event of default by its contractual counterparty – the GSA customer –

the customer would be liable to Duke for damages resulting from it having to continue paying the Renewable Supplier under the PPA. (Duke would suffer such damages where the PPA contract price exceeds its avoided costs. Duke understandably proposed that it be allowed to require performance security from the GSA customer to secure the payment of such damages, but the Commission withheld its approval of such requirements. In response to that result, in its Compliance Filing, including its proposed form PPAs, Duke makes a remarkable and troubling new proposal not previously addressed in Duke's prior filings or in the Commission's Order. Despite the fact that under Duke's GSA Program, as it has always been proposed, Duke will enter into a GSA Service Agreement with the GSA customer under which the GSA customer is obligated to reimburse Duke for payments made to the Renewable Supplier under the PPA, Duke now proposes that in the event of default by the GSA customer, it will not hold that customer – Duke's contractual counterparty – responsible for continuing to cover the PPA payments over the remainder of its term. Rather, Duke proposed to (i) reduce the

[3] While NCCEBA believes that the Commission's decision on the GSA Bill Credit will discourage program participation, the Commission should nonetheless design the application process to avoid an unfair result should NCCEBA's pessimism prove unjustified.

Renewable Supplier's PPA Price to equal the Bill Credit, and (ii) require the Renewable Supplier to pursue the GSA Customer for any damages it may suffer as a result. Apart from the fact that this new and controversial concept is being belatedly introduced by Duke and is not authorized by the Order, it is fraught with problems and inequities. First, providing for a contingent reduction in PPA pricing would be highly problematic for the financing of independent Renewable Supplier facilities, especially since the Bill Credit is only fixed for five years. No knowing where the Bill credit might be set in the future, independent Renewable Suppliers would face uncertainty and an unmanageable risk with respect to contracted cash flows. It should be noted that this illustrates another problem with Duke' proposal that it be allowed to rate-base the unrecovered post-PPA value of self-owned assets: that would totally insulate Duke from the risk of GSA Customer default. In fact, Duke could potentially achieve a higher rate of return in the scenario where a GSA customer defaults if Duke is indeed allowed to rate base those projects upon termination of the PPA. In addition, an independent Renewable Supplier should not have to incur the time and expense of pursuing damages from a GSA Customer who defaulted on its obligations under a contract with Duke. This unauthorized and highly problematic element of Duke's compliance filing should be rejected.

D. POST-COD FINANCIAL ASSURANCE

In Duke's Compliance Filing, Duke eliminated the requirement of post-COD financial assurance for GSA PPAs that utilize the Hourly Marginal Avoided Cost as the contract price. But, Duke continues to require financial assurance for GSA PPAs that utilize the Administratively Established Avoided Cost as the contract price. That disparate treatment in the GSA PPAs would result in preferential treatment for some

GSA customers (those that use the Hourly Marginal Avoided Cost as was proposed in the Wal-Mart Settlement). Additionally, such differing treatment might result in yet another obstacle to participation by GSA customers (and possibly all GSA customers other than Wal-Mart) that do not have the ability to enter into GSA PPAs using the bill credit based on the hourly incremental generation costs. Moreover, Duke has failed to provide a sufficient justification for why standard terms should not be required in the GSA PPAs.

E. DUKE SHOULD BE REQUIRED TO PROVIDE INTERCONNECTION COSTS AND GRID UPGRADE COSTS EARLY IN THE GSA PROGRAM APPLICATION PROCESS

It is clear that the GSA Facility Owner is responsible for the cost of Interconnection Facilities and any transmission or distribution Network Upgrade costs assigned to GSA Facility. *Commission Order,* p. 62. In the Commission's Order, the Commission made it clear that Duke must provide the GSA customer with "information regarding the interconnection costs and/or grid upgrade costs fairly attributed to accommodating the renewable energy facility selected by the GSA customer relatively early in the GSA application process." *Commission Order,* p. 62. Since GSA Facility Owners are responsible for interconnection costs and grid upgrade costs, the GSA Renewable Energy Supplier will have to take into account the cost of Interconnection Facilities and any Network Upgrades when offering a Negotiated Price with a GSA customer. The Commission recognizes how important it is that GSA Renewable Energy Suppliers have information of those costs early in the application process so that the costs can be included in prices offered to the GSA customers. Without information as to the cost of Interconnection Facilities and any Network Upgrades, the Renewable Energy

Supplier will not be able to offer a price inclusive of those costs to the GSA customer. Despite that clear directive, Duke stated in its Compliance filing:

> Therefore, to be clear, a GSA Customer will not necessarily receive information concerning the interconnection costs "relatively early in the GSA application process." Instead, interconnection-related information will be provided to the GSA Facility Owner in accordance with the applicable interconnection procedures.

Duke Compliance Filing, p. 11. NCCEBA requests that the Commission direct Duke to comply with its instruction to provide information as to interconnection and grid upgrade costs as early as possible in the GSA application process.

F. DUKE'S GSA ALLOCATION OF UNRESERVED GSA CAPACITY BETWEEN DEC AND DEP TERRITORIES NEEDS FURTHER COMMISSION OVERSIGHT

Duke proposes that the initial 250 MW of Unreserved Capacity will be allocated between DEC and DEP based upon the load-ratio share between DEC's and DEP's commercial and industrial customer classes. *Duke Compliance Filing,* p. 9. Specifically, Duke proposes that 160 MW of the initial 250 MW of Unreserved Capacity will be allocated to DEC customers, and 90 MW will be allocated to DEP customers. *Id.* Duke states that it will review and periodically update this allocation if any capacity remains unsubscribed at the end of the three-year Reserve Period, but does not state that any update to the capacity allocation is subject to Commission oversight. *Id.* NCCEBA believes that Duke should be required to update the Commission as to any changes to its allocation of Unreserved Capacity between DEC and DEP territories. NCCEBA further believes that the Commission should then determine whether any changes Duke makes to the allocation of Unreserved Capacity are appropriate.

III. CONCLUSION

NCCEBA respectfully requests that the Commission allow Duke to recover costs from Duke-owned GSA facilities on a market basis after the expiration of the GSA PPA term. NCCEBA also requests that the Commission order Duke to amend its GSA Program in accordance with these comments.

Respectfully submitted, this the 8th day of April, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that all persons on the docket service list have been served true and accurate copies of the foregoing Comments by hand delivery, first class mail deposited in the U.S. mail, postage pre-paid, or by email transmission to all parties of record.

Respectfully submitted, this the 8th day of April, 2019.

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