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November 21, 2008

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

Re: Brief of NCSEA
Docket No. E-7, Sub 856

Dear Ms. Vance:

Enclosed please find 30 copies of the Brief of the North Carolina Sustainable Energy Association in Docket No. E-7, Sub 856. All parties to this proceeding have been served.

Thank you for your attention to this matter.

Very truly yours,

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Full Comm.

STATE OF NORTH CAROLINA
BEFORE THE NORTH CAROLINA UTILITIES COMMISSION
DOCKET NO. E-7, SUB 856



**In the Matter of**
**Application of Duke Energy Carolinas LLC, for Approval of Solar Photovoltaic Distributed Generation Program and for Approval of Proposed Method of Recovery of Associated Costs**

**BRIEF OF THE NORTH CAROLINA SUSTAINABLE ENERGY ASSOCIATION**

Pursuant to the North Carolina Utilities Commission's ("the Commission") October 23, 2008 request for briefs, the North Carolina Sustainable Energy Association ("NCSEA") submits the following arguments and points of authority.

## SUMMARY OF POSITION

NCSEA has no dispute with a public utility meeting some of its obligations under Session Law 2007-397 (the "REPS Law") through the ownership and operation of its own new renewable energy generating sources. NCSEA recognizes that meeting the REPS requirements by using this approach along with others, is consistent with the General Assembly's intent. *See* NC Gen. Stat. § 62-133.8(b). It is equally clear, however, that the REPS Law was intended to do more than simply assure that renewable energy became part of the energy mix in North Carolina. Indeed, if that were the sole goal, the General Assembly could have simply stopped with establishing a REPS requirement and left open any discussion of where the renewable energy came from. The General Assembly did not stop there, however. Rather, the General Assembly made explicit its intent that a substantial part of the renewable energy bought for compliance in North Carolina should come from "private investment" in new renewable energy facilities in North Carolina, thus making clear that the REPS law is intended to accomplish more than just bringing renewable energy itself into the market. *See* N.C. Gen. Stat. §§ 62-133.8(b)(2)(d) & (e).

As explicitly stated therein, the REPS Law also is designed to encourage "private investment in renewable energy" and thereby promote "diversity" in the energy market and "greater energy security." *See* NC Gen. Stat. §§ 62-2(a)(10)(a)-(c).

NCSEA is concerned that Duke's solar project (Docket E-7, Sub. 856) (hereinafter Duke's "Proposed PV/DG Program") could effectively block the goals and objectives the General Assembly sought to achieve and perpetuate Duke as the sole meaningful provider in its franchised territory. The dearth of alternative energy sources upon which Duke predicates the need for its own PV/DG program will become self-fulfilling. REPS compliance would turn more expensive (as demonstrated by the Public Staff), and ultimately become a justification for moving away from or modifying the REPS altogether. While this may not be Duke's goal, it is a very real potential outcome and therefore measures are needed in the Proposed PV/DG Program to assure that this grim picture does not materialize. Some portion of the REPS obligations must come from the "private investors" that the General Assembly foresaw as bringing "diversity" and "security" to North Carolina's energy market.

Duke responds to these concerns, not by arguing that they are not real, but by suggesting that it is a "private investor" and its expenditures satisfy the objectives the General Assembly was aiming to achieve through "encouraging private investment." *See Transcript, In The Matter Of: Application for Approval of a Solar Photovoltaic Distribution Generation Program and for Approval of Proposed Method of Recovery of Associated Costs*, Volume 1, Testimony of Owen A. Smith at pages 174 ln. 13 to 175 ln. 24 (October 23, 2008) (hereinafter cited as "Tr. Vol __ at __"). This interpretation of the law was viewed with much skepticism at the hearing on Duke's proposal. *See* Tr. Vol. 1, at pg. 175 (ln. 1 to 24). And, as discussed below, is not correct. Duke

is not making investments. Rather, under the REPS Law Duke is incurring the "costs" of compliance.

Moreover, Duke itself recognizes this distinction between "costs of compliance" and "private investments." As more than one Duke witness testified, Duke would not make the expenditures on PV/DG Program if "we did not have a REP standard to meet." *See e.g.*, Tr. Vol. 2 at 47 (ln. 23-24) to 48 (ln. 1-19)(McManeus). *See also,* Tr. Vol. 2 at 198 (ln. 21-24) to 199 (ln. 1-6) (it is unlikely that Duke would make the expenditures PV if it did not recovers all of its costs) (McManeus).

In seeking to spur "private investment," the General Assembly clearly meant something more and different than an investor owned utility's costs to comply. Indeed, the goals the General Assembly saw arising from "private investment" are not achieved in that manner.

**STATEMENT OF INTEREST**

NCSEA is a Section 501(c)(3) non-profit organization that provides public education, collaborative leadership, and policy and technical analyses to ensure a sustainable future by promoting renewable energy and energy efficiency. NCSEA develops, analyzes and promotes policies and programs intended to advance viable markets for alternative energy. A critical component of this work is NCSEA's efforts to assure the existence of regulatory regimes that will enable citizens, businesses and government to use and benefit from economically and environmentally sustainable energy solutions. NCSEA achieves these objectives, in part, through participation in matters before the Commission that relate directly or indirectly to renewable energy and energy efficiency.

NCSEA's members include entities involved in the design, production and installation of solar photovoltaic ("PV") electric generation systems and other alternative energy sources.

NCSEA's members also are closely involved in the development and implementation of policy promoting the use of sustainable energy sources. NCSEA's members will be impacted economically and otherwise by any order, program or facility authorized by or coming out of the above referenced proceeding.

## FACTS

On June 6, 2008, Duke Energy Carolinas, LLC ("Duke") filed an application for approval of a PV distributed generation program and for approval of a proposed method of cost recovery. *See* Application for Approval of Solar Photovoltaic Generation Program/Method of Recovery of Costs (June 6, 2008), NCUC Docket E-7, Sub. 856. As originally proposed, Duke planned to invest approximately $100 million over a two-year period to install new PV generation systems with a total generating capacity of approximately 20 megawatts (MW). *Id.* The new systems would be installed on rooftops leased from industrial, commercial and residential customers or on ground-mounted structures located on property owned by Duke or its customers. *Id.*

On or around October 8, 2008, the Public Staff and intervenors in the proceeding filed direct testimony on Duke's proposal. Ms. Rosalie R. Day from NCSEA testified that the Association supported Duke's proposed program for utility scale projects but was opposed to the program if Duke's small scale, less cost effective systems, crowded out private development of small scale systems in North Carolina. *See* Testimony of Rosalie R. Day on Behalf of NCSEA (October 8, 2008), NCUC Docket E-7, Sub. 856. Ms. Day explained that this dichotomy was based on the REPS Law which manifested a clear intent that a "significant portion of the energy needed to meet REPS obligations [should] come from private investment in sustainable energy facilities." *Id.* at 4 (ln. 1-25). Ms. Day also explained that overall Duke's Proposed PV/DG Program was inconsistent with that legislative intent because it would allow Duke to generate all

of the renewable energy it needs for REPS compliance, leaving no market for private investors in Duke's franchise territory. *Id.* at. 5 (ln. 1-2). According to Ms. Day, "[w]ith Duke and possibly the other investor owned utilities dominating the small [PV] generation market and satisfying the mandated solar portion of the REPS . . . by their own generation, the long term viability of [North Carolina's] solar industry would be in serious jeopardy." *Id.* at 5 (ln. 2-5). *See also, id.* at 8 (ln. 17-22) (testimony that under Duke's proposal, Duke would not have to buy energy generated or renewable energy certificates from other facilities for its solar set aside requirements until 2018, thereby closing off any market for a renewable energy industry in NC). Ms. Day made clear that NCSEA supported Duke's Proposed PV/DG Program to the extent it involved large scale generation because that generation is in line with Duke's core business. *Id.* at 5 (ln. 16-17). "However, a certain amount of market share should be reserved for private investment to fulfill the legislative goals of the REPS law and ensure North Carolina's solar market development." *Id.* at 5, ln. 29-30. *See also, id.* at 9, ln. 9-10 (explaining that a more diverse approach would be more in line with the REPS Law and better for North Carolina ratepayers).

Following the filing of the direct testimony, Duke revised its Proposed PV/DG Program, essentially cutting it in half. *See* Rebuttal Testimony and Exhibits of McManeus, Smith & Ruff's Revised Direct Testimony (October 20, 2008), NCUC Docket E-7, Sub 856. In responding to issues NCSEA raised, Duke argued that to the extent the REPS Law sought to promote "private investment" in renewable energy systems, it was a "private investor." According to Duke, "any attempt to distinguish between customer-owned solar generation and utility-owned solar generation on [that] basis is erroneous given that as an investor owned

corporation, [Duke's] investment in generation is likewise 'private investment.'" *Id.* (Rebuttal Testimony of Owen A. Smith at 12, ln. 17, ftnt. 1).

On October 23, 2008 the Commission held a hearing on Duke's Proposed PV/DG Program. The question of what was a "private investment" under the REPS Law was a central point of disagreement. Tr. Vol 1 at 174 (ln. 19) to 175 (ln. 22); Tr. Vol. 2 at 183 (ln. 9) to 184 (ln. 7), and 185 (ln. 23) to 187 (ln. 5).

**ARGUMENT**

No one disputes that the REPS Law is intended to promote private investment in renewable energy. This objective is stated expressly and made a policy of the State. *See* NC Gen. Stat. § 62-2(10)(c). The REPS Law is intended to "encourage private investment in *renewable energy and energy efficiency.*" *Id.*

The question is whether in setting this goal, the General Assembly meant to encourage investment by persons other than the traditional IOUs, or whether projects by IOUs (potentially to the exclusion of others) was the type of investment the General Assembly had in mind. To be clear, no one is saying that an IOU cannot achieve compliance with the REPS Law, in part, by "generat[ing] electric power at a new renewable energy facility" or by "us[ing] a renewable energy resource to generate electric power at a generating facility." NC Gen. Stat. § 62-133.8(b)(2). These options are clearly outlined in the law. What is at issue, is whether the General Assembly intended more, whether the words "private investment" and "diversity" were to have any meaning. At its simplest then, the issue is what the General Assembly meant by "private investment."

Duke argues that its investments in renewable generation are the "private investments" contemplated by the REPS Law because Duke is owned by investors and investments made by

investor-owned companies are "private investments." *See* Tr. Vol. 1, pg. 175 (ln. 9-15). Although Duke's so-called "private investments" come from ratepayer funds, Duke nevertheless asserts that these monies are still "private investments" because before Duke is able to recover "these costs" the money is advanced by "[i]nvestors in Duke Energy Corporation." *See* Tr. Vol. 1, pg. 166, (ln 8-12). The fallacy of this argument is plain. It is supported neither by statute nor intuition.

1. **The Statute Does Not Support Duke's Position That the Expenditures It Makes on Its PV/DG Program Is the "Private Investment" the General Assembly Sought To Encourage.**

The REPS Law, as enacted, specifically states that one objective of the law is to "[e]ncourage private investment in renewable energy and energy efficiency." *See* N.C. Gen. Stat. § 62-2(a)(10). Not surprisingly, the REPS Law does not define "private investment." The Public Utilities Act (N.C. Gen. Stat. § 62-1, *et seq.*,) similarly does not define "private investment." Yet in referring to these controlling sources it is beyond clear that the General Assembly was not contemplating expenditures by IOUs when it expressed a desire to "encourage private investment." Expenditures by utilities in this instance are the recoverable "*costs*" of compliance that include a "rate of return on the cost." *See e.g.,* N.C. Gen. Stat. §§ 62-133.8(h) & 62-133. These expenditures are not "private investments."

First, although the REPS Law and Public Utilities Act refer to electric utilities as a lot of things, "private investors" is not one of them. The REPS Law refers to electric utilities as "electric power suppliers," meaning, among others, "a public utility . . . that sells electric power to retail electric power customers in the State." *See* N.C. Gen. Stat. § 62-133.8(a)(3). The REPS requirement itself is applicable to each "electric public utility." *See* N.C. Gen. Stat. § 62-133.8(b). Likewise, the Public Utilities Act refers to a "public utility" or "electric supplier." *See*

N.C. Gen. Stat. §§ 62-3(23) & 62-110.2(3). Neither legislative source refers to utilities as "private investors."

Second, the expenditures an electric power supplier spends on a "new renewable energy facility" under the REPS Law are expressly referred to as "costs;" they are not referred to as "investments," private or otherwise. *See* N.C. Gen. Stat. § 62-133.8(h). Unlike true investments, the "costs" under the REPS Law are recovered through a statutory mechanism and recovery is guaranteed. *Id.* Similarly, under the Public Utilities Act, public utilities incur "costs" that are recovered through rates. The rates include a "rate of return on the cost." *See e.g.*, N.C. Gen. Stat. § 62-133. Certain changes in "costs" are adjusted through riders. *See* N.C. Gen. Stat. § 62-133.2. Indeed, the Public Utilities Act as amended by the REPS Law, refers exclusively to "costs" to describe expenditures by public utilities; "private investment" is simply not part of the scheme.

It seems beyond any real dispute that in using the words "private investment" the General Assembly meant something other than the costs incurred by public utilities to comply with the REPS. As noted above, IOUs have never been considered "private investors" and the relevant laws have never referred to the expenditures by the utilities as "investments." Expenditures by utilities have always been called and considered "costs."[1] Duke recognizes this fact and in its application seeks affirmation that its costs will be recovered as "provided for in N.C. Gen. Stat. § 62-133.8(h) and Commission Rule R8-67(e)." *Id.* at 16. Section 133.8(h) does not allow "private investors" to recover "private investments." Rather, as noted above, it allows "*electric power suppliers*" to recover "all reasonable and prudent *costs* incurred [to] . . . [c]omply" with the REPS. *See*, N.C. Gen. Stat. § 62-133.8(h). Duke further recognized its expenditures as

[1] Specifically, in referring to expenditures by utilities on renewable energy facilities, the REPS Law expressly refers to these expenditures as "costs" to comply. *See*, N.C. Gen. Stat. § 62-133.8(h).

"cost" to comply at the hearing on the Proposed PV/DG Program where its witness made clear that but for the REPS requirements, Duke would not be making the expenditures on PV systems. *See,* Tr. Vol. 2 at 47 (ln. 23-24) to 48 (ln. 1-19).

The question at issue is one of statutory interpretation. The fundamental role of statutory interpretation is to ensure that the law is construed in a way that advances the General Assembly's intent. *See, Elec. Supply Co. of Durham, Inc. v. Swain Elec. Co.*, 328 NC 651, 656, 403 S.E. 2d 291, 294 (1991). The "[l]egislative purpose is first ascertained from the plain words of the statute." *Id. See also, O & M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 267-68, 624 S.E.2d 345, 348 (2006) ("[t]he first consideration is the words chosen by the legislature."). It also is presumed the legislature acted with full knowledge of prior and existing law, *Investors, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977), and with care and deliberation. *See, State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970). Every statute is to be interpreted "in light of the . . . laws as they were understood" at the time of the enactment at issue. *See, Southern Bell. Tel. & Tel. Co. v. Clayton*, 266, N.C. 687, 689, 147 S.E.2d 195 (1966); *News and Observer v. State; Co. of Wake v. State; Murphy v. State*, 312 N.C. 276, 282, 322 S.E.2d 133, 137(1984). Ultimately the goal of statutory interpretation is to give effect to the objectives the General Assembly sought to achieve through the statute. *See, McLeod v. Nationwide Mutual Ins. Co.*, 115 N.C. App. 283, 288, 444 S.E.2d 487, 490, *disc. review denied,* 337 N.C. 694, 448 S.E.2d 528 (1994)(the cardinal principle of statutory construction is to ensure that legislative intent is accomplished).

Here, in referring to "private investments" the General Assembly clearly was considering something other than the "costs" a public utility incurs to comply under the laws. "Private investments" under the REPS Law are expenditures from sources other than public utilities like

Duke. The fact that a primary objective of the REPS Law is to "encourage *private investment* in renewable energy and energy efficiency" shows that Duke's Proposed PV/DG Program, a "cost to comply" with the REPS, is not fully consistent with the statute and in fact would be inconsistent if it has the effect of blocking true private investment. Thus, as Ms. Day pointed out, measures need to be taken to prevent this potential from occurring.

**2. Intuitively Duke's Position That the Money It Spends on Its PV/DG Program Is the Type Of Private Investment the General Assembly Sought To Encourage Makes No Clear Sense.**

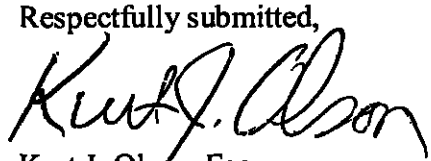
Duke's argument that its Proposed PV/DG Program is a "private investment" is reminiscent of the often paraphrased Descartes quote "*I am, because I think I am.*" According to Duke, it makes "private investments" because it is owned by private investors. Yet that characterization misses the mark. First, in its original application, before the question arose, Duke draws a clear distinction between itself, the Company, and entities who are engaged in "private investment" in the manufacture and installation of "materials needed to install solar PV generation facilities." *See* Application for Approval of Solar Photovoltaic Generation Program/Method of Recovery of Costs (June 6, 2006), NCUC Docket E-7, Sub. 856 at 10. Second, "private" is defined as of or pertaining to "nongovernmental sources." "Investment" is the investing of money or capital in order to gain profitable returns as interest, income or appreciation in value. The key points of "private investment" therefore would seem to be nongovernmental investment of capital for profitable return. As discussed above, Duke's venture is hardly consistent with this picture. The government is intimately involved, the expenditures are "costs" to comply, and the expenditures are not made for profitable return but for a "rate of return on costs." Further, the hallmark of private investment is risk, and here the risk is all but eliminated through cost recovery provisions, rates and riders.

To be sure, Duke is an investor-owned utility. It is, however, fully regulated and the fact that it has private investors does not make its expenditures "private investments." Its shareholders may make private investments in the company, but the company, in relation to expenditures on REPS compliance, does nothing of the sort.

## CONCLUSION

For the reasons set forth above, Duke's Proposed PV/DG Program, is not the "private investment" the General Assembly sought to encourage through the REPS program. It is a "cost to comply" with the REPS. As such, Duke's Proposed PV/DG Program is not fully consistent with the statute, and in fact would be inconsistent if it has the effect of blocking true private investment. Thus, as Ms. Day pointed out measures need to be taken to prevent this potential from occurring. Some market share needs to be reserved for true "private investment."

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that the following persons on the docket mailing list have been served a copy of the North Carolina Sustainable Energy Association's Brief in NCUC Docket No. E-7, Sub 856 by deposit in the U.S. Mail, postage prepaid, or by email transmission (as consented to):

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