

**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

In the Matter of			
Cube Yadkin Generation, LLC,)		
Complainant)	ORDER SCHEDULING	
)	HEARING AND ESTABLISHING	
v.)	PROCEDURAL SCHEDULE ON	
)	REMAND	
Duke Energy Progress, LLC, and)		
Duke Energy Carolinas, LLC,)		
Respondents)		

BY THE PRESIDING COMMISSIONER: On March 29, 2018, Cube Yadkin Generation, LLC, (Complainant), filed a verified complaint, request for declaratory ruling, and request for arbitration against Duke Energy Progress, LLC, and Duke Energy Carolinas, LLC (Respondents). Complainant is the owner of three hydroelectric facilities located on the Yadkin River (Yadkin River Facilities) that are qualifying facilities pursuant to the Public Utility Regulatory Policies Act of 1978. Complainant, therefore, is entitled to sell the electric output of the Yadkin River Facilities to Respondents under terms established in the Commission’s biennial avoided cost proceedings.

On July 16, 2018, the Commission issued an order granting Respondents’ motion to dismiss this complaint. In that order, the Commission first denied Complainant’s request for a declaratory ruling that Complainant established a legally enforceable obligation (LEO) prior to November 15, 2016, with respect to the Yadkin River Facilities, thereby entitling Complainant to a negotiated contract for the sale of the electric output from the Yadkin River Facilities with a rate based on the methodology approved in the Commission’s avoided cost order in Docket No. E-100, Sub 140, because Complainant did not transmit the required Notice of Commitment (NoC) Form to Respondents. The Commission next considered and denied Complainant’s request to waive the requirement to use the NoC Form based on the purpose of the LEO and the development of the Commission’s LEO standard. Commissioners ToNola D. Brown-Bland and Daniel G. Clodfelter dissented from the Commission’s order.

Complainant filed an appeal from the Commission’s July 16, 2018 order, and on December 17, 2019, the North Carolina Court of Appeals issued its opinion affirming the Commission’s decision in part, reversing in part, and remanding to the Commission for further proceedings on the question of whether Complainant should be granted a waiver

of the NoC Form requirement. *Cube Yadkin Generation, LLC v. Duke Energy Progress, LLC*, ____ NC. App. ____, 837 S.E.2d 144 (2019).

On March 20, 2020, Complainant and Respondents filed a joint report concerning a procedural schedule in this matter. In that filing, the parties stated that they were engaged in commercial negotiations that, if successful, may obviate the need for further proceedings in this matter, and Complainant agreed to suspend the proceedings until June, assuming that the parties are continuing to negotiate in good faith and are making commercially reasonable progress. The parties, therefore, requested that the Commission refrain from issuing a procedural order in this matter at that time and committed to filing a further joint report on the status of negotiations by May 1, 2020.

On May 1, 2020, Complainant filed a further report and stated that commercial negotiations had concluded unsuccessfully, that this matter will need to proceed to a hearing, and that the parties were working on a joint proposal for a procedural schedule, or separate proposals if they cannot reach agreement.

On May 19, 2020, the parties separately filed proposed procedural schedules for proceeding in this matter to address the court's remand.

In Respondents' Joint Request for Approval of Procedural Schedule on Remand, Respondents note that the only issue remaining before the Commission is the question of whether Complainant should be granted a waiver of the NoC Form requirement. Respondents request, therefore, that the parties "be afforded the opportunity to outline their positions on the issue of the waiver and submit additional evidence through a paper hearing, narrowly tailored for determining the single issue at hand." Respondents argue that the scheduling of an evidentiary hearing is unnecessary would involve unnecessary costs to all participants because the documents on which Complainant relies are already part of the record and, for the most part, verified. Respondents suggested that the Commission could require parties to appear to answer questions from the Commission and, to a limited extent, from opposing counsel if the Commission finds that it needs further clarification.

In its proposed procedural schedule, Complainant agrees that the core issue in dispute is whether the Commission should waive the NoC Form requirement for establishing a LEO, but disagrees with Respondents that the case should be decided based on the record without an evidentiary hearing. Complainant "believes that the posture of the case, the nature of the remaining issues, and the Court of Appeals' decision clearly require that discovery be permitted and that an evidentiary hearing be held." Complainant argues that the factual record in this case has not been developed, noting that it filed a motion authorizing discovery to address contested factual issues prior to the Commission's July 16, 2018 order. Thus, in recognition of the continued uncertainty and potentially longer response times resulting from the COVID-19 pandemic, and because this case turns on issues of fact on which further factual development is needed, Complainant proposes the following procedural schedule: (1) written discovery to be served beginning June 1, 2020; (2) depositions to be taken during a 60-day window beginning August 1, 2020;

(3) Complainant to file written direct testimony on September 1, 2020; (4) Respondents to file written direct testimony on October 1, 2020; (5) Complainant to file written rebuttal testimony on November 1, 2020; and (6) a hearing to be held on or after December 1, 2020.

After careful consideration the Presiding Commissioner agrees with Complainant that the parties should have the opportunity for discovery and that Complainant should have the opportunity to present additional evidence by its expert witnesses at a hearing in this matter. The Presiding Commissioner, therefore, will substantially adopt the procedural schedule proposed by Complainant allowing for written discovery and depositions and requiring pre-filing of direct and rebuttal testimony. The Presiding Commissioner will not adopt rigid discovery guidelines in this case beyond that proposed by Complainant, recognizing that in the past most discovery in Commission proceedings has been conducted in an informal manner without the need for Commission involvement or enforcement, and that such has been generally successful.

IT IS, THEREFORE, ORDERED as follows:

1. That a hearing shall be, and is hereby, scheduled for Tuesday, November 24, 2020, at 9:30 a.m., in Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, for the purpose of receiving expert witness testimony on remand of this case from the North Carolina Court of Appeals on the sole issue of whether Complainant should be granted a waiver of the NoC Form requirement with respect establishing a LEO for its Yadkin River Facilities;

2. That parties may engage in discovery related to the complaint and the prefiled testimony of the parties, with written discovery to be served upon the other parties beginning Monday, June 1, 2020, and any depositions to be taken during a 60-day window beginning Monday, August 3, 2020;

3. That the direct testimony and exhibits of Complainant shall be filed on or before Tuesday, September 1, 2020;

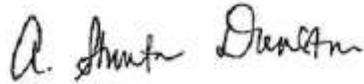
4. That the direct testimony and exhibits of Respondents shall be filed on or before Thursday, October 1, 2020; and

5. That Complainant may file rebuttal testimony and exhibits no later than Monday, November 2, 2020.

ISSUED BY ORDER OF THE COMMISSION.

This the 28th day of May 2020.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in black ink, appearing to read "A. Shonta Dunston". The signature is written in a cursive style.

A. Shonta Dunston, Deputy Clerk