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May 17, 2021

VIA ELECTRONIC FILING

Ms. Kimberley A. Campbell
Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, NC 27699-4300

RE: Duke Energy Carolinas, LLC and Duke Energy Progress, LLC's Joint Proposed Order
Docket No. E-7, Sub 1172 and E-2, Sub 1177

Dear Ms. Campbell:

Enclosed for filing with the Commission is the Joint Proposed Order of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC in the referenced matter. An electronic copy is being emailed to briefs@ncuc.net.

If you have any questions, please do not hesitate to contact me.

Sincerely,

/Robert W. Kaylor

Robert W. Kaylor, P.A.

Enclosure

cc: Parties of Record

CERTIFICATE OF SERVICE

I certify that a copy of Duke Energy Carolinas, LLC's and the Duke Energy Progress, LLC's Joint Proposed Order, in Docket Nos. E-7, Sub 1172 and E-2, Sub 1177, has been served by electronic mail, hand delivery or by depositing a copy in the United States mail, postage prepaid to the parties of record.

This is the 17th day of May, 2021.

/Robert W. Kaylor

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STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-2, SUB 1177
DOCKET NO. E-7, SUB 1172

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	)	**DUKE ENERGY PROGRESS, LLC AND DUKE ENERGY CAROLINAS, LLC'S JOINT PROPOSED ORDER DISMISSING COMPLAINT**

HEARD: Wednesday, March 3, 2021, at 10:00 a.m. via WebEx videoconference

BEFORE: Commissioner Daniel G. Clodfelter, Presiding; Commissioners ToNola D. Brown-Bland, Lyons Gray, Kimberly W. Duffley, Jeffrey A. Hughes, and Floyd B. McKissick, Jr.

APPEARANCES:

For Duke Energy Carolinas, LLC and Duke Energy Progress, LLC:

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BY THE COMMISSION: On March 29, 2018, Cube Yadkin Generation, LLC ("Cube Yadkin" or "Cube") filed a complaint against Duke Energy Progress, LLC and Duke Energy Carolinas, LLC (collectively, the "Companies" or "Duke"). On May 7, 2018, the Companies filed a motion to dismiss the complaint, which the Commission granted on July 16, 2018. Complainant then filed an appeal with the North Carolina Court of Appeals (the "Court") on September 13, 2018. The Court issued its judgment on December 17, 2019, affirming the Commission's Order in part, reversing in part, and remanding to the Commission for further proceedings. The Court's judgment was certified to the Commission on January 6, 2020 and docketed on January 23, 2020. These matters are on remand to the Commission from a decision by the Court on the question of whether Cube Yadkin should be granted a waiver of the Notice of Commitment ("NoC") Form requirement in order to establish a legally enforceable obligation as a qualifying facility ("QF") under the Public Utility Regulatory Policies Act of 1978 ("PURPA").

On March 20, 2020, Cube Yadkin and the Companies asked the Commission to refrain from issuing a procedural schedule, to allow the parties to engage in commercial negotiations that, if successful, might obviate the need for further proceedings.

On May 1, 2020, Complainant filed a further report and stated that commercial negotiations had concluded unsuccessfully, that the matter would 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 could not reach agreement.

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

On May 28, 2020, the Commission issued an order scheduling a hearing on November 24, 2020 and establishing deadlines for discovery and prefiled testimony.

The parties subsequently requested extensions of the procedural schedule on August 27, 2020, November 10, 2020 and December 9, 2020. The Commission granted these motions, and in its order on December 10, 2020 rescheduled the hearing to be held remotely via videoconference on March 3, 2021 and established new deadlines for prefiled testimony.

On December 14, 2020, Cube Yadkin filed the direct testimony and exhibits of John Collins.

On January 15, 2021, the Companies filed the direct testimony and exhibits of Glen Snider and Michael Keen.

On February 16, 2021, Cube Yadkin filed the rebuttal testimony and exhibits of Mr. Collins.

Also on February 16, 2021, Cube Yadkin and the Companies filed consent to the hearing on March 3, 2021 being conducted via remote means.

The evidentiary hearing was held as scheduled on March 3, 2021 via WebEx videoconference. Cube Yadkin presented the testimony of witness Collins, and the Companies presented the testimony of witnesses Snider and Keen. The pre-filed testimony and exhibits were stipulated to and copied into the record as if given orally from the stand. The parties filed cross-examination exhibits on March 5, 2021.

On March 17, 2021, the Commission issued a notice requiring proposed orders and briefs by April 16, 2021.

On April 1, 2021, the Companies filed a motion for extension of time to file proposed orders, which the Commission granted on April 5, 2021, requiring proposed orders and briefs to be filed by May 14, 2021.

On May 14, 2021, Cube Yadkin and the Companies filed proposed orders and briefs.

Based on the foregoing, all of the parties' testimony, and other filings made but not discussed in this order, and the entire record in this proceeding, the Commission now must decide if Cube Yadkin should be granted a waiver of the Notice of Commitment Form and if the answer is "yes," the date that Cube Yadkin clearly committed to sell the output of the Cube QFs to the Companies and sufficient to establish a legally enforceable obligation ("LEO").

SUMMARY OF CUBE YADKIN'S EVIDENCE

Cube Yadkin witness John Collins testified that as early as 2013, Cube Yadkin began discussions with Alcoa Power Generating Inc. ("Alcoa") related to the purchase of

the four hydroelectric facilities ("Yadkin facilities"). Ultimately, in 2016, Cube Yadkin entered negotiations to purchase the facilities and began the due diligence process in early 2016. On or about June 30, 2016, Cube Yadkin and Alcoa entered into a purchase agreement for the facilities. Alcoa and Cube Yadkin prepared and filed with the Federal Energy Regulatory Commission ("FERC") a request to transfer the license for the facilities from Alcoa to Cube Yadkin in September 2016. The license was transferred by order of FERC in January 2017. The closing on the purchase of the facilities was completed on February 1, 2017.

The three QF hydroelectric facilities are (1) the High Rock facility, which was placed in service in 1927 with a total installed capacity of 40.32 MW; (2) the Tuckertown facility, which was placed in service in 1962 with a total installed capacity of 38.04 MW; and (3) the Falls facility, which was placed in service in 1917 with a total installed capacity of 31.13 MW. Cube Yadkin also purchased the Narrows facility, which is not a QF, because its capacity exceeds the limit for being a QF.

Witness Collins testified that Cube Hydro did not and could not obtain a certificate of public convenience and necessity ("CPCN") for the Cube QFs since N.C. Gen. Stat. §62-110.1(a) was enacted in 1963 at which time the Yadkin facilities had already been constructed and had been selling power in North Carolina for decades. Witness Collins testified that Cube's review of existing precedent indicated that the Commission had not required any other generating facility that had been constructed before the CPCN statute to obtain a CPCN to continue operating. Witness Collins also testified that, through counsel, Cube had sought the advice of the Public Staff of the North Carolina Utilities Commission ("Public Staff") on whether the facilities could proceed without a CPCN and, based on its

analysis of the law and the response from the Public Staff, had concluded that no CPCN was required for the facilities.

Witness Collins testified that the QF facilities were interconnected to the Yadkin Transmission System, a distinct Balancing Authority Area that is interconnected to the Companies' systems. Cube Hydro had contacted the Companies in March 2016, prior to signing the purchase agreement with Alcoa to explore the possibility of a long-term power purchase agreement ("PPA") with the Companies and that Alcoa was aware of the outreach and approved of the discussions with the Companies before and after the signing of the purchase agreement. He further testified that the Companies were aware that Cube Yadkin was fully authorized to negotiate PPAs on behalf of the Cube QFs and that on August 26, 2016, he informed Company witness Michael Keen that Cube Hydro desired to enter a long-term PPA with the Companies.

On or about September 16, 2016, witness Collins contacted Michael Keen to further discuss Duke's purchasing the output of the Cube QFs. By responsive letter dated September 21, 2016 (Collins Exhibit 1), Michael Keen acknowledged that Cube Yadkin indicated its intent to sell the power from its QFs but he noted that Cube Yadkin did not yet own the facilities, but was scheduled to close on the purchase in November of 2016. He further replied that Duke did not have any current needs; however, he stated that "to the extent that Cube Yadkin approached Duke under PURPA . . . Duke would likely have no obligation to purchase any output of energy or capacity from that Yadkin system that may be certified as qualified facilities." Mr. Keen did not indicate in his letter that this state of affairs would be an impediment to PPA negotiations, and his response indicates Duke's understanding that Cube was authorized to negotiate on behalf of the Cube QFs.

By letter sent to Duke on or about October 11 (Collins Exhibit 2), witness Collins responded that the QFs were self-certified with FERC and that Cube Hydro wanted to meet to discuss the process for making sales from the projects to Duke pursuant to PURPA. Michael Keen responded in a letter on October 14, 2016 (Collins Exhibit 3), stating that if the QFs are qualifying facilities that seek to sell power to Duke, Duke believed that it would be exempted from the purchase obligations under FERC's regulations at 18 C.F.R. § 292.309-310, which establish a procedure under which a utility may petition FERC for an order exempting it from its obligation to purchase power QFs that have nondiscriminatory access to wholesale markets that meet specified criteria.

Witness Collins then testified that Cube Yadkin, through Cube Hydro, believed it had established a LEO for the three QFs and was entitled to sell their output under PURPA but, given the Companies' refusal to purchase from the Cube QFs, Cube Yadkin was open to continuing discussions to sell power from all four Yadkin hydro facilities under long-term PPAs. He further testified that in November 2016 the Companies drew out the negotiations on a non-PURPA PPA and requested a letter agreement, which would give rise to any rights under PURPA. The letter agreement, dated April 25, 2017, acknowledged that Cube Hydro and the Companies would enter into non-PURPA discussions but that in the letter agreement Cube did not waive its existing rights under PURPA, which dated back to the fall of 2016, when Cube Hydro committed to sell the output of the Cube QFs to the Companies. Witness Collins maintained that the Cube QFs' LEOs were established as early as March 2016, but no later than October 11, 2016, when Cube Hydro sought to interface with the Companies concerning the potential for a long-term PPA.

In his direct testimony, witness Collins testified that the Commission's NoC Form required Cube Yadkin to make certifications that it could not or was not required to make and that at no time throughout the course of PPA negotiations did the Companies request that Cube Yadkin complete the NoC Form or indicate that a NoC Form would need to be completed in order to establish a LEO or enter into a PPA. He then testified that a waiver of the NoC Form was appropriate as Cube Yadkin proceeded reasonably and in good faith in not filing the NoC Form. Cube Yadkin had reason to believe the Commission would not require a NoC Form because the Cube QFs were in full operation and pre-dated the NoC requirements; witness Collins considered the NoC Form a technical deficiency that did not cause harm or prejudice to any party. Witness Collins concluded his direct testimony by stating that the Companies were fully on notice of Cube's commitment to sell the output of the Cube QFs based on negotiations with Cube that started in March 2016 and continued through November 2016. (Tr. Vol. 1 at pp. 22-35.)

In his rebuttal testimony, witness Collins testified that the Companies understood Cube Yadkin had entered an agreement to purchase the Yadkin facilities. In defending Cube Yadkin's decision to not complete the NoC Form, witness Collins testified that Cube Yadkin could not have completed the third section of the NoC Form because it was not required to receive a CPCN or file a report of proposed construction since the QFs were in existence and operating before the CPCN requirement was established by the General Assembly in N.C. Gen. Stat. §62-110.1(a). Further, because Cube Yadkin could not and was not required to certify under Section 3 of the NoC Form, it could not incorrectly acknowledge the information in Section 5 of the NoC Form. (Tr. Vol. I at pp. 38-46.)

Witness Collins responded, in rebuttal to the direst testimony of the Companies' witness Keen, that Cube Yadkin was attempting to impose excessive, out-of-date avoided costs rates on the Companies' customers, by stating that while Cube Yadkin was aware that avoided cost rates for standard offer QFs were approved every two years through an administrative docket, it was unaware in September and October 2016 of the changes the Companies would propose to its avoided cost calculation methodologies in November 2016. He then accused the Companies of acting in bad faith by delaying and dragging out negotiations past the November filing date for new (and lower) avoided cost rates. He then disagreed with the testimony of the Companies' witness Keen that Cube Yadkin had "disappeared" for five months (October 2016 through March 2017) during a critical time during negotiations between the parties. He also referred to the direct testimony of witness Keen wherein witness Keen testified that the Companies were not aware that Alcoa was aware of, involved in, and had approved the PPA discussions between the Companies and Cube Yadkin prior to the purchase by Cube Yadkin of the Alcoa facilities. He testified that if witness Keen had asked at any time during the negotiations, he would have been informed that Alcoa was aware of and had approved the PPA discussions. (Tr. Vol. II at pp, 46-49.)

In response to the direct testimony of the Companies' witness Glen Snider, witness Collins testified that the Cube QFs were not the type of facilities for which the NoC Form and the revised LEO standard were established, because the Cube facilities were not required to receive a CPCN to continue operating and had already achieved commercial operation and were providing power. Therefore, because of the uniqueness of the circumstances surrounding the Cube QFs, including their long-term standing operations

before and after the CPCN requirement, waiver of the NoC Form requirement would be appropriate. Witness Collins further testified that the circumstances of Cube Yadkin's purchase of the QFs from Alcoa were such that Cube Yadkin was contractually entitled to acquire the facilities once all necessary FERC approvals including a license transfer had been granted. In October 2016, as all other requirements of the sales contract had been completed, it was a matter of months before Cube Yadkin would own the Alcoa QFs. (Tr. Vol. I at pp. 51-54.)

Witness Collins then testified that it was clear that, even if Cube could have submitted a NoC Form in a manner that would establish an immediate LEO date, Duke would not have accepted it on the basis of Duke's contention that only the current owner of a facility could submit a NoC Form. Additionally, the circumstances of Cube Yadkin's purchase of the QFs from Alcoa were such that Cube Yadkin was contractually entitled to acquire the facilities once all necessary FERC approvals including a license transfer (which was approved in October 2016) had been obtained. All other requirements of the sales contract, including all diligence, had been completed, and it was a matter of months before Cube Yadkin would own the Cube QFs. Accordingly, Duke was negotiating with an incoming owner, not merely an interested purchaser, as Duke's pre-filed testimony suggests.

SUMMARY OF DUKE'S EVIDENCE

In his direct testimony, Company witness Keen stated that the Companies acted in good faith to negotiate with Cube Yadkin in the interests of its customers and consistent with the Commission's PURPA policies and orders. Put simply, Cube Yadkin demanded, and still demands, to be paid prices for its capacity and energy that are inconsistent with

the Commission's policies and far in excess of what is just and reasonable for its customers to pay. (Tr. Vol. II at pp. 7, 21.)

Company witness Keen was assigned commercial responsibility for this project in August 2016 after Cube Yadkin reached out to one of Duke's executives, Regis Repko, to let him know that Cube Yadkin intended to purchase four hydroelectric facilities along the Yadkin River – High Rock, Tuckertown, Falls, and Narrows - from Alcoa. Typically, Company witness Keen would not discuss matters of this type with anyone other than the owner of the facilities, because Duke does not want to provide information that might impact whether assets were ultimately purchased. On September 16, 2016, Company witness Keen had a conversation with Mr. Collins, which he followed up with a letter on September 21, 2016, providing Duke's position on purchasing the output of the Facilities. Company witness Keen noted that Alcoa owned the Facilities and advised that Duke did not have any need for energy and capacity at that time, but if need arose in the future, Duke would likely issue a request for proposals (or RFP), and Cube Yadkin could submit a bid. Company witness Keen further informed him that, to the extent that Cube Yadkin approached Duke under PURPA, Duke would likely have no obligation to purchase the energy or capacity from the Facilities that may be certified as QFs. In response to a question by Commissioner Duffley, Mr. Keen responded that Duke decided to not pursue that issue with the FERC as there was the issue as to whether FERC would agree with the Duke position. (Tr. Vol. II, p. 149). The Commission also notes that in its Joint Answer and Motion to Dismiss filed on May 7, 2018 at paragraph 30 of its FIRST DEFENSE, Duke admitted that it had "not sought from FERC, nor have been granted, an exemption from their obligations under PURPA… but had properly reserved, and not waived, their

entitlement to petition FERC for authority to grant this exemption under 18 C.F.R. 292.309."

On October 11, 2016 Company witness Keen received an undated letter from Mr. Collins in response to his September 21, 2016 letter. In the undated letter, Mr. Collins indicated that Alcoa had certified the three smaller Facilities as QFs and that Cube Yadkin anticipated closing before the end of 2016. The letter also recommended meeting to discuss the process for making sales from these projects to Duke pursuant to PURPA, noting that Duke had not petitioned to be relieved of the mandatory obligation under PURPA to purchase output from the QFs. (Tr. Vol. II at pp. 9, 27.)

Company witness Keen testified that it should be noted that, while Mr. Collins projected closing the purchase of the facilities on November 1, 2016, the transaction was not completed until February 1, 2017. Cube Yadkin never offered an explanation on what caused the delay. Company witness Keen testified that Duke did not begin negotiations with Cube Yadkin in the Fall of 2016 for a PURPA PPA because Cube Yadkin did not own the Facilities in question, and the first step in this process is for the actual owner of the Facilities to submit a NoC Form. (Tr. Vol. II at pp. 8-9.)

According to witness Collins, once the Companies receive a NoC Form, they calculate the appropriate avoided cost rates in effect at that time, which rates are then locked in for the duration of a PPA. Cube Yadkin did not submit a NoC Form. While Cube Yadkin contends that one portion of the NoC Form did not apply to them, Duke witness Keen testified that it is unreasonable to conclude that a sophisticated company like Cube Yadkin, and an experienced employee like Mr. Collins with access to legal expertise, would have reached the conclusion that, because one small aspect of the NoC Form did not

apply, therefore the NoC Form should simply be disregarded in its entirety. The Companies require the NoC Form from all potential PURPA suppliers and cannot complete the required analysis until the form is received. (Tr. Vol. II at pp. 9-10.)

Duke witness Keen further testified that, after Cube Yadkin closed on the purchase in February 2017, Duke negotiated non-PURPA PPAs in good faith and provided firm proposals to Cube Yadkin on two occasions. On August 10, 2017, Duke proposed a two-year energy only transaction, with energy pricing based on a detailed analysis of the energy market at that time, and offered to purchase the full output (~200 MW) from Cube Yadkin including the non-PURPA facility (Narrows). Cube Yadkin rejected this offer. On September 25, 2017, Duke proposed to purchase the output from all three QFs for a total of 108 MW for a five-year term, with pricing based on DEC's avoided costs - $39/MWh on-peak and $32/MWh off-peak with an average price of $34/MWh, using the regulatory methodology in-place at that time. Cube Yadkin rejected this offer as well. Cube Yadkin also made two proposals to Duke. Duke rejected both offers because the pricing was significantly above Duke's avoided costs and exceeded current market prices, also the term was not consistent with the limits contained in North Carolina House Bill 589 and Duke was granted no dispatch rights or any environmental attributes. (Tr. Vol. II at pp. 10-11.)

In 2018, Duke Energy Progress, LLC ("DEP") issued an RFP to solicit capacity and energy to meet its future capacity needs. Cube Yadkin was invited to participate and did submit a proposal. DEP executed five PPAs to secure approximately 1,800 MW of capacity and energy. However, Cube Yadkin's proposal was not accepted because it was not competitive. (Tr. Vol. II at p. 11.)

Witness Keen also provided testimony contesting Cube's assertions that Alcoa supported Cube obtaining a fixed, long-term PURPA PPA from DEC and DEP. He stated that, even if Alcoa might have approved the negotiations, Alcoa never contacted Duke about PURPA sales to the Companies. (Tr. Vol. II at pp. 11-12.) And even if Cube Yadkin were authorized to negotiate on behalf of Alcoa, it could not have made any commitment to sell output from the Alcoa-owned assets. (*Id*.) Furthermore, Duke witness Keen did not draw out the negotiations with Cube Yadkin. A detailed review of the timeline clearly shows that Duke was responsive and that any long pauses were caused by Cube Yadkin, which basically disappeared for five months during a critical time (October 2016 through March 2017). (Tr. Vol. II at p. 12.) He stated that the Companies were not aware of what caused the delay in Cube Yadkin's purchase of the Facilities or the financial details of the purchase; however, Cube Yadkin's unrealistic and outdated demands for excessive pricing did not help move the process along. (*Id.*)

Company witness Snider testified that under PURPA, a QF has the unconditional right to choose whether to sell its power "as available" or pursuant to a LEO at a forecasted avoided cost rate determined, at the QF's option, either at the time of delivery or at the time the obligation is incurred. Regulations of the FERC, set forth in 18 C.F.R. 292.304(d)(2), are intended to protect the QF's right to sell power to the utility under PURPA where the QF and the utility cannot agree to the form, terms or rates of a PPA. Put simply, FERC's LEO concept provides that the QF and the utility can either negotiate and enter into a PPA or, if the utility refuses to enter into a contract, the QF can seek the assistance of the state regulatory authority to bind the utility to purchase power from the QF by establishing a non-contractual, but still binding, LEO prior to executing a PPA. (Tr. Vol. II at pp. 14-15.)

Duke witness Snider continued that, if a QF establishes a LEO in North Carolina, there is a bifurcated approach to determining the applicable avoided cost rates. Generally, smaller QFs may qualify for the standard rate which is established by the Commission every two years. Larger QFs that do not qualify for standard rates have their avoided cost rates calculated on a regular basis to reflect economic and regulatory conditions that exist at the time those calculations are made. As a general rule, a QF in North Carolina chooses the avoided cost rate in effect at the time the LEO is established. (Tr. Vol. II at p. 15.)

Witness Snider further provided context on why the Commission adopted the NoC Form. Prior to 2015, the Commission's policy provided that a LEO is established when the QF has (1) obtained a certificate of public convenience and necessity ("CPCN") (or filed a Report of Proposed Construction if applicable) and (2) indicated to the relevant North Carolina utility that it is seeking to commit itself to sell its output to that utility. The second prong was too vague to be implemented fairly for all QFs, and there was not enough guidance on what it meant for a QF to "commit itself" to sell its output. Complaints and requests for arbitration resulted in costly litigation and the unnecessary utilization of resources by the Commission and the parties. Therefore, to avoid the precise dispute that is at issue in this proceeding, the Commission established new LEO requirements, effective January 16, 2016, which include 3 prongs: (1) self-certification as a QF with the FERC; (2) making a commitment to sell the facility's output pursuant to PURPA via the use of the approved NoC, and (3) receipt of a certificate of public convenience and necessity for construction of the facility. (Tr. Vol. II. at pp. 15-16.)

Witness Snider concluded by noting that it is the Companies' customers who pay for the avoided cost rates that the Companies pay the QFs. The LEO helps align the

avoided cost rates that customers ultimately pay to the QFs with the Companies' current avoided costs. Allowing QFs to establish LEOs that do not reflect current avoided costs places the risk and burden of overpayment on customers of the Companies. This risk is exacerbated if the QF has the latitude to retrospectively select a LEO date that provides the QF the highest possible revenues at the expense of customers. The Commission has sought to mitigate this risk through the LEO requirements. (Tr. Vol. II at pp. 16-17.)

DISCUSSION

As the initial Complainant in this matter, Cube Yadkin bears the burden of proof to demonstrate that it is entitled to a waiver of the Commission's well-established LEO procedures. N.C. Gen. Stat. § 62-75.[1] Cube Yadkin has failed to meet its burden.

Establishing a LEO is a matter of state law, and the states determine: (i) whether and when a LEO is created and (ii) the procedures for obtaining approval of such an obligation. Order No. 588-A, 119 FERC ¶ 61,305 at p. 139 (2007); *see also, Power Res. Grp., Inc. v. Pub. Util. Comm'n*, 422 F.3d 231, 239 (5th Cir. 2005). The procedures in place in North Carolina prior to 2015 to establish a LEO had resulted in many disputes due to lack of clarity. Specifically, in the years leading up to the Sub 140 avoided cost proceeding, the Commission experienced "an increasing number of disputes over the date of an LEO," which resulted in the Commission clarifying and adding to its LEO requirements in order "to provide a standardized and clearly stated method to establish a LEO." *Sub 140 Order* at 52. Therefore, it was determined appropriate by the Commission to establish in its Sub

[1] N.C. Gen. Stat. § 62-75 provides that in all proceedings instituted by the Commission for the purpose of investigating any rate, service, classification, rule, regulation, etc. the burden of proof is on the public utility. In all other proceedings, the burden of proof is on the complainant.

140 Order a more precise process to avoid precisely the type of dispute at issue in this proceeding.

The three-part LEO standard that was established in the Sub 140 Order and in effect during the time period relevant to this proceeding is simple and straightforward and not in dispute: (i) the developer has self-certified with FERC as a QF; (ii) the QF has made a commitment to sell the QF's output to a utility under PURPA using the approved NoC form; and (iii) the QF has filed a report of proposed construction or been issued a CPCN pursuant to N.C. Gen. Stat. § 62-110.1. *Sub 140 Order* at 52.[2]

The Commission has held that a developer must have QF status to satisfy the Commission's LEO test. *Sub 140 Order* at 52. As a matter of law, Cube Yadkin had no authority or ability to assert its rights as a QF prior to February 1, 2017, when it completed its purchase of the Yadkin facilities. Cube Yadkin did not actually own or, crucially, *operate* the Yadkin facilities at any time prior to November 2016, when it claims it established a LEO. The Companies' policy of not negotiating long-term fixed PURPA PPAs with *potential* owners is sound. The Companies were not privy to negotiations between Cube and Alcoa and thus would not want to influence the purchase price or other terms and conditions by agreeing to a PPA before the purchase had closed. As noted in the Companies' response to Cube Yadkin's initial complaint, Cube Yadkin had no right to establish a LEO under PURPA prior to its ownership of the Facilities or its March 9, 2018 self-certification as a QF. *Vote Solar Initiative and Montana Environmental Center v. Montana Public Serv. Comm'n*, 157 F.E.R.C. P 61,080 (Nov. 1, 2016). The FERC order

[2] In the Commission's *Sub 148 Order*, the Commission reaffirmed those requirements, but added a fourth prong - the QF has submitted a completed interconnection request pursuant to NCIP. *Sub 148 Order* at 106. Although Cube is not exempt from the LEO requirements, it is not in the interconnection queue, and so this LEO requirement does not apply.

transferring the license to operate the Facilities was not transferred from Alcoa to Cube until December of 2016, and it was expressly contingent upon the transfer of title from Alcoa to Cube, which did not happen until February of 2017. (Tr. Vol. 1 at pp. 77-78) Moreover, Cube Yadkin did not submit to the FERC the Form 556 to show that it owned and operated the Facilities until March 2018. (Tr. Vol. I at pp. 80-81.) Although Cube Yadkin claims that the FERC rules requiring these types of filings are essentially "perfunctory" (*See* Tr. Vol. I, at p. 134), the Commission does not agree that Cube Yadkin has provided sufficient justification for it to simply disregard the FERC's orders and regulations regarding the transfer of the operating license and the new owners self-certification of facilities, even if a prior owner had previously self-certified them.[3] Notably, the self-certification forms submitted to FERC appear to be intended to provide, among other things, notification to the FERC on the current owner and operator, of the applicable facilities . (Tr. Vol. I, at p. 73.)

As noted, this proceeding presents the very circumstances that the Commission intended the NoC Form to remedy – a QF alleges that it provided notice of its commitment to sell to the utility when it can maximize the avoided cost rates to be paid to it. This allegation then leaves the utility and, potentially, the Commission itself to later sift through various emails, letters, or meetings between the QF and the utility to determine whether or when the QF had actually provided such notice. Cube Yadkin has proposed a self-serving LEO date in case the Commission allows its requested waiver, based on various actions by Alcoa, the previous owner of the Yadkin facilities, or letters and emails between Cube

[3] Order No. 732 (Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility), 130 FERC ¶61,214 at P 58 (2010) (under FERC's QF ownership reporting requirement, a change in ownership triggers a recertification requirement).

Yadkin and the Companies, even though all of such letters and emails occurred prior to Cube Yadkin's purchase of the Yadkin facilities and prior to Cube Yadkin's self-certification.

In contrast, the Commission's mandatory NoC Form provides a clear, non-discriminatory method for all QFs to unequivocally provide the required notice of commitment to sell its output to the utility in a manner that reduces disputes between the parties and before the Commission. Commissioner McKissick asked Company witness Snider if his understanding was that the NoC Form was mandatory. Witness Snider responded that it was his understanding that the NoC form was mandatory and was necessary to establish a LEO. (Tr. Vol II, at p. 154). In this proceeding, Cube Yadkin has presented no compelling argument why the Commission should abandon its well-considered and effective determination that a NoC Form is mandatory.

Cube Yadkin argues, however, that because the Yadkin facilities were constructed prior to the enactment of the statutory obligation, and because the facilities have long-standing relationships with the Companies, the Commission's LEO requirements are not applicable to the facts and circumstances here. The fact that the Yadkin facilities existed prior to the CPCN requirement is not a substitute for meeting the Commission's second-prong requirement that Cube Yadkin provide notice of its commitment to sell the output of the Yadkin facilities by submitting the required NoC Form to establish a LEO. First, Cube Yadkin has never sought any clarification from the Commission as to whether it did. The Public Staff's qualified and conditional response to Cube Yadkin that it may not need a CPCN hardly establishes that the CPCN requirement was not applicable, nor does it address the central question in this matter of whether Cube needed to submit a NoC Form

to the Companies. Commissioner Clodfelter asked Cube Yadkin witness Collins if Cube Yadkin had ever given any consideration to filling out the NoC Form. Witness Collins replied that Cube Yadkin did give that some consideration but stated that it was Duke's position to not accept an incomplete NoC Form, and therefore the NoC Form had not been completed. However, witness Collins, in further response to Commissioner Clodfelter, stated that Duke had not directly stated in writing or told him that Duke would not accept an incomplete or non-complying NoC Form. (Tr. Vol 1, at pp. 127-128). The Commission does not find that Cube's unwillingness to do this simple due diligence on its LEO obligations, of which Cube was aware, justifies its requested waiver.

Cube Yadkin is not a small, unsophisticated QF, but instead is a sophisticated market participant, in the business of owning, developing and modernizing hydroelectric facilities. Cube Yadkin's communications with the Companies evince its familiarity with PURPA's requirements as early as August 2016. The Commission's *Sub 140 Order* implementing PURPA and including the mandatory requirement of the NoC Form was publicly issued at the end of 2015. The NoC Form has been widely used by even small, unsophisticated QFs to establish a LEO. Finally, submission of the NoC Form is hardly burdensome, as the Commission itself noted in the *Sub 140 Order*. *Sub 140 Order* at 51.

CONCLUSION

The parties in this proceeding agree that Cube Yadkin failed to comply with the Commission's requirements to establish a LEO prior to November 16, 2016. There is no dispute from the record starting with the Complaint, the Joint Answer and Motion to Dismiss, the Commission's July 16 2018 *Order Granting Motion to Dismiss* that (1) Cube Yadkin did not own the Yadkin Facilities until February 1, 2017; (2) Cube Yadkin did not

self-certify as a QF with respect to the Yadkin Facilities until March 2018; and (3) Cube Yadkin had not submitted the required NoC Form. Therefore, the only question before the Commission is "whether Complainant should be granted a waiver of the NoC Form requirement with respect to establishing a LEO for its Yadkin River Facilities." *Order Scheduling Hearing And Establishing Procedural Schedule On Remand*, Docket Nos. E-2, Sub 1177 and E-7, Sub 1172, issued May 28, 2020 at 3. The answer is that Cube should not be granted a waiver, because it has failed to justify a waiver of the Commission's mandatory NoC Form.

When issuing its directive on the use of the NoC Form, the Commission clearly stated that the NoC Form was mandatory, and it did not carve out exceptions. In fact, the Commission specifically explained that the NoC Form was to "reduce the number of disputes between the parties and the number of complaints brought before the Commission for adjudication as to when an LEO was established." *Id*. Allowing for waivers of the NoC form could begin a slippery slope of having contested LEO issues back before the Commission. As Duke witness Snider testified in response to a question from Commissioner McKissick, the NoC form was absolutely required and was not discretionary because "having a voluntary NoC form doesn't do much to solve" the issue of having the Commission sift through letters and emails to determine when a LEO was established. (Tr. Vol. II at p. 154.) Moreover, there is nothing in the North Carolina General Statutes, including N.C. Gen. Stat. § 62-156, or PURPA that requires the Commission waive their LEO requirements. N.C. Gen. ¶ 62-156 does not speak to the requirement for a LEO, and it is FERC's established policy to "leave to state regulatory authorities . . . issues relating to the specific application of PURPA requirements to the

individual QFs." *Cuero Hydroelectric Inc*., 85 FERC ¶ 61,124, at 61,467 (1998). FERC's regulations allow the states a wide degree of latitude in implementing PURPA, especially with the LEO requirements. *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61, 304 at 61,645 (1983); *Order No. 588-A,* 119 FERC ¶ 61,305 at p. 139 (2007); *see also, Power Res. Grp., Inc. v. Pub. Util. Comm'n*, 422 F.3d 231, 239 (5th Cir. 2005). Therefore, nothing in the Commission's prior orders, N.C. Gen. § 62-156, or PURPA requires the Commission to provide for a waiver of its second-prong of its well-established and well-publicized LEO requirements.

Additionally, Cube Yadkin has failed to establish any policy or equitable basis for waiving the clearly established NoC requirement. The NoC form requirement was imposed to provide clarity to avoid precisely this type of dispute. Allowing for a waiver undercuts the very purpose of the NoC requirement, interjecting ambiguity and imprecision into the process and opening the potential for myriads of similar disputes. In fact, one could argue that any potential waiver basically guts virtually the entire benefit of the clear NoC requirements.

Moreover, even if a waiver is to be granted, it should be reserved for the most extreme of circumstances and any party seeking such a waiver should be required to make a compelling demonstration regarding why such party was unable to comply with NoC requirement. Simply proceeding in "good faith" based on having a "reason to believe the Commission would not require a NoC form" as is asserted by Cube Yadkin is a wholly inadequate basis for waiver. Similarly, the failure to submit a NoC form is not a "technical deficiency" as is alleged by Cube Yadkin but represents the very center of the need for

clarity on these issues that was the basis for the Commission's decision to impose the NoC requirement. Furthermore, not granting a waiver would not "reward Duke" but instead would confirm the critical importance of adhering to Commission requirements for establishing a LEO.

Cube Yadkin's other arguments that the Commission should waive the NoC form requirement because the facilities "provide greater value to Duke than other QFs, such that there would no harm to ratepayers" (Tr. Vol. I at p. 61.) are similarly unavailing. First, the Cube has entered into "as available" agreements with Duke at this time, which allow them to sell their energy output, as available, to Duke. Therefore, the "clean energy" (Tr. Vol. 1 at p. 61.) referred to in witness Collins' testimony is being sold to Duke at this time. The Commission agrees that there may be some benefits to purchasing Cube Yadkin's output. However, as witness Snider testified, if the Commission allowed for Cube's requested waiver, Duke's ratepayers would overpay for Cube Yadkin's output by $10 million over a ten-year contract, when compared with current avoided cost rates. (Tr. Vol. II at p. 131.) Therefore, in this case, the Commission does not find that the benefits of Duke buying Cube's output are in any way outweighed by the cost to Duke's ratepayers.

Therefore, for the foregoing reasons, Cube Yadkin has failed to justify any waiver of the NoC form requirement.

Accordingly, these proceeding in Docket Nos. E-2, Sub 1177 and E-7, Sub 1172 are dismissed, with prejudice.

ISSUED BY ORDER OF THE COMMISSION.

This the ___ day of ____ 2021.

NORTH CAROLINA UTILITIES COMMISSION

Kimberley A. Campbell, Chief Clerk