

PRE-FILED REBUTTAL TESTIMONY OF  
JOHN COLLINS  
ON BEHALF OF CUBE YADKIN GENERATION, LLC  
NCUC DOCKET NO. E-2, SUB 1177, E-7, SUB 1172

**INTRODUCTION**

**Q. PLEASE STATE YOUR NAME, TITLE, AND BUSINESS ADDRESS.**

A. My name is John Collins. I am currently president and chief executive officer of First State Advisers, LLC based in Rehoboth Beach, Delaware. The company's address is 49 W. Side Dr., Rehoboth Beach, Delaware, 19971. Previously, I worked for Cube Hydro Partners, LLC ("Cube Hydro") based in Bethesda, Maryland as executive vice president and later as president and chief executive officer. Cube Hydro's address is Two Bethesda Metro Center, Suite 1130, Bethesda, Maryland 20814. I also served as president of Complainant, and Cube Hydro's affiliated company, Cube Yadkin Generation, LLC ("Cube Yadkin") based in Bethesda, Maryland and at the same address as Cube Hydro.

**Q. DID YOU PROVIDE DIRECT TESTIMONY IN THIS PROCEEDING?**

A. Yes.

**Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

A. As a reminder, this matter involves Cube Yadkin's purchase of three facilities on the Yadkin River that are Qualifying Facilities ("QFs") under the Public Utility Regulatory Policies Act ("PURPA) which is administered by the Federal Energy Regulatory Commission ("FERC") and this Commission (the "Cube QFs"), and the negotiations which took place for a power purchase agreement ("PPA") between Cube Yadkin and Respondents Duke Energy Progress, LLCs ("DEP") and Duke Energy Carolinas, LLCs ("DEC") (collectively, "Duke"). The primary issue before the Commission is whether the Notice of Commitment Form ("NoC Form") requirement to establish a legally enforceable obligation ("LEO") should be waived. My rebuttal

1 testimony responds to several points made by Duke witnesses in their Direct Testimony.  
2 Specifically, my testimony will rebut several misrepresentations and mischaracterizations in the  
3 testimony of Michael Keen and Glen Snider. Further, my testimony will demonstrate that waiver  
4 of the NoC Form requirement to establish a LEO for the Cube QFs before November 2016 is  
5 appropriate.

6 **Q. ARE YOU SPONSORING ANY EXHIBITS WITH YOUR DIRECT**  
7 **TESTIMONY?**

8 A. Yes. Exhibit 1 is a copy of the Duke NoC Form. Exhibit 2 is an email from Kendall  
9 Bowman of Duke to several Duke employees acknowledging that Cube Yadkin reached out to  
10 Duke in February 2017 concerning a meeting. Exhibit 3 is a document containing background and  
11 talking points for a conversation with the CEO of Duke Energy, Duke's parent company, related  
12 to Cube Yadkin. Exhibit 4 is an internal Cube Yadkin email describing communications with the  
13 Public Staff of the Utilities Commission ("Public Staff") concerning the requirement to seek  
14 Certificates of Public Necessity and Convenience ("CPCNs") for the Cube QFs. Exhibit 5 contains  
15 information Duke received concerning the purchase of the Cube QFs by Cube Yadkin. Exhibit 6  
16 contains information related to Alcoa's belief that the Cube QFs qualify for QF status and that a  
17 PPA was appropriate. I further incorporate by reference the exhibits referenced in my pre-filed  
18 direct testimony and the testimony of Mr. Keen.

19 **Q. AT ANY TIME WHILE CUBE WAS ATTEMPTING TO NEGOTIATE A**  
20 **PURPA PPA WITH DUKE, DID MICHAEL KEEN RELATE TO CUBE YADKIN**  
21 **DUKE'S POSITION THAT A NOC FORM WAS REQUIRED TO ESTABLISH A LEO?**

22 A. No. Despite Mr. Keen's statements (on pages 7 and 12 of his direct testimony) that  
23 a NoC form is required from all potential PURPA suppliers, he does not, nor can he, testify that

1 he discussed Duke's supposed requirement with me or anyone at Cube Yadkin. Prior to the filing  
2 of Duke's Answer in this matter, neither Mr. Keen nor anyone else at Duke discussed with Cube  
3 Yadkin Duke's apparent requirement that a NoC Form must be completed and filed in order to  
4 establish a LEO, notwithstanding the unique circumstances presented. Although Duke's letters to  
5 Cube in September and October 2016 (Exhibits 1 and 3 to my Direct Prefiled Testimony) asserted  
6 several spurious objections to purchasing the output of the Cube QFs under PURPA, they  
7 conspicuously left out the one supposed defect (according to Duke) that Cube might have been  
8 able to cure, *i.e.* the NoC Form.

9 **Q. WHY WAS CUBE YADKIN UNABLE TO COMPLETE THE NOC FORM?**

10 A. The NoC Form (Exhibit 1) contains six sections to be answered by a seller. The  
11 first two sections could be completed by Cube. The first section provides that:

- 12 1. [ ] ("Seller") hereby commits to sell to Duke Energy Carolinas, LLC or Duke Energy Progress, LLC (the "Company") all of the electrical output of the Seller's qualifying facility ("QF") described in Seller's self-certification of QF status filed with the Federal Energy Regulatory Commission in Docket No. QF \_\_\_\_\_ (the "Facility").

13 As an initial matter, Mr. Keen is incorrect in his statement that Cube Yadkin was required to  
14 demonstrate from Duke's view that Cube Yadkin owned the QFs. The plain language of the NoC  
15 Form bears this out as it states that "the Seller", in this case, Cube Yadkin, was required to:  
16 (1) commit to sell to Duke all of the electrical output of the QFs, and (2) self-certify as a QF in a  
17 filing with FERC. Cube Yadkin was clearly committed to sell the electrical output to Duke as  
18 outlined in the extensive communication with Mr. Keen and other Duke personnel, beginning at  
19 least in August 2016. Further, on September 28, 2016, Form 556's were submitted for the Cube  
20 QFs to self-certify the facilities' status as QFs. Despite Mr. Keen's protestations to the contrary,  
21 he and Duke were also well aware that Cube Yadkin had entered an agreement to purchase the

1 Cube QFs. Specifically, Duke received several notices, including press releases, announcing the  
2 Alcoa’s sale of the Cube QFs. (Exhibit 5)

3 Notably, Mr. Keen blames executive contacts between Cube Yadkin and its principal  
4 owner and Duke for his continuing negotiations with Cube Yadkin, despite his contention that  
5 Cube Yadkin did not own the Cube QFs.<sup>1</sup> Either Mr. Keen failed to clearly delineate his policy  
6 for entering negotiations with his superiors at Duke and proceeded to communicate with Cube  
7 Yadkin regardless of his policy, or these “executive contacts” or the person “assigning” him the  
8 project ignored Mr. Keen’s policy related to ownership (which was contrary to the requirements  
9 of the NoC Form)– perhaps because they were not Duke’s policies, but merely Mr. Keen’s  
10 preference.

11 Cube Yadkin would have answered this section of the NoC Form by acknowledging its  
12 commitment to sell and noting that on September 28, 2016 three Form 556’s for the QFs were filed  
13 at FERC.

14 The second section of the NoC Form reads:

2. The name, address, and contact information for Seller is:

\_\_\_\_\_ Telephone: \_\_\_\_\_  
\_\_\_\_\_ Email: \_\_\_\_\_

15  
16 Cube Yadkin could have provided this information (which Duke was well aware of) as the seller  
17 of the QF’s electrical output as the filed Form 556’s for self-certification were filed and Cube  
18 Yadkin had established its commitment to sell generation to Duke. Cube Yadkin would have  
19 submitted its contact information in response to this section of the NoC Form.

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<sup>1</sup> Curiously, Mr. Keen does not state who “assigned” him commercial responsibility for this project, nor whether he informed this person of his apprehension concerning the negotiations concerning a PPA.

1 As to each of the remaining four sections, however, Cube Yadkin could not have completed  
2 the section because it was not required to receive a CPCN or file a report of proposed construction  
3 (“ROPC”), since the QFs were in existence and operating before the CPCN requirement was  
4 established by the General Assembly.

5 The third section of the NoC Form states:

3. By execution and submittal of this commitment to sell the output of the Facility (the  
“Notice of Commitment”), Seller certifies as follows:

(Select the applicable certification below)

- i. \_\_\_\_\_ Seller has received a certificate of public convenience and necessity (“CPCN”) for the construction of its \_\_\_\_\_ kW (net capacity ac) Facility from the North Carolina Utilities Commission (“NCUC”) pursuant to North Carolina General Statute § 62-110.1 and NCUC Rule R8-64, which CPCN was granted by NCUC on [insert date] in Docket No. \_\_\_\_\_.
- 6 ii. \_\_\_\_\_ Seller is exempt from the CPCN requirements pursuant to North Carolina General Statute § 62-110.1(g) and has filed a report of proposed construction for its \_\_\_\_\_ kW (net capacity ac) Facility with the NCUC pursuant to NCUC Rule R8-65 (“Report of Proposed Construction”) on [insert date] in Docket No. \_\_\_\_\_.
- iii. \_\_\_\_\_ Seller has applied or will apply for a CPCN for the construction of its \_\_\_\_\_ kW (net capacity ac) Facility on [insert date] in Docket No. \_\_\_\_\_. If the Seller does not know the docket number on the date of submission of this Notice of Commitment, Seller shall notify the Company of the docket number when it is assigned by the NCUC. Seller shall notify the Company upon issuance of an order by the Commission granting the CPCN.
- 7 iv. \_\_\_\_\_ Seller is exempt from the CPCN requirements pursuant to North Carolina General Statute § 62-110.1(g) and will file a Report of Proposed Construction for its \_\_\_\_\_ kW (net capacity ac) Facility with the NCUC pursuant to NCUC Rule R8-65 and shall notify the Company at the address specified in paragraph 1 of the docket number of such filing when it is assigned by the NCUC.

8 This section required Cube Yadkin to certify that it had either received (or would apply for) a  
9 CPCN or that it was exempt from the CPCN requirement because it was eligible for one of the

1 exemptions set forth in G.S. § 62-110.1(g) and could file a ROPC instead. However, as I noted in  
2 my direct testimony, North Carolina law requires that a CPCN be obtained only before a public  
3 utility or other person “begin[s] the construction” of a generating facility. N.C. Gen. Stat. § 62-  
4 110.1(a). Because the Cube QFs were constructed and had been selling power in North Carolina  
5 for decades prior to the enactment of this statute, the Cube QFs would not be required to receive a  
6 CPCN. Accordingly, Cube Yadkin could not have completed this section of the NoC Form.

7 The fourth section of the NoC Form provides as follows:

4. This Notice of Commitment shall take effect on its “Submittal Date” as hereinafter defined. “Submittal Date” means (a) the receipted date of deposit of this Notice of Commitment with the U.S. Postal Service for certified mail delivery to the Company, (b) the receipted date of deposit of this Notice of Commitment with a third-party courier (e.g., Federal Express, United Parcel Service) for trackable delivery to the Company, (c) the receipted date of hand delivery of this Notice of Commitment to the Company at the address set forth in paragraph 1, above, or (d) the date on which an electronic copy of this Notice of Commitment is sent via email to the Company if such email is sent during regular business hours (9:00 a.m. to 5:00 p.m.) on a business day (Monday through Friday excluding federal and state holidays). Emails sent after regular business hours or on days that are not business days shall be deemed submitted on the next business day.

8

9 Because Cube Yadkin was not required to and could not make the certification required in Section  
10 3 of the NoC Form, it could not establish a Submittal Date in response to this section.

11 Section 5 of the NoC Form states:

5. By execution and submittal of this Notice of Commitment Seller acknowledges that:
- a. The legally enforceable obligation date (“LEO Date”) for the Facility will be determined in accordance with subsections (c) or (d) below. For QFs of 5 MW or less, the LEO Date will be used to determine Seller’s eligibility for the rates, terms and conditions of the Company’s currently effective Schedule PP. If the Seller’s Facility does not qualify for Schedule PP, rates for purchases from the Facility will be based on the Company’s avoided costs as of the LEO Date, calculated using data current as of the LEO Date.
  - b. If on the Submittal Date, Seller has a CPCN from or has filed a Report of Proposed Construction with NCUC for the Facility, the LEO Date will be the Submittal Date.
  - c. If on the Submittal Date, Seller does not have a CPCN for the Facility or has not filed a Report of Proposed Construction with the NCUC for the Facility, the LEO Date will be the date on which the NCUC issues a CPCN for the Facility or the filing date of the Report of Proposed Construction for the Facility, as applicable.

1  
2 This “acknowledgement” would have required Cube to agree (incorrectly) that the Cube QFs  
3 would not even be able to establish LEOs until they went through the CPCN process. Because  
4 Cube Yadkin could not and was not required to certify under Section 3 of the NoC form, it could  
5 not incorrectly acknowledge the information in this section of the NoC Form.

6 Finally, Section 6 of the NoC Form provides:

6. This Notice of Commitment shall automatically terminate and be of no further force and effect in the following circumstances:
- a. Upon execution of a PPA between Seller and Company.
  - b. For a seller eligible for Schedule PP, if such Seller does not execute a PPA within thirty (30) days of the Company's delivery of an "executable" PPA. An executable PPA shall mean a PPA delivered to the QF by the Company that contains all information necessary for execution and that the Company has requested that the QF execute and return.
  - c. For a Seller that is not eligible for Schedule PP, if such Seller does not execute a PPA within six months (as such period may be extended by mutual agreement of Seller and Company) after the Company's submittal of the PPA to the QF, provided, however, that if no interconnection agreement for the Facility has been tendered to Seller prior to the expiration of such deadline, the deadline for execution of the PPA shall be automatically extended until the date that is five days after the date that the interconnection agreement is tendered to the Seller. Notwithstanding the foregoing, if the PPA proposed by the Company becomes the subject of an arbitration or complain proceeding, the six month deadline for execution of the PPA shall be tolled upon the filing of the pleading commencing such proceeding and thereafter the deadline for execution of the PPA will be as directed by the NCUC.

1  
2 As with Sections 4 and 5 of the NoC Form, Cube Yadkin could not and was not required to certify  
3 under Section 3 of the NoC Form, and, therefore, Section 6 of the NoC Form could not be attested  
4 because a prior section of the NoC Form was inapplicable to Cube Yadkin. Without the  
5 completion of the entire NoC Form, according to Mr. Keen, Duke would not enter into a PPA and  
6 thus it would be impossible for Cube Yadkin to complete this provision.

7 **Q. ARE YOU AWARE THAT MR. KEEN TESTIFIED THAT THE REASON**  
8 **CUBE YADKIN COULD NOT COMPLETE THE NOC FORM WAS BECAUSE CUBE**  
9 **YADKIN WAS NOT THE OWNER OF THE CUBE QFS?**

10 A. Yes, I am aware of this portion of his pre-filed testimony. I was not aware of Mr.  
11 Keen's position, however, until I read his testimony and, nonetheless, he is incorrect. Despite Mr.  
12 Keen's statement that he has 22 years of experience negotiating new PURPA and non-PURPA  
13 power purchase agreements ("PPAs"), he failed to understand Duke's own NoC Form in at least



1 two ways: (1) the NoC Form required either a CPCN or ROPC; and (2) the NoC Form required  
2 only a commitment to sell and self-certification with FERC, rather than a formal contractual  
3 commitment by Alcoa and Cube Yadkin. As to the first, Cube Yadkin was not required to procure  
4 a CPCN as the Cube QFs have been producing electrical output long before the CPCN  
5 requirements. With respect to the second, Cube Yadkin established both a commitment to sell the  
6 electrical output of the Cube QFs by initiating negotiations with Duke and obtaining the filing of  
7 Form 556's with FERC in September 2016. Furthermore, Mr. Keen and others at Duke were well  
8 aware of the fact that Cube was in the process of buying the assets from Alcoa. (Exhibit 5)

9 **Q. ARE YOU AWARE THAT MR. KEEN STATED THAT CUBE YADKIN IS**  
10 **ATTEMPTING TO IMPOSE EXCESSIVE, OUT-OF-DATE AVOIDED COST RATES ON**  
11 **DUKE'S CUSTOMERS?**

12 A. Yes, I am aware of his statement in his pre-filed testimony. I was not aware,  
13 however, of Mr. Keen's position until I read his testimony. Mr. Keen's statement supports Cube's  
14 argument that Duke conducted these negotiations in bad faith. While Cube Yadkin was aware that  
15 avoided cost rates for standard offer QFs were approved every two years through an administrative  
16 docket, it was unaware in September and October 2016 of the changes Duke would propose to its  
17 avoided cost calculation methodologies in November 2016. Duke, however, was well aware of  
18 these planned changes, which would have the effect of significantly reducing the avoided cost rates  
19 calculated for the Cube QFs. With the knowledge that there would be a reduction in avoided cost  
20 rates that Duke would have to pay for the electrical output if a PPA was entered after November  
21 2016, Duke had every incentive to delay and drag out negotiations. While we understand that  
22 Duke should look after its customers, it cannot employ bad faith and a lack of candor to achieve  
23 that goal, and further, it should not receive the benefit of its own malfeasance.

1 As further evidence of Duke’s inherent bad faith in this matter, Duke also selectively  
2 attempts to use avoided cost rate statements. Specifically, Mr. Keen and Mr. Snider make several  
3 claims about Cube Yadkin seeking contracts at avoided cost rates, specifically, that these contracts  
4 would not be in the interest of ratepayers. During the course of this matter, however, Duke  
5 believed that avoided cost rates were not relevant to the question of whether waiver of the NoC  
6 Form is appropriate, to the point of refusing to respond to data requests requesting avoided cost  
7 rate calculations. As another example of Duke’s attempts to negotiate unfairly, they now attempt  
8 to rely on this information to score points with the Commission.

9 **Q. ARE YOU AWARE THAT MR. KEEN TESTIFIED THAT CUBE YADKIN**  
10 **“DISAPPEARED” FOR FIVE MONTHS (OCTOBER 2016 THROUGH MARCH 2017)**  
11 **DURING A CRITICAL TIME IN THESE NEGOTIATIONS?**

12 A. Yes, I am aware of this portion of his pre-filed testimony. I was not aware of Mr.  
13 Keen’s position, however, until I read his testimony, and, nonetheless, he is incorrect because the  
14 record clearly demonstrates communications between October 2016 and March 2017. Notably,  
15 despite Mr. Keen’s statement that he did not begin negotiating a PPA with Cube Yadkin because  
16 Cube Yadkin did not own the facilities, he failed to accurately describe the process the parties were  
17 involved in as negotiations in his direct testimony as recounted below. Moreover, it appears that  
18 Duke’s internal communications leave much to be desired, otherwise, Mr. Keen appears to be  
19 making a false statement as to Cube Yadkin’s alleged disappearance from the negotiations.

20 As an initial matter, even after communications before and during October 2016 as  
21 discussed below, Cube Yadkin met with and communicated with Duke on multiple occasions  
22 between October 2016 and March 2017. On November 9, 2016, representatives of Cube Yadkin  
23 met directly with Duke representatives concerning the Cube QFs. (Exhibit 3) On or about

1 February 17, 2017, Cube Yadkin representatives also met with Duke concerning the Cube QFs  
2 after Cube Yadkin reached out to Duke in early February 2017. (Exhibit 2)

3 As I have testified previously (on pages 8-13 of my Direct Testimony), there is  
4 considerable history as to the negotiations between Cube Yadkin and Duke for a PURPA PPA.  
5 Conversations between Duke and Cube Yadkin began as early as March 2016. In an effort to  
6 explore a potential long-term PPA with Duke, Cube Yadkin reached out to Duke for introductions.  
7 In June 2016, Alcoa and Cube Yadkin entered into a purchase agreement for the sale of the Cube  
8 QFs. On or about August 12, 2016, Dhiaa Jamil of Duke met with me and Kristina Johnson, then  
9 the CEO of Cube Yadkin. I communicated with Regis Repko at Duke to negotiate for the sale of  
10 the output from the Cube QFs. After being referred to Mathew Palasek of Duke, I was referred to  
11 Mr. Keen on or about August 25, 2016. I exchanged multiple emails and telephone calls with Mr.  
12 Keen, including on August 26, 2016 and September 6, 2016. Mr. Keen sent the September 21,  
13 2016 letter that purported to state that Duke was not required to purchase the power from the Cube  
14 QFs at avoided cost rates, among other inaccuracies.

15 Contrary to Mr. Keen's statement that Cube Yadkin "disappeared" in October 2016, on or  
16 about October 5, 2016, Ms. Johnson continued discussions with Ms. Jamil including informing  
17 Ms. Jamil of the transfer of the license of the Cube QFs from Alcoa to Cube Yadkin and the  
18 submission of the Form 556's to the FERC for self-certification of the facilities. Mr. Keen is aware  
19 that he exchanged letters with Mr. Collins in October 2016. First, I responded to Mr. Keen's  
20 September 21, 2016 letter on October 11, 2016, where I pointed out that the Cube QFs were self-  
21 certified and Cube Yadkin wanted to meet to discuss the process for making sales from the Yadkin  
22 QFs. Mr. Keen responded on October 14, 2016 that Duke would be exempted from any purchase  
23 obligations.

1           **Q.    ARE YOU AWARE THAT MR. KEEN STATED THAT IT WAS**  
2 **INACCURATE AND FALSE TO SAY THAT ALCOA FULLY AUTHORIZED CUBE**  
3 **YADKIN TO NEGOTIATE PPAS ON THEIR BEHALF PRIOR TO CUBE YADKIN’S**  
4 **OWNERSHIP?**

5           A.    Yes, I am aware of this portion of his pre-filed testimony. However, Mr. Keen  
6 apparently responded to a question that I was not asked in my prior testimony: specifically, whether  
7 Cube Yadkin was authorized to act on Alcoa’s behalf. Because of the sale of the Cube QFs, Alcoa  
8 authorized and encouraged Cube Yadkin to negotiate PPAs on Cube Yadkin’s behalf as the  
9 purchaser of the Cube QFs and because the Cube QFs were QFs. (Exhibit 6)

10           **Q.    ARE YOU AWARE THAT MR. KEEN TESTIFIED THAT YOUR PRE-**  
11 **FILED DIRECT TESTIMONY WAS THE FIRST THAT HE HAD HEARD OF ALCOA**  
12 **BEING AWARE OF, INVOLVED IN, AND APPROVED THE PPA DISCUSSIONS**  
13 **BETWEEN DUKE AND CUBE YADKIN?**

14           A.    Yes, I am aware of this portion of his pre-filed testimony. If Mr. Keen had asked  
15 at any time during the negotiations, he would have been informed that Alcoa was aware of,  
16 involved in, and approved the PPA discussions between Duke and Cube Yadkin. During the  
17 negotiations, Mr. Keen and Duke did not request any written or other formal authorization from  
18 Alcoa in order to negotiate with Cube Yadkin.

19           **Q.    ARE YOU AWARE THAT MR. SNIDER TESTIFIED THAT THE LEO**  
20 **TEST HAD THREE REQUIREMENTS?**

21           A.    Yes, I am aware of this portion of his pre-filed testimony. Those three requirements  
22 were: (1) self-certification with the FERC as QF; (2) a commitment to sell the facility’s output to  
23 a utility pursuant to PURPA via the use of the NoC Form; and (3) have received a CPCN for the

1 construction of the facility. Notably, a prerequisite for the second requirement as discussed above  
2 is the issuance of a CPCN. As noted previously, there was no reason for Cube Yadkin to pursue  
3 a CPCN, where the Cube QFs have been in operation for decades.

4 The Cube QFs are in a unique position because a CPCN was not required when the facilities  
5 were first constructed. There are not many facilities in the state that are similarly situated to the  
6 Cube QFs, and thus, contrary to Mr. Keen's and Mr. Snider's testimony, waiving the NoC  
7 requirement under these unique circumstances will not create uncertainty and recurring  
8 disagreement over the formation of a LEO in contravention to the use of the NoC form.

9 Before the NoC form requirement was implemented in 2015, Duke was receiving a very  
10 large volume of requests to contract with new QF facilities that had not yet achieved commercial  
11 operation – in particular, solar facilities seeking to contract under the utilities' standard offer tariffs.  
12 *See, e.g.,* Docket No. E-100 Sub 140, Order Setting Avoided Cost Input Parameters (Dec. 31,  
13 2014) at 63-64. The Cube QFs, and similarly situated facilities, were not the type of facilities for  
14 which the NoC Form and the revised LEO standard were established because these facilities:  
15 (1) were not required to receive a CPCN to continue operating and (2) had already achieved  
16 commercial operation and were providing power. Every facility constructed after 1965 would  
17 have been required to receive a CPCN, such that the requirements of the NoC form make sense for  
18 the vast majority of QFs across the state. However, as previously stated, the Cube Yadkin QFs  
19 had been operating continuously since 1917, 1927, and 1962, respectively, a fact Duke is and was  
20 well aware of. It is illogical that facilities that have operated for decades both before and after the  
21 enactment of the CPCN statute would be required to submit an application for a CPCN to comply  
22 with LEO requirements. This would be a waste of the Commission's resources and take up as  
23 much, if not more, of the Commission's time as considering the issue of waiver of the NoC Form.

1 As Commissioner Brown-Bland noted in her dissent to the Order dismissing the Complaint,  
2 one of the utilities' long-standing arguments was that they do not know whether an owner of a  
3 facility can actually deliver electrical output to allow a utility to rely on a QFs electrical output.  
4 The NoC requirement is a response to this concern. However, this argument does not hold much  
5 weight where, as here, the provider at issue, Cube Yadkin, has a record of reliable performance  
6 and a previous relationship with Duke (as did Cube Yadkin's predecessor), and the Yadkin QFs  
7 were constructed decades ago and have operated continuously since that time. In fact, Duke is  
8 extremely familiar with the Cube QFs as they operate up-river of two Duke hydroelectric facilities,  
9 Tillery and Blewett. As Commissioner Brown-Bland stated, "[Duke] can hardly claim not to  
10 understand that [Cube Yadkin] will be able, reasonably, to count on the QFs and [Cube Yadkin]  
11 to deliver." Because of the uniqueness of the circumstances surrounding the Yadkin QFs,  
12 including their long-standing operations before and after the CPCN requirement, waiver of the  
13 NoC Form requirement is appropriate.

14 **Q. WHAT ARE THE CIRCUMSTANCES THAT SUPPORT A WAIVER OF**  
15 **THE NOC FORM HERE?**

16 A. First, Cube was unable to complete the form without waiving its rights. The form  
17 requires a Seller to acknowledge the effective date of its LEO as the later of either the NoC form  
18 submittal date, or the date that a facility obtains a CPCN. As the facilities did not have, and were  
19 not required to have, a CPCN, submitting the NoC form would have been a circular exercise.  
20 Rather than establishing a LEO, it would have given Duke a basis for delaying or denying the  
21 establishment of a LEO.

22 Second, as explained above, the Cube QFs did not require a CPCN, the issuance of which  
23 is a condition presumed by Duke's NoC Form. As emails we have produced in this case

1 demonstrate, the Commission’s Public Staff informed our prior outside counsel that it agreed with  
2 our understanding that no CPCN was required and that we should not expect Duke to make an  
3 issue of it. (Exhibit 4).

4 Third, as the Public Staff predicted, Duke did *not* make an issue of the Cube QFs not having  
5 a CPCN or not submitting a NoC Form when the parties were in discussions about the sale of the  
6 Cube QFs output to Duke. Indeed, Duke never stated that it believed either a CPCN or a NoC  
7 Form was required for negotiations with Cube, and Duke never referenced the NoC form at any  
8 point in negotiations. The fair inference of this is that Duke did not think a CPCN or a NoC Form  
9 were required. If Duke did not mention them and apparently did not think they were required, it  
10 is not fair to allow Duke to evade its PURPA purchase responsibilities based on the CPCN and  
11 NoC form requirements.

12 Fourth, Duke’s pre-filed testimony establishes that, even if Cube could have submitted a  
13 NoC Form in a manner that would establish an immediate LEO date, Duke would not have  
14 accepted it on the basis of Duke's contention that only the current owner of a facility can submit a  
15 NoC form. Notably, however, Duke has never pointed to any formal policy -- written or unwritten  
16 -- that requires a current owner's submission of the form. Any such requirement by Duke would  
17 be inconsistent with the language of the NoC Form, which requires only that it be submitted by  
18 the “Seller.”

19 Fifth, the circumstances of Cube Yadkin’s purchase of the QFs from Alcoa were such that  
20 Cube Yadkin was contractually entitled to acquire the facilities once all necessary FERC approvals  
21 including a license transfer (which was approved in October 2016). All other requirements of the  
22 sales contract, including all diligence, had been completed, and it was a matter of months before  
23 Cube Yadkin would own the Cube QFs. Accordingly, Duke was negotiating with an incoming

1 owner, not merely an interested purchaser, as Duke's pre-filed testimony suggests. Further, Alcoa  
2 was in active cooperation with Cube Yadkin regarding its ownership goals, which is evidenced by  
3 Alcoa suggesting (and authorizing) that Cube Yadkin to reach out to Duke and by Alcoa self-  
4 certifying the QFs with FERC after Mr. Keen's September 21, 2016 letter to me indicating that the  
5 facilities needed to be certified.

6 Sixth, Cube Yadkin's establishment of a LEO in its correspondence with Duke is clear. To  
7 interpret the NoC form as an unwaivable requirement, as Duke suggests, under these circumstances  
8 would constitute an interference with Cube Yadkin's ability to establish a LEO, where, as here,  
9 Cube Yadkin could not complete the NoC form for the reasons stated above.

10 Seventh, an unwaivable requirement that Cube Yadkin submit a NoC form,  
11 notwithstanding the lack of a CPCN and the form's language that would delay the establishment  
12 of a LEO, would be harmful to Duke's ratepayers and North Carolina's citizens. The Yadkin QFs  
13 are established, reliable power production facilities that can provide clean energy to the grid at  
14 lower or substantially the same costs to consumers as an expensive Duke gas facility self-build.  
15 Further, Cube Yadkin was willing to provide dispatch rights to Duke, which would provide  
16 additional benefits to Duke's ratepayers by enhancing Duke's ability to meet the impact of  
17 increased intermittent solar generation resources on the reliability of Duke's electric grid and  
18 reduce the need for new transmission and storage investments. Moreover, the Cube QFs' output  
19 could be coordinated with Duke's immediately downriver hydroelectric facilities, Tillery and  
20 Blewett, to provide enhanced capacity during peak periods of energy use.

21 Finally, the rates received by Cube Yadkin based on its establishment of a LEO in October  
22 2016 are consistent with PURPA and would be fair. The Cube QFs would provide greater value  
23 to Duke than other QFs, because Duke could coordinate with Duke's other facilities downstream



1 from the Cube QFs and have the ability to provide energy and capacity as needed by Duke. Duke's  
2 proposed non-PURPA terms offered to Cube Yadkin failed to account for these advantages.

3 **Q. DO DUKE'S WITNESSES RESPOND TO YOUR TESTIMONY ABOUT**  
4 **THE REASONS CUBE ASSERTS THAT A WAIVER OF THE NOC FORM**  
5 **REQUIREMENT IS APPROPRIATE HERE?**

6 A. No. In my direct prefiled testimony, I cited three reasons that a waiver would be  
7 appropriate: First, Cube Yadkin proceeded reasonably and in good faith in not filing the NoC form.  
8 Second, this was at most a technical deficiency that did not cause harm or prejudice to any party,  
9 because Duke was on notice of Cube Yadkin's commitment to sell the output of the Cube QFs  
10 based on the negotiations with Cube Yadkin that started in March 2016 and continued through  
11 November 2017. And third, not granting the requested waiver would in effect reward Duke for its  
12 efforts to try to evade its PURPA obligations. Although Mr. Keen asserts in a conclusory fashion  
13 that Duke negotiated with Cube Yadkin in good faith, he does not otherwise attempt to rebut Cube  
14 Yadkin's arguments regarding waiver.

15 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

16 A. Yes.