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

DOCKET NO. E-2, SUB 1177	)	
	)	
In the Matter of	)	
Cube Yadkin Generation, LLC,	)	
Complainant	)	
	)	
v.	)	
	)	ORDER DENYING WAIVER
Duke Energy Progress, LLC,	)	AND DISMISSING
Respondent	)	COMPLAINTS
	)	
DOCKET NO. E-7, SUB 1172	)	
	)	
In the Matter of	)	
Cube Yadkin Generation, LLC,	)	
Complainant	)	
	)	
v.	)	
	)	
Duke Energy Carolinas, LLC,	)	
Respondent	)	

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

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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For Cube Yadkin Generation, LLC:

Joseph S. Dowdy, Phillip A. Harris, Jr., and Benjamin L. Snowden, Kilpatrick Townsend & Stockton LLP, 4208 Six Forks Road, Suite 1400, Raleigh, North Carolina 27609

BY THE COMMISSION: On March 29, 2018, Cube Yadkin Generation, LLC (Cube Yadkin), filed complaints against Duke Energy Progress, LLC, and Duke Energy Carolinas, LLC (together, the Companies or, sometimes, Duke). On May 7, 2018, the Companies filed a motion to dismiss the complaint, which the Commission granted on July 16, 2018. Cube Yadkin thereafter appealed to the North Carolina Court of Appeals on September 13, 2018. The Court of Appeals 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.

The question on remand is whether Cube Yadkin should be granted a waiver of the requirement that it submit a Notice of Commitment Form (NoC Form) to Duke in order to establish a legally enforceable obligation (LEO) as a qualifying facility (QF) under the Public Utility Regulatory Policies Act of 1978 (PURPA).

On March 20, 2020, Cube Yadkin and the Companies filed a Joint Report in which the parties requested that the Commission refrain from issuing a procedural schedule in order to allow the parties to engage in commercial negotiations that, if successful, might obviate the need for further proceedings. On May 1, 2020, Cube Yadkin filed a letter with the Commission stating that commercial negotiations had concluded unsuccessfully and that the parties were working on a joint proposal for a procedural schedule or would submit separate proposals if they could not reach an 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 an evidentiary hearing for 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 evidentiary 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 A. 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, by remote video means. Cube Yadkin presented the testimony of witness Collins, and the Companies presented the testimony of witnesses Snider and Keen. The prefiled 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 17, 2021.

On May 17, 2021, Cube Yadkin and the Companies filed proposed orders and briefs. On May 18, 2021, Cube Yadkin filed a corrected posthearing brief.

Based on the foregoing, the testimony and exhibits admitted into evidence, and the entire record in this proceeding, the Commission now must determine if Cube Yadkin should be granted a waiver of the requirement that it submit to Duke a NoC Form, one of three requirements for a QF to establish a LEO under PURPA in North Carolina.

SUMMARY OF CUBE YADKIN'S DIRECT 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 four hydroelectric generating facilities then owned and for many years operated by Alcoa (the Yadkin River Facilities).[1] Tr. vol. 1, 25. Three of these facilities were potentially eligible to become QFs under PURPA: (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. The fourth facility, the Narrows, exceeds the permitted capacity limit for QF status. Tr. vol. 1, 26.

Eventually, Cube Yadkin entered negotiations to purchase all four of the Yadkin River Facilities and began its due diligence in early 2016. On or about June 30, 2016, Cube Yadkin and Alcoa entered into a purchase agreement for the four facilities. Tr. vol. 1, 30. Alcoa and Cube Yadkin thereafter 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 transfer was approved by FERC order in January 2017, and the purchase was consummated on February 1, 2017. Tr. vol. 1, 27.

At the time Cube Yadkin entered into purchase negotiations, Alcoa did not hold certificates of public convenience and necessity (CPCNs) for any of the Yadkin River

[1] All four of the Yadkin River Facilities were interconnected to a transmission grid also owned and operated by Alcoa. This transmission grid is interconnected to the Companies' transmission systems but is operated as a separate balancing authority. As part of the transaction involved in this case, an affiliate of Cube Yadkin acquired from Alcoa the separate transmission system assets.

Facilities. Witness Collins testified that Cube Yadkin did not consider that it would need CPCNs for the facilities, and therefore it did not seek to obtain them, since at the time N.C. Gen. Stat. § 62-110.1(a) was enacted in 1963 the Yadkin River Facilities had already been constructed and had been generating and selling power for decades. Witness Collins testified that Cube Yadkin's review of existing precedent indicated that the Commission had not required any other generating facility constructed before the CPCN statute was enacted to obtain a CPCN in order to continue operating. Witness Collins also testified that during its due diligence and purchase negotiations Cube Yadkin, through its counsel, had sought the advice of the Public Staff on whether the facilities could be purchased and could continue to operate without CPCNs. Based on its own analysis of the law and the response it received from the Public Staff, Cube Yadkin concluded that no CPCN was required for any of the four facilities. Tr. vol. 1, 27-28.

Witness Collins testified that he had initially contacted Duke executive Regis Repko in March 2016, before Cube Yadkin had signed the purchase agreement with Alcoa, to indicate Cube Yadkin's interest in a long-term power purchase agreement (PPA) with the Companies. He also testified that Alcoa was aware of this outreach and approved of Cube Yadkin's contacts 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 Yadkin River Facilities, even though Cube Yadkin was not yet the owner of those facilities, and that on August 26, 2016, he informed Company witness Michael Keen that Cube Yadkin desired to enter a long-term PPA with the Companies. Tr. vol. 1, 30. Witness Collins did not testify that he disclosed to Keen or any other Duke representative the existence of the asset purchase agreement with Alcoa, and there is no other evidence in the record to indicate that Duke was provided a copy of that agreement at any time during September and October 2016. Cube Yadkin and Alcoa had tentatively scheduled the purchase to close sometime in November 2016. Tr. vol. 1, 31.

On or about September 16, 2016, witness Collins contacted Michael Keen to discuss further the possibility of long-term PPAs for some or all of the four facilities. By letter dated September 21, 2016, Michael Keen acknowledged that Cube Yadkin had indicated its intent to sell to Duke the power from the three facilities that were eligible for QF status, but he noted that Cube Yadkin did not yet own the facilities. Collins Ex. No. 1. He further replied that Duke did not have any current need for the power from those facilities and 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." By letter sent to Duke on or about October 11, 2016, witness Collins responded that the three QFs had been self-certified with FERC by Alcoa and that Cube Yadkin wanted to meet to discuss the process for making sales from the projects to Duke pursuant to PURPA. Collins Ex. No. 2. Keen then replied in a letter on October 14, 2016, stating that if the three QF facilities sought to sell power to Duke under PURPA, Duke believed that it would be exempt from the purchase obligations under FERC's regulations appearing at 18 C.F.R. § 292.309-10, which establish a procedure under which a utility may petition FERC for an order exempting it from its obligation to purchase power from QFs that have

nondiscriminatory access to wholesale markets that meet specified criteria. Collins Ex. No. 3; Tr. vol. 1, 30.

Witness Collins testified that Cube Yadkin believed that by virtue of this series of communications and contacts it had established a LEO under PURPA for the three hydroelectric facilities that Alcoa had certified as QFs and was entitled to sell their output to Duke under PURPA as early as March 2016, when he made his initial contact with Duke, but certainly by no later than the date of his October 11, 2016, letter. He also testified that given the Companies' communicated refusal to purchase from the three facilities under PURPA, Cube Yadkin was also open to continuing discussions to sell power from all four of the Yadkin River Facilities under long-term, non-PURPA PPAs. Tr. vol. 1, 32. He further testified that in November 2016. the Companies drew out the negotiations and requested a letter agreement stating that any negotiations would not give rise to any rights under PURPA. Tr. vol. 1, 33. Cube Yadkin and the Companies executed a letter agreement, dated April 25, 2017, that acknowledged that Cube Yadkin and the Companies would enter into non-PURPA discussions but that by doing so Cube Yadkin did not waive its existing rights under PURPA, if any, dating back to the fall of 2016 when Cube Yadkin contends it committed to sell the output of the Cube Yadkin QFs to the Companies. *Id.*

Witness Collins testified that the Commission's NoC Form required Cube Yadkin to make certain certifications that it could not truthfully make and therefore was not required to make, all arising from the fact that the Yadkin River Facilities predated enactment of the statutory CPCN requirement and therefore did not have CPCNs.[2] Witness Collins also noted that at no time throughout the course of the parties' discussions 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 PURPA PPA. Witness Collins testified that he believed a waiver of the NoC Form requirement in this case is appropriate since Cube Yadkin had proceeded reasonably and in good faith in not filing or delivering to Duke a form that it could not truthfully and accurately complete. He testified that Cube Yadkin had a reasonable belief that the Commission would not require a NoC Form because the three QF facilities were in full operation and pre-dated the NoC Form requirement, although there is no evidence in the record that anyone on behalf of Cube Yadkin had communicated with anyone at the Commission or at the Public Staff on this point. Witness Collins considered Cube Yadkin's failure to tender to Duke a NoC Form in the fall of 2016 to be a technical deficiency that did not cause harm or prejudice to any party and that the purpose and intent of the form were fulfilled by his written communications in September and October 2016. Witness Collins concluded his direct testimony by stating that the Companies were fully on notice of Cube Yadkin's commitment to sell the output of the three QF facilities based on negotiations with Cube Yadkin that started in March 2016 and continued through November 2016. Tr. vol. 1, 32-35.

[2] Witness Collins testified that Cube Yadkin could not comply with section 3 of the NoC Form that required Cube Yadkin to certify that it had either received a CPCN or was exempt from the requirement for a CPCN for reasons that they were not applicable to the Yadkin River Facilities.

SUMMARY OF DUKE'S EVIDENCE

In his direct testimony Duke witness Keen contended that the Companies acted in good faith in negotiating with Cube Yadkin in the best interests of its customers and consistent with the Commission's PURPA policies and orders. Witness Keen stated Duke's position that Cube Yadkin demanded, and still demands, to be paid prices for capacity and energy from the three QF facilities that are inconsistent with the Commission's policies and are far in excess of what is just and reasonable for the Companies' retail customers to pay. Tr. vol. 2, 7, 21.

Witness Keen was assigned commercial responsibility for this matter 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 the Yadkin River Facilities from Alcoa. Witness Keen testified that typically he 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 affect the outcome of the purchase negotiations. Tr. vol. 2, 57. On September 16, 2016, 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 Yadkin River Facilities. Witness Keen noted in his communication that Alcoa owned the Facilities, and he advised that Duke did not have any need for energy and capacity at that time. He explained that if need arose in the future, Duke would likely issue a request for proposals, and Cube Yadkin could then submit a bid in response. Witness Keen further informed Mr. Collins that to the extent Cube Yadkin approached Duke under PURPA, Duke would likely have no obligation to purchase the energy or capacity from the facilities that might be certified as QFs based on Duke's understanding of the possibility of an exemption from PURPA's "must purchase" requirements. Witness Keen testified that Duke ultimately decided not to pursue the exemption issue since it was uncertain whether FERC would agree with Duke's position concerning the possible exemption. Tr. vol. 2, 149. Further, 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 [has it] . . . 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, witness Keen received an undated letter from Mr. Collins in response to his September 21, 2016 letter. In the undated letter, Mr. Collins stated that Alcoa had certified the three smaller Yadkin River Facilities as QFs and that Cube Yadkin anticipated closing the purchase of those facilities before the end of 2016. The letter also recommended a meeting to discuss the process for making sales from these facilities 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. 2, 8-9, 27.

Witness Keen testified that while Mr. Collins projected closing the purchase of the facilities on November 1, 2016, the transaction was not actually consummated until February 1, 2017, the timing difference being due to the need to receive FERC approval before closing could occur. Witness Keen testified that Duke did not begin negotiations with

Cube Yadkin in the fall of 2016 for a PURPA PPA for the three smaller facilities because Cube Yadkin did not own the facilities in question and that the first step in the negotiation process is for the actual owner of the facilities to submit a NoC Form. Tr. vol. 2, 8-9.

According to witness Keen, once the Companies receive a NoC Form, they calculate the appropriate avoided cost rates in effect at the time the form is received, which rates are then locked in for the duration of any PPA that is ultimately agreed and executed. Cube Yadkin did not submit a NoC Form at any time during the fall of 2016. In response to Cube Yadkin's contention that it did not submit the form because portions of the form did not apply to the facilities at issue, witness Keen stated his belief that it is unreasonable to conclude that a sophisticated company like Cube Yadkin, and an experienced employee like Mr. Collins, would have reached the conclusion that because one part of the NoC Form was inapplicable in the particular circumstances, the NoC Form should therefore be disregarded in its entirety. The Companies require the NoC Form from all potential PURPA suppliers in order to fix the date on which a LEO is established, and they do not complete the required analysis of the applicable rates and pricing until that form is received. Tr. vol. 2, 9-10.

Witness Keen further testified that after Cube Yadkin closed the purchase in February 2017, Duke continued to negotiate for non-PURPA PPAs in good faith, and as evidence of this he pointed to two proposals made to Cube Yadkin on two occasions.[3] On August 10, 2017, Duke proposed a two-year energy-only PPA transaction, with energy pricing based on a detailed analysis of the energy market at that time. This offer was not made pursuant to PURPA and included the full output (~200 MW) of all four of the Yadkin River Facilities, including the Narrows. Cube Yadkin rejected this offer. On September 25, 2017, Duke proposed to purchase the output from all three of the 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 rates based on the Commission-approved regulatory methodology in place at that time. This offer was also not made pursuant to PURPA and Cube Yadkin rejected this offer as well. Cube Yadkin in turn made two non-PURPA PPA proposals to Duke, which offers included all four of the Yadkin River Facilities. Duke rejected both offers because the pricing was significantly above Duke's avoided costs and exceeded current market prices, because the proposed agreement terms were not consistent with the limits contained in North Carolina House Bill 589 and because Duke was not granted any dispatch rights or the rights to any environmental attributes. Tr. vol. 2, 10-11.

In 2018, Duke Energy Progress, LLC (DEP), issued a request for proposals to solicit capacity and energy to meet its future capacity needs. Cube Yadkin was invited to participate in this solicitation and did submit a proposal. DEP executed five PPAs to

[3] As noted above, Duke and Cube Yadkin agreed in a letter agreement dated March 22, 2017, to engage in negotiations for the output of the four facilities, provided that Cube Yadkin would not treat the negotiations as establishing a LEO. Tr. vol. 2, 99.

secure approximately 1,800 MW of capacity and energy. However, Cube Yadkin's proposal was not accepted because it was not competitive relative to other bids. Tr. vol. 2, 11.

Witness Keen also provided testimony contesting Cube Yadkin's assertions that Alcoa supported Cube Yadkin's obtaining a fixed, long-term PURPA PPA from DEC and DEP. He stated that even if Alcoa might have approved such negotiations, Alcoa never contacted Duke about PURPA sales to the Companies nor did it otherwise participate in the negotiations between the Companies and Cube Yadkin. Tr. vol. 2, 11-12. He stated that 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*.[4]

Witness Keen denied that he had delayed and drawn out the negotiations with Cube Yadkin in the fall of 2016 in order to buy time until after Duke had filed with the Commission in November 2016, for approval of a new round of avoided cost rates for purposes of PURPA contracts. He contended that a detailed review of the timeline shows that Duke was responsive and that any long pauses in the parties negotiations were caused by Cube Yadkin, whom he says dropped the negotiations for five months during a critical time (October 2016 through March 2017). Tr. vol. 2, 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.*

Duke 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. The date of this LEO determines the avoided costs rates, and thus the pricing, that will be applicable under such PPA. Tr. vol. 2, 14-15.

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

[4] Neither Cube Yadkin nor Duke submitted any evidence from which written confirmation of Alcoa's position concerning negotiations for PPAs could be determined. As noted earlier, no copy of the asset purchase agreement was introduced into evidence, nor did either party submit any document, such as a power of attorney or other similar written confirmation by Alcoa of Cube Yadkin's authority to commit the output of the four Yadkin River Facilities under a long-term purchase agreement.

the avoided cost rate in effect at the time the LEO is established. Tr. vol. 2, 15. In the end, the outcome of the dispute in this proceeding determines whether or not Cube Yadkin established a LEO prior to November 1, 2016, and thereby became eligible for the avoided cost rates applicable to PURPA PPAs that were in existence before that date.

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 had (1) obtained a CPCN or filed a report of proposed construction as 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 proved to be 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 Form, and (3) receipt of a certificate of public convenience and necessity for construction of the facility. Tr. vol. 2, 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' then-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. 2, 16-17.[5]

SUMMARY OF CUBE YADKIN'S REBUTTAL EVIDENCE

In rebuttal testimony, witness Collins testified that the Companies knew and understood Cube Yadkin had entered an agreement with Alcoa to purchase the Yadkin River Facilities. Tr. vol. 1, 46. In defending Cube Yadkin's failure to submit a 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 due to the fact the three 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). Tr. vol. 1, 50. He contended that because Cube Yadkin could not and therefore was not required to make the certification under Section 3 of the NoC Form concerning its CPCNs, it therefore also could not make the acknowledgement required in Section 5 of the NoC Form. *Id.*

[5] As witness Snider explained in his testimony, avoided costs rates using the Commission's approved methodology were steadily declining over the period of time pertinent to this dispute. Tr. vol. 2, 121.

In rebuttal to the direct testimony of Duke witness Keen, to the effect that Cube Yadkin was attempting to impose excessive costs on the Companies' customers by insisting it is entitled to PPA's based on out-of-date avoided costs rates, witness Collins stated 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 what changes the Companies would propose to its avoided cost methodologies or calculations in the upcoming new rate filings due in November 2016. Tr. vol. 1, 46. In turn, he accused the Companies of acting in bad faith by delaying and dragging out the parties' negotiations past the November filing date for new avoided cost rates. He then disagreed with the testimony of witness Keen that Cube Yadkin had "disappeared" for five months (October 2016 through March 2017) during a critical time during negotiations between the parties. Tr. vol. 1, 47. He also referred to the direct testimony of witness Keen wherein witness Keen testified that the Companies were not aware that Alcoa knew of, was 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. 2, 49.

In response to the direct testimony of Duke witness Snider, witness Collins testified that the Cube Yadkin QFs were not the type of facilities for which the NoC Form and the revised LEO standard were established because the Cube Yadkin 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 three facilities eligible for QF status, including their long-term standing operations before and after the CPCN statute was adopted, waiver of the NoC Form requirement would be appropriate. Tr. vol. 1, 50. 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 only a matter of months before Cube Yadkin would own the Alcoa QFs. Tr. vol. 1, 54.

Witness Collins then testified that it was clear that even if Cube Yadkin 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. Tr. vol. 1, 52. 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. Tr. vol. 1, 48. All other requirements of the sales contract, including all due 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 prefiled testimony suggests.

DISCUSSION AND CONCLUSIONS

As the complainant in this matter Cube Yadkin should present facts sufficient for the Commission to, within its discretion, grant a waiver of the Commission's well-established LEO procedures in order to meet its ultimate burden of proof for the relief requested in its complaint. N.C.G.S. § 62-75.[6] Ultimately, the Commission does not find good cause to grant the waiver.

As the Court of Appeals noted, Cube Yadkin advanced several possible grounds for the grant of a waiver of the NoC Form requirement. Two of these grounds — that the NoC Form requirement should be waived because Cube Yadkin's facilities were constructed and in operation before the CPCN requirement was enacted into law, and that Cube Yadkin should be considered to have substantially complied with the requirements for a LEO — rests on a common or overlapping set of facts. The Commission considers these two related grounds in the following discussion. Establishing a LEO is a matter of state law, and the states determine: (1) whether and when a LEO is created and (2) the procedures for obtaining approval of such an obligation. Order No. 588-A, 119 FERC ¶ 61,305, 139 (2007); *see also Power Res. Grp., Inc. v. Pub. Utils. Comm'n*, 422 F.3d 231, 239 (5th Cir. 2005). The procedures for establishing a LEO that were in place in North Carolina prior to 2015 produced many disputes due to their lack of clarity. In its December 17, 2015 order in Docket No. E-100, Sub 140 (Sub 140 Order) the Commission noted that there were "an increasing number of disputes over the date of a LEO," which resulted in the Commission clarifying and adding to its LEO requirements "to provide a standardized and clearly stated method to establish a LEO." Sub 140 Order at 52.

The three-part LEO standard that was established in the Sub 140 Order and that was in effect during the time relevant to this proceeding is straightforward and not in dispute: (1) the developer must have self-certified with FERC as a QF; (2) the QF must have made a commitment to sell the QF's output to a utility under PURPA by submitting to the utility the approved NoC Form; and (3) the QF must have filed a report of proposed construction or been issued a CPCN pursuant to N.C.G.S. § 62-110.1. Sub 140 Order at 52.

The Commission notes that Cube Yadkin is not a small, unsophisticated business but is instead a sophisticated market participant in the business of owning, developing, and modernizing hydroelectric facilities in several states. Tr. vol. 1, 24-25. Cube Yadkin's communications with the Companies during the course of 2016 evince its familiarity with PURPA's requirements. Tr. vol. 1, 31. 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, and the NoC Form has since that time been widely used by even small, unsophisticated QFs in order to establish a LEO without dispute and without need for protracted proceedings before this Commission. Finally, submission of the NoC Form

[6] Section 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.

is hardly burdensome, as the Commission itself noted in the Sub 140 Order. Sub 140 Order at 51.

This proceeding presents the very situation the Commission intended the NoC Form to remedy — a QF alleges that the totality of the facts and circumstances constitute notice of its commitment to sell and thereby establishes a LEO as of a certain date. This allegation leaves the utility and, potentially, the Commission itself to later sift through various emails, letters, or results of meetings between the QF and the utility to determine whether and, importantly, *when* the facts actually come together to show such a commitment. Cube Yadkin has proposed that the Commission find in this case that a LEO was established at some point in 2016 *before* November 1, 2016, the date the Companies commenced biennial proceedings to establish new avoided costs rates for purposes of contracts with QFs under PURPA. Cube Yadkin bases its case on various actions by Alcoa, the owner of the Yadkin River Facilities in 2016, and on letters and emails between Cube Yadkin and the Companies during September and October 2016, even though all of such letters and emails predate Cube Yadkin's actual ownership of the Yadkin River Facilities.

In short, the Commission finds that predicating a waiver of the NoC Form requirement on "substantial compliance" with the requirements for establishing a LEO would undermine the very purposes that called the NoC Form into existence in the first place and would invite a case-by-case repeal of the NoC Form requirement as parties would seek to litigate "substantial compliance" in every case where it was to their advantage to try to establish some different effective date for a LEO for their projects.

Cube Yadkin advances its "substantial compliance" argument, just discussed, as a corollary to its argument that it should be exempt from the NoC Form requirement because all of the Yadkin River Facilities were constructed and in operation before the time certificates of public convenience and necessity were required. The Commission agrees with Cube Yadkin that the circumstances of the three QF facilities included among the group of the four Yadkin River Facilities are atypical. As Cube Yadkin points out, they were in existence and in operation for decades before PURPA was adopted, before the statutes requiring certificates of public convenience and necessity were adopted, and before the NoC Form was promulgated by this Commission. Even among the group of generating facilities that may share this same characteristic, it is possible that the three hydroelectric facilities at issue in the present case may be part of a subset of some larger group of facilities that were constructed and in operation before CPCNs were required in North Carolina. This is so for the following reason. The Yadkin River Facilities went through significant modifications as part of the FERC re-licensing process while under Alcoa's ownership. Those modifications made the three facilities at issue eligible to be treated as "new" capacity under PURPA. Tr. vol. 1, 27. Although it might be contended, that a waiver of the NoC Form requirement based on the facts of this case would not set off a deluge of other applications for waivers and a return to the days of dispute and controversy surrounding the date when a QF makes a commitment to sell its output that led to adoption of the NoC Form requirement, this circumstance standing alone is insufficient to support the requested waiver. The record does not in any event establish how many other potentially eligible QFs are reasonably similarly situated to Cube Yadkin

nor how many other requests for waiver might be triggered by the grant of a waiver in this case.

Cube Yadkin knew, from the exchanges between Collins and Keen in September and early October 2016, that Duke did not think that it would be obligated to purchase the output under PURPA due to an exemption potentially available under FERC regulations, but that Duke would be willing to discuss any possible purchase obligation under PURPA once Cube Yadkin closed on the transaction with Alcoa. There was no mistaking Duke's position. Put on notice of that position, the Commission finds that it was incumbent on Cube Yadkin to take reasonable and necessary precautions to protect its own potential rights. By witness Collins' own admission, Cube Yadkin knew about the NoC Form requirement at around the same time it approached Duke in September 2016. There is no evidence that Duke concealed the matter or misled Cube Yadkin concerning the NoC Form. The parties' communications during the fall of 2016 do not even discuss the topic. Indeed, the record shows that the form itself and the explanation of the need for the form were published on the public websites of both of the Companies.

Cube Yadkin knew enough and was sufficiently concerned about whether the facilities required CPCNs that it reached out to the Public Staff and sought advice on the question, but it is a mystery why that consultation, or some other consultation that could have been had, did not address the issue of what to do about the NoC Form. In response to questioning by Commissioners at the hearing, witness Collins admitted that Cube Yadkin did not consider seeking guidance with respect to the NoC Form, nor did it consider submitting the NoC Form to Duke and marking the problematic questions concerning CPCNs as "not applicable."[7]

Cube Yadkin's posthearing brief provides further support for the Commission's decision not to allow a waiver of the NoC Form in the present case. Specifically, Cube Yadkin in arguing that it acted diligently and reasonably stated that during the due diligence process both before and after the execution of the purchase agreement in the summer of 2016, Cube Yadkin reviewed the NoC form issue and the requirements for a CPCN and based upon that review determined it could not submit a NoC Form. Cube Yadkin Br. at 27. Cube Yadkin thereafter argued that it potentially risked its right to establish a LEO by submitting a NoC Form. Cube Yadkin argued:

[7] Commissioner Clodfelter asked witness Collins if Cube Yadkin had ever given any consideration to filling out and submitting the NoC Form to Duke, marking the problematic certifications relating to possession of a CPCN as "not applicable." 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 response to further questioning, admitted that Duke had not directly stated in writing or told him that Duke would not accept an incomplete or variant NoC Form. Tr. vol. 1, 127-28. The fact is that the matter was never put at issue between the parties, not through any act or misconduct by Duke but solely due to Cube Yadkin's own decision.

> By filling out the form and arguably consenting to this provision, Cube Yadkin would have risked creating a circumstance in which Duke would argue that Cube Yadkin could not establish a LEO date for the Facilities unless it received a CPCN (which it was not required to do to operate) and that obtaining a CPCN should delay the Cube Yadkin QFs' effective LEO date. Tr. Vol. 1 at 51:14-21 (Cube Yadkin Witness John Collins Testimony). Accordingly, this case presents an unusual situation in which submitting the NoC Form would create less clarity and would increase the proceedings before the Commission. *Id.* at 139:2-9 (noting that Cube Yadkin's application for a CPCN would have taken longer to resolve than typical).

Id. at 28. In Cube Yadkin's own words, Cube Yadkin was fully aware of the NoC Form requirement and assessed whether or not to file the NoC Form. Cube Yadkin chose not to submit the NoC Form for fear that it could potentially cause delay in establishing the LEO date that Cube Yadkin desired.

It may well be the case that had Cube Yadkin sought guidance from the Commission on how it should address the NoC Form issue, it might not have received formal guidance until after the date it needed to establish a LEO in order to entitle it to negotiate based on the avoided costs rates in effect in September and October 2016. Even so, that would not take into account the Commission's power to deem Cube Yadkin's request effective retroactively to a certain date nunc pro tunc. The point for present purposes is that Cube Yadkin took no steps of any kind to address the NoC Form issue until long after the fact, even though it knew of the requirement at the time. Instead, Cube Yadkin relied upon the advice of the Public Staff regarding whether it might need to obtain a CPCN for the facilities and thereafter made a business decision not to file the NoC Form. Obviously, the record is silent as to whether Cube Yadkin made a contemporaneous determination that it would seek a waiver of the NoC Form at some later date. The Commission finds this decision by Cube Yadkin not to submit a NoC Form or to seek clarification with respect to the requirement was a decision to accept a calculated risk that its interpretation of the NoC Form requirement might not be accepted by the Commission. *Cf. Nieto-Espinoza v. Lowder Const., Inc.*, 229 N.C. App. 63, 748 S.E.2d 8 (2013) (excusable neglect for missing a filing deadline not shown where party fails to pay diligent attention to its own interests). Had Cube Yadkin sought and taken some guidance or direction concerning the NoC Form, or had it attempted to submit a NoC Form but omitted the certification concerning the existence of CPCN's for the three QF facilities, its argument concerning "substantial compliance" might have been stronger. Instead, it simply ignored the NoC Form requirement altogether.

The Commission has next considered Cube Yadkin's contention that waiver should be granted based on misconduct by Duke, but the evidence does not support a finding of any such misconduct. As has already been pointed out, Duke said absolutely nothing on the subject of the NoC Form during September and October 2016, and its silence on the topic cannot be construed as any form of misconduct. Cube Yadkin complains that Duke was obstructing and delaying negotiations because it insisted negotiations should wait until Cube Yadkin had acquired ownership of the Yadkin River Facilities. Duke replies

that it did not want to involve itself in negotiations with a non-owner due to the risk that such involvement might affect or color the as-yet-unconsummated transaction between Alcoa and Cube Yadkin. Whether or not that risk was real, Cube Yadkin did nothing to attempt to dispel it, other than simply insisting that "Duke knew" that it was going to be purchasing the facilities from Alcoa and that the consummation of the purchase was merely a matter of time. The Commission is unable to find on this record that Duke's concern was simply pretext or was in bad faith.[8]

Finally, Cube Yadkin makes what seems to be a public policy argument for waiver, asking that the Commission to waive the NoC Form requirement because the Yadkin River Facilities "provide greater value to Duke than other QFs, such that there would be no harm to ratepayers." Tr. vol. 1, 61. This argument is unavailing. In 2019, Cube Yadkin entered into "as available" agreements with Duke, which allow the four Yadkin River Facilities to sell their energy output, as available, to Duke. Tr. vol. 2, p 34. Therefore, the "clean energy" referred to in witness Collins' testimony, tr. vol. 1, 61, is being sold to Duke at this time, and Duke's customers are receiving the benefit of that energy. Moreover, they are receiving that benefit at lower cost than if Cube Yadkin were selling the same energy from the three hydroelectric QF's under PURPA PPA's at 2016 avoided cost rates. Duke witness Snider testified that if the Commission granted the relief Cube Yadkin now seeks 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. 2, 131. The Commission cannot find that the "public policy" benefit of granting a waiver in this case in any way outweighs the resulting burden to Duke's retail ratepayers.

Based upon the evidence and filings, the Commission concludes in its discretion that Cube Yadkin has not shown good cause for the Commission to grant a waiver of the requirement that it submit a NoC Form to the Companies in order to trigger the

[8] The Commission is not called upon to decide in this case, and therefore does not decide, whether there are any circumstances under which a non-owner can properly establish a LEO for a QF and then proceed to negotiate a PPA for a facility it does not own. It is undisputed in this case that no one — neither Alcoa, as owner, nor Cube Yadkin, as prospective owner — submitted or attempted to submit a NoC Form to Duke. Because of the Commission's determination that no waiver of the NoC Form requirement is warranted on the facts of this case, it is not necessary to reach the additional question concerning when, if ever, a LEO may be established by someone who is not the owner of a QF.

establishment of a LEO, and the Commission therefore declines to waive the NoC Form requirement. The complaints in these dockets are dismissed with prejudice.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 30th day of December, 2021.

NORTH CAROLINA UTILITIES COMMISSION

Erica N. Green, Deputy Clerk

Chair Charlotte A. Mitchell did not participate in this decision.
Commissioner ToNola D. Brown-Bland concurs.
Commissioner Floyd B. McKissick, Jr., joins in Commissioner Brown-Bland's concurrence.

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

Commissioner ToNola D. Brown-Bland concurring:

I agree with the result reached by the majority on the ground that the evidence of record establishes that Cube Yadkin (Cube) did not present sufficient evidence that it substantially complied with the substance of the Commission's three-part Legally Enforceable Obligation (LEO) test and, therefore, Cube Yadkin should not be granted a waiver.

During the time period when Cube and Duke engaged in communications regarding the hydro facilities at issue, Cube was not the owner of the facilities such that it could have committed to sell the electric output of the facilities and Cube presented insufficient evidence to establish that the owner of the facilities had authorized Cube to negotiate on its behalf and commit to sell the output of the facilities to Duke. Even if Cube had the authority or right to commit to sell, it failed to present sufficient evidence that it committed to sell the electric output of the hydro facilities to Duke. Cube's evidence established only that it wanted to engage in discussions with Duke about the possibility of selling electric output. Cube failed to present evidence that it made a clear statement to Duke that it was in fact committing to sell to Duke. Such a clear statement of commitment is the reason for the Notice of Commitment (NoC) requirement. Prior to the Commission's adoption of the NOC requirement, the Commission ruled in various factual circumstances that a QF's mere indication of a desire to negotiate or discuss making a commitment was not sufficient to create a LEO. *See generally*, Order Establishing Date of Legally Enforceable Obligations, Docket No. E-22, Sub 521, at 9-10 (Sept. 22, 2015) (concluding that neither applications to interconnect with Dominion North Carolina Power (Dominion), nor applications for CPCNs that included statements that facility "plans to sell the electricity to" Dominion, nor Commission orders granting CPCNs containing "plans to sell" statements constitute a commitment by QFs to sell electric output to Dominion).

Furthermore, Cube's allegation that Duke did not act in good faith in its dealings with Cube is not supported by the evidence. Accordingly, Cube has failed to present competent, material or substantial evidence that it should be granted a waiver of the Commission's requirement that a QF must submit a NoC form to the utility in order to establish that it legally obligated itself to sell electric output to Duke. As can be gleaned from the majority opinion, the evidence supports the following findings of fact:

1. Cube Yadkin did not make a commitment to sell the electric output of its QFs to Duke prior to November 1, 2016;

2. Prior to November 1, 2016, Cube Yadkin did not substantially comply with the Commission's requirements for establishing a LEO; and

3. Duke did not act in bad faith.

Finally, to be clear, while recognizing that a decision to waive the NoC form requirement is a matter within the Commission's discretion, I am of the opinion that proof of substantial compliance could support a waiver of Commission rules and had there been a sufficient, clear and convincing showing of facts establishing substantial compliance with respect to the very information sought by the NoC form, the failure to submit the form should not be the sole basis for denying the requested waiver.

For the foregoing reasons, I concur in the result of the majority opinion.

/s/ ToNola D. Brown-Bland
Commissioner ToNola D. Brown-Bland