

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.	)
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	)

**COMPLAINANTS' PROPOSED  
PROCEDURAL SCHEDULE**

Cube Yadkin Generation, LLC (“Cube Yadkin”), by and through counsel, hereby files this request for approval of a procedural schedule on remand.

On December 17, 2019, the Court of Appeals of North Carolina issued an Order affirming in part and reversing in part this Commission’s July 16, 2018 Order Granting Motion to Dismiss, and remanding the matter to the Commission for further proceedings. The Court’s judgment was certified to the Commission on January 6, 2020, and docketed on January 23.

On March 20, 2020, the parties filed a Joint Report stating that they were in commercial negotiations that might obviate the need for further proceedings, requesting that the Commission refrain from issuing a procedural schedule, and stating that they would provide another report on the status of negotiations by May 1. On May 1, the Parties informed the Commission that commercial negotiations had concluded unsuccessfully and this matter will need to proceed to a hearing. The parties subsequently conferred but were unable to reach agreement on an appropriate procedural schedule for this matter.

### **REQUEST FOR PROCEDURAL SCHEDULE**

The Parties agree that the core issue in dispute is whether, under the facts and circumstances of this case, the Commission should waive one element of its three-part test for establishing a Legally Enforceable Obligation (“LEO”) under PURPA, and find that Cube Yadkin had established an LEO without filing a “Notice of Commitment” Form (“NoC Form”) with the utility.

Duke Energy Progress LLC and Duke Energy Carolinas LLC (collectively, “Duke”) maintain that no additional factual development is required in this matter, and that the case should be decided based on the papers and without an evidentiary hearing. Cube Yadkin disagrees, and believes that the posture of the case, the nature of the remaining issues, and the Court of Appeals’ decision clearly require that discovery be permitted and that an evidentiary hearing be held.

Although some documentary evidence (in the form of correspondence) has been put before the Commission, the factual record in this case has not been developed. Prior to the dismissal of its Complaint, Cube Yadkin filed a motion requesting that the Commission issue a procedural order authorizing (among other things) discovery to address contested factual issues. *Complainant’s Request for Approval of Procedural Schedule* (June 6, 2018) at 4-5. The contested issues cited by way of example in Cube Yadkin’s motion included: (1) whether Duke acted in good

faith in initially denying the existence of its PURPA purchase obligation; (2) whether Duke suggested to Cube Yadkin that it seek registration of its facilities as New Renewable Energy Facilities; (3) whether Cube Yadkin was entitled to assert the PURPA rights of facilities then owned by Alcoa; and (4) whether Cube Yadkin clearly and unequivocally communicated its desire to “put” the energy and capacity of the Cube Yadkin QFs to Duke in September or October 2016. All of these issues are potentially relevant to Cube Yadkin’s waiver claim.

Although the Commission did not explicitly rule on Cube Yadkin’s motion, its July 16, 2018 *Order Granting Motion to Dismiss* effectively denied the motion and cut off further discovery. In dissent, Commissioner Brown-Bland took issue with the dismissal of the case without factual development, stating that the Commission’s Order “prematurely disposes of the Complaint on a procedural technicality,” and “thwart[s] the Complainant’s opportunity to develop a record in support of its position.” *Order Granting Motion to Dismiss*, Dissent of Commissioner Brown-Bland at 1-2.

Similarly, Commissioner Clodfelter opined in dissent that “Issues of the sort raised by this [waiver] request are particularly inappropriate for summary disposition on an undeveloped factual record.” Commissioner Clodfelter even identified one specific topic of potential discovery, noting that:

the Order treats the letter exhibits attached to the Complaint as exhaustive of Complainant’s possible evidence, even though by their own terms they reference other meetings and discussions among the parties, to the point that in one case (Complaint Exhibit 4), the author points out that the series of written communications do not fully reference or capture the parties’ discussions.

*Order Granting Motion to Dismiss*, Dissent of Commissioner Clodfelter at 1-2.

The Court of Appeals agreed, reversing the dismissal of the waiver claim and stating that “the weighing of such evidence on an undeveloped record at this preliminary motion-to-dismiss

stage is improper.” *Cube Yadkin Generation, LLC v. Duke Energy Progress, LLC*, 837 S.E.2d 144, 151 (N.C. Ct. App. 2019) (emphasis added).

Because this case turns on issues of fact on which further factual development is needed, Cube Yadkin submits that a full procedural schedule authorizing discovery on the remaining issues is appropriate and necessary. Cube Yadkin proposes the following schedule:

- Written discovery would commence June 1, 2020.
- Limited depositions would be authorized starting August 1, for a 60-day window.
- Cube Yadkin prefiled direct testimony to be filed September 1, 2020.
- Duke prefiled rebuttal testimony to be filed October 1, 2020.
- Cube Yadkin prefiled surrebuttal testimony to be filed November 1, 2020.
- Hearing at the Commission’s convenience, on or after December 1, 2020.

Cube Yadkin proposes this somewhat extended schedule not because it believes that extensive discovery is necessary, but in recognition of the continued uncertainty and potentially longer response times resulting from the COVID-19 pandemic.

Respectfully submitted this 19th day of May, 2020.

KILPATRICK TOWNSEND & STOCKTON LLP

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing *Complainants' Proposed Procedural Schedule* has been served by electronic mail, hand delivery, or by depositing a copy in the United States Mail, 1st Class Postage Prepaid, properly addressed to parties of record.

This the 19th day of May, 2020.

/s \_\_\_\_\_  
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