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June 8, 2018

**VIA ELECTRONIC FILING**

M. Lynn Jarvis  
Chief Clerk  
North Carolina Utilities Commission  
4325 Mail Service Center  
Raleigh, North Carolina 27699-4300

**RE: Duke Energy Progress, LLC's and Duke Energy Carolinas, LLC's  
Joint Response in Opposition to Complainant's Request for Approval  
of Procedural Schedule  
Docket Nos. E-2, Sub 1177 and E-7, Sub 1172**

Dear Ms. Jarvis:

Please find enclosed for filing Duke Energy Progress, LLC's and Duke Energy Carolinas, LLC's Joint Response in Opposition to Complainant's Request for Approval of Procedural Schedule in the above-referenced dockets.

If you have any questions, please let me know.

Sincerely,

Kendrick C. Fentress

Enclosure

cc: Parties of Record

OFFICIAL COPY

JUN 08 2018

CERTIFICATE OF SERVICE

I certify that a copy of Duke Energy Progress, LLC's and Duke Energy Carolinas, LLC's Joint Response in Opposition to Complainant's Request for Approval of Procedural Schedule, in Docket Nos. E-2, Sub 1177 and E-7, Sub 1172 has been served by electronic mail, hand delivery, or by depositing a copy in the United States Mail, 1<sup>st</sup> Class Postage Prepaid, properly addressed to parties of record.

This the 8<sup>th</sup> day of June, 2018.



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BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-2, SUB 1177

DOCKET NO. E-7, SUB 1172

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

**RESPONDENTS’ JOINT  
 RESPONSE IN OPPOSITION TO  
 COMPLAINANT’S REQUEST FOR  
 APPROVAL OF PROCEDURAL  
 SCHEDULE**

NOW COME Duke Energy Progress, LLC (“DEP”) and Duke Energy Carolinas, LLC (“DEC”) (collectively “the Companies” or “Respondents”) by and through counsel and pursuant to Rule R1-9 of the North Carolina Utilities Commission (“Commission” or “NCUC”) Rules and Regulations, and respond to Complainant’s Request for Approval of Procedural Schedule (“Request”), which was filed by Cube Yadkin Generation, LLC (“Complainant” or “Cube Yadkin”) on June 6, 2018. Cube Yadkin’s Request is premature, as the Respondents’ Joint Answer and Motion to Dismiss (“Motion to

Dismiss”), filed in these dockets on May 7, 2018 remains pending before the Commission. Cube Yadkin has filed a Complaint on March 29, 2018 and a Response to Respondents’ Joint Answer and Motion to Dismiss (“Response”) on May 23, 2018, wherein it has both set forth its arguments in support of its contentions and responded to the Answer and Motion to Dismiss of the Respondents. Nothing in the Response alters the Respondents’ Motion to Dismiss or compels them to consent in writing to arbitration under N.C. Gen. Stat. § 62-40. In short, the arguments of the parties are before the Commission, and the matter is ripe for the Commission’s review and determination. Accordingly, Cube Yadkin’s Request should be denied. In support, the Companies respectfully show the following:

**RESPONDENTS’ RESPONSE IN OPPOSITION TO REQUEST FOR  
PROCEDURAL SCHEDULE**

1. Cube Yadkin claims that it has established a legally enforceable obligation (“LEO”) for three hydroelectric facilities - the High Rock, Tuckertown, and Falls facilities (“Yadkin Facilities”) - in either September 2016 or October 2016 such that Cube Yadkin is entitled to a long-term (10 years or more) power purchase agreement (“PPA”) at avoided cost rates calculated as of those alleged LEO dates. The uncontroverted facts before this Commission, however, show that Cube Yadkin has not established a LEO and is not entitled to a 10-year PPA at outdated avoided cost rates.

2. As Respondents noted in their Motion to Dismiss (hereby incorporated by reference), the Commission’s requirements for establishing a LEO (prior to October 11, 2017) are well-established and clear:

Beginning with the mandatory use of the LEO Form (40 days from the issuance of this Order), a developer will be required to: (1)

have self-certified with the FERC as a QF; (2) have made a commitment to sell the facility's output to a utility pursuant to PURPA via the use of an approved LEO form, and (3) have received a CPCN for construction of the facility.

*Order Establishing Standard Rates and Contract Terms for Qualifying Facilities*, Docket No. E-100, Sub 140, issued Dec. 17, 2015 at 52.

3. The undisputed facts before this Commission demonstrate without question that Cube Yadkin has failed to comply with any of these requirements to establish a LEO on any of the dates it has offered as potential LEO dates. The undisputed facts are: (i) Cube Yadkin did not own the Yadkin Facilities until February 1, 2017; (ii) Cube Yadkin did not self-certify as a QF with respect to the Yadkin Facilities until March 9, 2017;<sup>1</sup> (iii) Cube Yadkin has not submitted the mandatory "LEO" or Notice of Commitment ("NoC") form; and (iv) Cube Yadkin does not have a certificate of public convenience and necessity ("CPCN") for any of the Yadkin Facilities.

4. Having failed to establish a LEO either in 2016 as it alleges, or at the present time, Cube Yadkin is not entitled to a PPA that is inconsistent with N.C. Gen. Stat. § 62-156(c) and that includes avoided cost rates in excess of the Respondents' current forecasts of their respective avoided costs.

5. Because the Commission has the necessary relevant, uncontested facts before it to make a determination on Cube Yadkin's Complaint, a bifurcated, months-

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<sup>1</sup> Cube Yadkin filed its self-certifications at the Federal Energy Regulatory Commission ("FERC") with the NCUC on March 16, 2017 in Docket Nos. SP-9172, Subs 0-2. In the transmittal letters to the NCUC, Cube Yadkin notes it made these filings pursuant to 18 C.F.R. 292.207(c)(1), which requires that an applicant filing a self-certification, self-recertification, application for Commission certification or application for Commission recertification of the qualifying status of its facility must concurrently serve a copy of such filing on each electric utility with which it expects to interconnect, transmit or sell electric energy to, or purchase supplementary, standby, back-up or maintenance power from, and the State regulatory authority of each state where the facility and each affected electric utility is located.

long discovery and hearing process, as proposed by Cube Yadkin (Request at ¶¶ 9-10), is not necessary.

6. In its Request, Cube Yadkin lists a series of “legal issues” that the Commission should consider “in advance of any consideration of the specific PPA terms and conditions.” (Request at ¶ 7) The “legal issues” listed in sub-paragraphs 7.(b)-(e), however, are essentially the allegations from Cube Yadkin’s Complaint restated as questions. Respondents respectfully submit that the legal arguments and the uncontroverted facts already set forth in the Complaint, the Respondents’ Motion to Dismiss, and the Response fully address these issues and are sufficient for the Commission to determine that Cube Yadkin has failed to: (i) establish a LEO; (ii) show that the Commission should abandon its well-established LEO requirements for Cube Yadkin; and (iii) demonstrate that Cube Yadkin is entitled to evade application of N.C. Gen. Stat. § 62-156(c) (maximum term of negotiated PPAs is five years) to sign a 10-year PPA at avoided cost rates in excess of the Respondents’ current forecast of their avoided costs.

7. With respect to the legal issue that Cube Yadkin presents in sub-paragraph 7.(a), Respondents state that they do not dispute that they sent the letters attached as Exhibit 2 and Exhibit 4 to the Complainant prior to the Complainant closing on the transaction with Alcoa Power Generation, Inc. (“Alcoa”). *See also* Motion to Dismiss at ¶¶ 28-30. With respect to Exhibit 4, the Respondents note that the October 14, 2016 letter from Respondents to Cube Yadkin indicates that:

You further inform us that Cube Hydro seeks to purchase the Yadkin system from Alcoa, and *may be the actual owner and operator of the Yadkin system by the end of 2016. At this time, Cube Hydro neither owns nor is a qualifying facility with respect to the Yadkin system. Therefore, Cube Hydro has no potential rights to*

exert under PURPA. Although your letter fails to reference our discussions, we have previously and prior to your letter informed you of the PURPA provisions under which Duke would be exempted from PURPA with regard to the Yadkin system. Accordingly, this letter serves as Duke's formal notice under 292.309/10 that if in the future Cube Hydro is a qualifying facility with respect to the Yadkin system and it seeks to sell power to Duke, it is Duke's view that it is exempted from any purchase obligation under PURPA with respect to the Yadkin system.

Representations and warranties in applications made at FERC demonstrate that Cube Hydro has sought, and Alcoa currently has market-based rate authority on the basis of the ability and history of selling the output of the Yadkin system into competitive wholesale and organized markets. However, *after you have closed on the transaction with Alcoa*, if you seek to approach Duke under PURPA we will be glad to discuss the matter further.

Complaint at Exhibit 4 (emphasis added); see also Motion to Dismiss at ¶¶ 28-29 (explaining how after Cube Yadkin closed on the transaction with Alcoa, it and Respondents pursued a non-PURPA PPA that included the Narrows facility). Moreover, with respect to the legal issue that Cube Yadkin presents in sub-paragraph 7.(g), Respondents respectfully note that the Commission does not have the legal authority to preempt N.C. Gen. Stat. § 62-156(c) on the basis of PURPA. *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 336 N.C. 657, 674, 446 S.E.2d 332, 342-43 (1994). With respect to the issue presented in sub-paragraph 7.(f), it is premature to consider or brief the issue of "new capacity" due to the Respondents' pending Motion to Dismiss the Complaint on the grounds that it has not established a LEO at this time.

8. Additionally, Cube Yadkin seeks to divert the attention from the legal issues before the Commission by listing a series of what it terms "factual issues in dispute." These factual issues alleged "in dispute," however, are not germane to the issues of whether Cube Yadkin established a LEO or is entitled to a PPA at the term and avoided cost rates it seeks. With respect to Cube's assertions regarding Respondents seeking a waiver of its obligation to purchase from the Yadkin Facilities, Respondents do

not dispute the facts set forth in the September 21, 2016 letter from Respondents to Cube Yadkin (attached to the Complaint as Exhibit 2) and the October 14, 2016 letter to Cube Yadkin, which is quoted in the preceding paragraph and attached to the Complaint as Exhibit 4. Furthermore, whether Respondents “suggested” that Cube Yadkin register the facilities as new renewable energy facilities or Cube Yadkin did so as a result of the conversations with Respondents is immaterial. The material, undisputed fact is that less than eight weeks after Cube Yadkin closed on the transaction with Alcoa (February 1, 2017), Respondents sent Cube Yadkin a letter agreement dated March 22, 2017, in which they offered to discuss purchase of the output of the Yadkin Facilities and the Narrows facility on a non-PURPA basis, which potentially would include terms and conditions that were contingent upon Commission approval of the Yadkin Facilities and the Narrows facility as new renewable energy facilities. (Motion to Dismiss at ¶¶ 28-29) The letter agreement was finalized on April 25, 2017. (Complaint at ¶ 28-29) Finally, contrary to Cube Yadkin’s assertion, a review of the scope of the “regulatory out” provisions contained in the contract to purchase the Yadkin Facilities and Narrows facility between Cube Yadkin and Alcoa is not relevant to the issue of whether, for example, Cube Yadkin has submitted the mandatory NoC form that QFs are required to submit to establish a LEO in North Carolina.

9. Cube Yadkin argues that approximately two months of discovery is necessary to “uncover further facts” that may bear on the Commission’s analysis of these issues. The facts that are relevant and material to this Complaint, however, are already sufficiently developed and uncontested before the Commission. Based on the foregoing

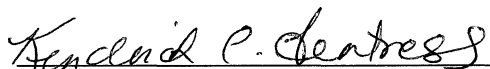


and their Motion to Dismiss, Respondents respectfully request that the Commission deny Cube Yadkin's Request for a Procedural Schedule.

WHEREFORE, in addition to the relief sought in Respondents' Motion to Dismiss, Respondents respectfully pray as follows:

1. That the Commission issue an order denying Cube Yadkin's Request for Approval of Procedural Schedule;
2. That the Commission grant such other relief as the Commission deems just, equitable, and proper.

Respectfully submitted, this the 8<sup>th</sup> day of June, 2018.



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