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NCSEA

March 4, 2009

Ms. Renee Vance
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North Carolina Utilities Commission
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RE: Docket No. E-7, Sub 856

Enclosed please find the original and thirty (30) copies of the North Carolina Sustainable Energy Association's Brief in the above captioned docket. All parties of record have been served.

Thank you for your attention to this matter.

Very truly yours,

Kurt J. Olson
Staff Counsel

Full D.F. MSF

Attachment

cc: Service List

STATE OF NORTH CAROLINA
BEFORE THE NORTH CAROLINA UTILITIES COMMISSION
DOCKET NO. E-7, SUB 856

In the Matter of Application of Duke Energy Carolinas, LLC for Approval of Solar Photovoltaic Distributed Generation Program and for Approval of Proposed Method of Recovery of Associated Costs	)	BRIEF OF THE NORTH CAROLINA SUSTAINABLE ENERGY ASSOCIATION

Pursuant to the North Carolina Utilities Commission's ("the Commission") February 13, 2009 request for briefs, the North Carolina Sustainable Energy Association ("NCSEA") submits the following arguments and points of authority.

SUMMARY OF POSITION

NCSEA has no dispute with a public utility meeting some of its compliance obligations under Session Law 2007-397 (the "REPS Law") through the ownership and operation of its own new renewable energy generating sources. NCSEA recognizes that meeting the REPS requirements by using this approach is one of several options the General Assembly provided for achieving compliance. NC Gen. Stat. § 62-133.8(b)(2)a. It is equally clear, however, that this approach is not required; it is simply one of many approaches that a utility can take to meet its REPS obligations. NC Gen. Stat. §§ 62-133.8(b)(2)a-f. Indeed, the General Assembly's intent in providing multiple compliance approaches was to achieve a myriad of goals including promoting "private investment in renewable energy,"[1] creating "diversity" in the energy market and providing "greater energy security." NC Gen. Stat. §§ 62-2(a)(10)a-c.

[1] As argued in NCSEA's first brief filed in this proceeding, the term "private investment" does not encompass projects undertaken by a regulated public utility. A public utility is regulated in the public interest. This concept of public interest is imbedded in the Certificate of Public Convenience and Necessity ("CPCN") process that a public utility must pursue before constructing **any** generation additions. NC Gen. Stat. § 62-110.1(a). The CPCN proceeding asks the Commission to determine whether the public utility's construction of generation additions is in

In addition to the policy goals of the REPS outlined in NC Gen. Stat. §§ 62-2(a)(10)a-c, the General Assembly took special care to specifically set requirements for three renewable energy resources – solar energy, swine waste, and poultry waste. NC Gen. Stat. §§ 62-133.8(d)(e) & (f) (hereinafter "solar set-aside" or "solar carve-out," etc). Of particular note, the General Assembly set a compliance deadline for the solar set-aside that is two years earlier than the overall REPS requirement, 2010 as opposed to 2012. NC Gen. Stat. § 62-133.8(d). Thus, it can be inferred that the General Assembly placed special priority on this renewable energy technology.

As with the overall REPS, the General Assembly authorized a variety of compliance approaches for the solar set-aside. These approaches include "new solar electric facilities and new metered solar thermal energy facilities that use one or more of the following applications: solar hot water, solar absorption cooling, solar dehumidification, solar thermally driven refrigeration, and solar industrial process heat." *Id.* In providing these various options, the General Assembly preserved a utility's flexibility in deciding how best to meet its requirements while mitigating compliance and financial risk.

As demonstrated above, the General Assembly gave the utilities numerous options and great flexibility in achieving the obligations under the REPS, and expected the utilities to achieve compliance. To that end, the REPS Law provided the Commission express authority to enforce the requirements, and to permit a delay or modification to the compliance schedule only when

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the public interest. If the Commission determines that the public utility's project is not in the public interest, the Commission will not grant a CPCN. Conversely, nonutility investments in renewable energy generation under two megawatts in size, and all nonutility generating facilities intended only for private use, are exempt from the CPCN process and do not require the Commission's consideration of whether the investments are in the "public interest." NC Gen. Stat. § 62-110.1(g). These generation additions constitute "private investments" and are precisely the types of investments the General Assembly was referring to when it used the term. *See* NC Session Law 2007-397 which directed NC Gen. Stat. § 62-110.1(g) to be rewritten to exclude a "nonutility-owned generation facility fueled by renewable energy resources under two megawatts in capacity" from obtaining a CPCN. Because all public utilities' self-built generation additions must pass a CPCN proceeding, these generation additions are not "private investments."

the Commission deems that a change or delay is in the public interest and the utility seeking a waiver "demonstrate[s] that it made a reasonable effort to meet the requirements" of the REPS. NC Gen. Stat. §§ 62-133.8(i)(1) & (2).

Duke Energy Carolinas, LLC's ("Duke" or "the Company") approach thus far to complying with the solar carve-out of the REPS has been extremely limited, primarily relying on only one project – Duke's own solar project (hereinafter Duke's "PV/DG Program") – to meet its 2010 solar set-aside requirements.[2] Throughout this proceeding, Duke has argued that its program is necessary because it cannot rely upon private, nonutility, projects to provide enough solar energy to comply with the REPS. *See Transcript, In the Matter Of: Application for Approval of a Solar Photovoltaic Distribution Generation Program and for Approval of Proposed Method of Recovery of Associated Costs*, Volume 1, Testimony of Owen A. Smith at pg. 69 ln. 13-20 to pg. 70 ln. 1-2 (October 23, 2008) (hereinafter cited as "Tr. Vol. __ at __"). Now, Duke's own tax requirements may lead to Duke abandoning its PV/DG Program, and not being able to comply with the 2010 solar set-aside requirements. Thus, it is Duke's reliance on only one project, an approach that eschews investment diversity and prudent risk management, which has put the Company in this now precarious position.

Regardless of how the Commission rules now on Duke's request to guarantee cost-recovery of all of the costs related to the PV/DG Program, it is too early to delay Duke's 2010 solar set-aside compliance obligation. While Duke may have demonstrated that such a delay is in Duke's interest, it has not demonstrated that such a delay is in the "public interest." Further, Duke's limited approach cannot be considered a "reasonable effort" at compliance, especially because Duke has not demonstrated what other attempts, such as simply purchasing solar renewable energy credits ("RECs"), it has made to achieve compliance. Duke's "one try and

[2] A contract signed with SunEdison has been announced to come on line in 2011.

out" approach cannot be considered "reasonable" and certainly cannot be considered in the "public interest." Duke still has over a year and a half to develop and execute an alternative compliance plan, and the Commission should use its full power and authority to ensure that Duke complies.

FACTS

On December 31, 2008, the Commission issued an Order Granting [a] Certificate of Public Convenience and Necessity with Conditions ("the CPCN Order") for Duke's PV/DG Program. The primary limiting conditions of the CPCN Order were that Duke's Program may not exceed 10 MW (DC) of capacity, and its recoverable costs under the REPS rider may not exceed the effective price per MWh of the third place bidder's price submitted to Duke's solar request for proposals ("RFP").[3] *CPCN Order* at 20. The Order further stated that Duke has the right to apply for cost recovery of any remaining program costs and that any party may take issue with the treatment of the program's final costs in a future proceeding. *Id.*

In response to the CPCN Order, Duke filed a Motion of Reconsideration on January 29, 2009 ("the Motion"). In its Motion, Duke argued that the Commission-imposed cap on cost recovery under the REPS rider placed Duke "in jeopardy of violating the federal tax normalization requirements." *Motion* at 1. The potential violation, according to Duke, "effectively precludes the Company from moving forward with the [PV/DG] Program and also effectively eliminates the opportunity for the large scale and coordinated implementation of distributed generation ("DG") on the Company's system for the foreseeable future." *Motion* at 2. Consequently, Duke is requesting multiple avenues of relief. Among these avenues, Duke is

[3] In 2007, prior to the passage of the REPS Law, Duke issued a RFP for renewable energy projects greater than 2 MW in size. Duke received numerous responses to this proposal, and identified multiple projects as being good proposals based upon the independent analysis of a consulting firm, Black and Veatch. Of the submitted proposals, Duke chose to enter into a single contract with SunEdison, the winner of the RFP. *CPCN Order* at 4.

asking the Commission to either remove the cap on cost recovery for the PV/DG Program under the REPS rider or declare that all of the Program's costs are reasonable, prudent and fully recoverable through a combination of base rates and the REPS rider. In the event the Commission denies Duke's requested relief, Duke is asking that its solar set-aside requirements be delayed one year from 2010 to 2011. *Motion* at 17-18.

On February 2, 2009, the Commission issued an Order Allowing Briefs on [the] Motion of Reconsideration and Scheduling Oral Argument. The dates set for filing initial briefs, reply briefs, and oral arguments were February 25, March 11, and March, 16, 2009, respectively. On February 10, 2009, the Attorney General filed a Motion to Reschedule. The Commission granted the Attorney General's Motion and set the dates for initial briefs, reply briefs, and oral arguments for March 4, March 18, and March, 25, 2009, respectively.

ARGUMENT

The issue of when a utility can invoke the "off-ramp provision" of the REPS was discussed at length in NCUC Docket No. E-100, Sub 113, Rulemaking Proceeding to Implement Session Law 2007-397. As a result of that proceeding, Rule R8-67(b)(7) was amended to read:

> In any year, an electric power supplier or other interested party may petition the Commission to modify or delay the provisions of G.S. 62-133.7(b), (c), (d), (e) and (f), in whole or in part. The Commission may grant such petition upon finding that it is in the **public interest** to do so. If an electric power supplier is the petitioner, it shall demonstrate that it had made a **reasonable effort** to meet the requirements of such provisions. Retroactive modification or delay of the provisions of G.S. 62-133.7(b), (c), (d), (e) or (f) shall not be permitted. The Commission shall allow a modification or delay only with respect to the electric power supplier or group of electric suppliers for which a need for a modification or delay has been demonstrated. [emphasis added]

As emphasized in the quoted regulation above, in order to invoke the off-ramp provision of the REPS, the Commission has determined that two criteria must be met. First, the petitioner of the off-ramp must demonstrate that it is in the *public interest* to delay or suspend compliance.

Second, if an electric power supplier, in this case Duke, is the petitioner, then it must also show that is has made a *reasonable effort* to comply. Thus, the question at hand is whether Duke has met its burden of proof necessary to invoke the "off-ramp provision" of the REPS.

Over the course of this proceeding, Duke has not demonstrably proven that delaying its compliance date to 2011, thus invoking the off-ramp provision, would be in the public interest. On the contrary, because of the large size of Duke's obligation, over 11,000 megawatt-hours, delaying Duke's compliance date for its solar set-aside requirements would create a ripple effect throughout the market. This effect would delay the ramping up of solar energy resources and undermine the REPS generally and specifically the General Assembly's intent to promote solar energy resources. The General Assembly's selection of 2010 as the first compliance deadline for solar energy resources, a date two years prior to the first compliance dates for the overall REPS and the other set-asides, indicates the General Assembly found ramping up solar energy resources available within the state to be in the public interest. To delay Duke's compliance date at this point in time would undermine the development of solar resources in North Carolina and would not be in the public interest. The impact of Duke's federal tax obligations on its ability to comply with the set-aside requirements in a timely manner only satisfies the criterion of being in Duke's interest; it does not satisfy the criterion of being in the public interest.

Further, Duke has not proven that it has undertaken a reasonable effort to meet the 2010 solar set-aside requirements. According to Duke, "the Company believes prudent planning for customer needs requires a plan that is robust under many possible future scenarios, and maintains a number of options to respond to many potential outcomes of major planning uncertainties." *See* Testimony of Janice D. Hagar, Tr. Vol. 2 at pg. 11 ln. 20-22 to pg. 12 ln. 1-2. If the Company had pursued such prudent planning, then the Commission could infer that Duke had

made a reasonable effort to comply with the solar set-aside obligation. Duke, instead, chose to issue a single RFP that was developed prior to the passage of the REPS Law that only considered projects greater than 2 MW in size, and specifically excluded the purchase of renewable energy certificates ("RECs"). Duke then chose to pursue two headline grabbing projects – a contract with SunEdison, the winner of the RFP, and its own PV/DG Program.[4] Duke's compliance approach to date does not embody the prudent planning to which Ms. Hagar testified because the approach only maintains one option as a response to potential regulatory or operational uncertainties – that option being to delay compliance. A company with as sophisticated risk and regulatory management strategies as Duke has in place surely could not seriously consider this limited effort as satisfying the reasonableness standard.

Duke's approach is further undermined when looking at a similarly situated utility's solar set-aside compliance strategy. In stark contrast to Duke's approach, Progress Energy Carolinas, LLC ("Progress") has entered into ten contracts thus far in an effort to comply with the 2010 requirements, seven of which are RECs-only contracts. *See Transcript. In the Matter of Application for Authority to Adjust Rates Pursuant to G.S. 133.7 and R8-67 (NCUC Docket No. E-2. Sub 930)*, Volume 1, Supplemental Exhibits of David K. Fonvielle, Exhibit No. 3, Page 3 (September 17, 2008). Progress' strategy effectively manages the risk of non-compliance by spreading the risk over a number of contracts; thus the failure of any one contract would not necessarily put Progress in the position of needing to invoke the off-ramp provision. Duke's approach, on the other hand, relies so heavily on its PV/DG Program that the failure or delay of it potentially puts Duke out of compliance. And, in the event that Duke is able to move up the in-service date of the SunEdison project, Duke's compliance approach will still rely almost

[4] Duke's public statements indicate that, of these two projects, only Duke's PV/DG Program would be eligible for complying with the 2010 deadline.

exclusively on this project for compliance. Surely, such a regulatory and risk management approach cannot be considered either reasonable or prudent.

Further, to grant Duke's delay would ignore the limited compliance efforts Duke has undertaken in North Carolina. Similar to the action Duke took in North Carolina, Duke Energy Ohio, Inc. ("Duke Ohio") issued an RFP for renewable energy and capacity prior to the issuance of Ohio Senate Bill 221 ("Ohio Energy Bill"). Both of these RFPs reserved Duke's right to update the RFPs after the passage of the legislation and promulgation of rules. Accordingly, Duke Ohio did revise its RFP while the North Carolina RFP remains unchanged. Unlike the RFP issued in North Carolina, Duke Ohio's RFP included the consideration of REC purchases, thereby expanding Duke Ohio's compliance strategy. In North Carolina, Duke's approach to solar REC purchases thus far has consisted of discussing the development of a program to buy solar RECs from small providers. *See* Testimony of Owen A. Smith, Tr. Vol. 1 at pg. 75 ln. 7-23 to pg. 76 ln. 1-2. To date, Duke has not announced any steps toward program development or implementation.

Duke's limited approach to compliance with the solar set-asides in North Carolina pales in comparison to the effective models for developing solar markets that have been implemented in other states by other investor-owned utilities. The Arizona Public Service Company ("APS") offers both up-front and production-based incentives to both residential and non-residential customers for a variety of solar technology applications including photovoltaic systems, water heating, and space cooling and heating. With the up-front incentives, APS pays customers a fixed amount per DC watt of installed capacity for a solar project. With production-based incentives, APS makes periodic payments to the owners of solar systems based on the energy production of the system. In return for both of these incentives, APS receives the RECs for the

life of the project.[5] Xcel Energy in Colorado offers a similar standard offer rebate program to its residential and commercial customers installing solar systems. Under Xcel's program, the utility pays customers both an up-front incentive (a fixed amount per DC watt of installed capacity) and a REC payment based upon the solar system's actual production. In return for these incentives, Xcel receives the RECs for the life of the project.[6]

Yet another incentive approach is the one taken by Public Service Company of New Mexico ("PNM") with its REC Purchase Program. Under this program, PNM pays its customers for providing solar energy to the grid a standard offer of 13 cents per kilowatt-hour for production, in addition to incentives the customer might be receiving by participating in PNM's net metering program.[7] These examples are just a few of the many that are currently being implemented across the country by investor-owned utilities to acquire solar energy and RECs to meet their compliance obligations.

As illustrated above, the concept of meeting compliance with solar requirements is not a new one, neither to investor-owned utilities nor to Duke. With the multitude of options available for compliance with the 2010 solar set-aside, it is simply too early to allow Duke to delay its first obligation under the REPS.

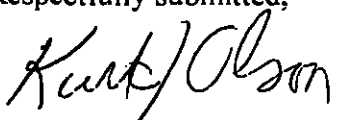
CONCLUSION

At this time, it would be premature for the Commission to delay Duke's solar set-aside requirements one year from 2010 to 2011. Throughout the course of this proceeding, Duke has not proven that the delay of its solar set-aside requirements to 2011 is in the public interest nor

[5] APS Solar and Renewable Incentive Program, http://www.aps.com/main/green/choice/choice_23.html?source=hme (Accessed March 3, 2009).
[6] Xcel Energy Colorado Solar Rewards, http://www.xcelenergy.com/Residential/RenewableEnergy/Solar_Rewards/Pages/home.aspx (Accessed March 3, 2009).
[7] PNM Small PV Program, http://www.pnm.com/customers/pv/program.htm (Accessed March 3, 2009).

has it proven that it has made reasonable efforts to meet the current 2010 requirements. For these reasons, NCSEA recommends that the Commission deny Duke's request to delay its solar set-aside requirements to 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the following persons on the docket mailing list have been served a copy of the North Carolina Sustainable Energy Association's Brief in NCUC Docket No. E-7, Sub 856 by deposit in the U.S. Mail, postage prepaid, or by email transmission (as consented to):

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