

March 29, 2018

Via Electronic Filing

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

***Re: Docket No. E-7, Sub 1172
Docket No. E-2, Sub 1177
Cube Yadkin Generation LLC v. Duke Energy Carolinas, LLC
and Duke Energy Progress, LLC***

Dear Ms. Jarvis:

Transmitted on behalf of Cube Yadkin Generation LLC for filing in the above-referenced dockets is a Verified Complaint, Request for Declaratory Ruling, and Request for Arbitration against Duke Energy Carolinas, LLC and Duke Energy Progress, LLC. We are separately transmitting via hand-delivery fifteen paper copies of this filing.

Should any questions arise in connection with this matter, please do not hesitate to contact either of us.

Very truly yours,



Jim W. Phillips, Jr.
Marcus W. Trathen

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

**Docket No. E-7, Sub 1172
Docket No. E-2, Sub 1177**

CUBE YADKIN GENERATION LLC,)	
)	
Complainant,)	
)	
v.)	VERIFIED COMPLAINT, REQUEST FOR DECLARATORY RULING, AND REQUEST FOR ARBITRATION
)	
DUKE ENERGY CAROLINAS, LLC, and)	
DUKE ENERGY PROGRESS, LLC)	
)	
Respondents.)	

COMES NOW Complainant Cube Yadkin Generation LLC (“Cube Yadkin” or “Complainant”), pursuant to N.C. Gen. Stat. § 62-73 and § 1-253 and Rule R1-9 of the Rules and Regulations of the North Carolina Utilities Commission, and files this Complaint and Request for Declaratory Ruling against Duke Energy Carolinas, LLC (“DEC”), and Duke Energy Progress, LLC (“DEP”) (collectively, “Duke”), based on Duke’s refusal to enter into long-term power purchase agreements (“PPAs”) with Cube Yadkin as required by federal and North Carolina law. Cube Yadkin also requests arbitration of any unresolved terms pursuant to N.C. Gen. Stat. § 62-40 and the Commission’s Orders in the avoided cost proceedings. The Complainant respectfully shows the Commission as follows:

INTRODUCTION AND SUMMARY

Complainant operates the Yadkin Project, a series of four hydroelectric stations, dams and reservoirs along a 38-mile stretch of the Yadkin River as it flows through Davidson, Montgomery, Davie, Rowan and Stanly Counties. Together, the four hydroelectric stations have a total generating capacity of 215 megawatts (“MW”) and they

are expected to produce nearly 800,000 megawatt-hours of clean, reliable electricity per year—enough to power some 72,000 homes with renewable energy.

Three of the Yadkin Project facilities have been self-certified as Qualifying Facilities (“QFs”) under the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3 (“PURPA”), while the fourth facility exceeds PURPA’s “small power production facility” size limit. By this action, Complainant seeks to enforce its right under federal law to commit the output and capacity of the QFs to DEC and/or DEP at avoided cost rates determined as of the date that Complainant first established a legally enforceable obligation to provide such energy and capacity to Duke.

Here, the evidence will show that the QFs are interconnected with both DEC and DEP and are components of hydroelectric operations well known to Duke; that Complainant initiated discussions with Duke concerning the purchase of the QF energy and capacity in March 2016, prior to Cube Yadkin’s purchase of the QFs, as part of its due diligence activity; that the sale of the QF energy and capacity to Duke was an integral component of Complainant’s business plan in proceeding with the acquisition of the Yadkin Project and committing to the facility upgrades required by the Federal Energy Regulatory Commission (“FERC”) in connection with the acquisition; that Cube Yadkin had multiple meetings and communications with Duke in the August through October 2016 timeframe to discuss Cube Yadkin’s desire to enter into a long-term PPA to sell the energy and capacity provided by the Yadkin Project; that by letter transmitted on October 11, 2016, Cube Yadkin further apprised Duke of the status of its QFs and the utilities’ obligation, under the law, to purchase the energy and capacity of those facilities; and that by letter dated October 14, 2016, Duke

gave notice to Complainant that it would not honor Cube Yadkin's assertion of rights under PURPA.

Complainant acknowledges that it did not submit to Duke the commitment form recognized by the Commission in its avoided cost orders. However, because the Cube Yadkin QFs are existing facilities that are not subject to the certificate of public convenience and necessity ("CPCN") requirement in N. C. Gen. Stat. § 62-110.1(a) and have had long-standing relationships—including existing interconnections—with the electric utilities in question, the commitment form by its own terms does not apply to the Cube Yadkin QFs. Given that (1) the construction of the hydroelectric QFs pre-dated the CPCN statute and their current status as operating facilities; (2) Cube Yadkin committed to purchase and upgrade the facilities in reliance in part upon the QF status of three of the facilities; and (3) multiple communications between the Complainant and Duke confirmed Complainant's intention to "put" its PURPA-qualifying energy and capacity to Duke, as acknowledged by Duke in its purported anticipatory rejection of Complainant's assertion of PURPA rights, Complainant established legally enforceable obligations no later than October 11, 2016, to sell the energy and capacity from the three QFs to Duke.

Notwithstanding the existence of a binding commitment by Cube Yadkin to sell the energy and capacity of the QFs to Duke as of October 2016, since that time, at Duke's urging, Cube Yadkin sought to negotiate a mutually-beneficial alternative, non-PURPA commercial arrangement by which it would deliver energy and capacity from all four of the Yadkin Project facilities to Duke. As it became clear as of March 19, 2018 that Duke has no intention of entering into such an agreement, Complaint now seeks enforcement of its federally-protected rights as to the three QFs. As hydroelectric facilities, the QFs are unique

assets that are available to meet the growing demand for renewable, carbon-free energy sources, consistent with Duke's publicly-stated strategy to reduce dependence on fossil fuels and move toward clean, renewable energy sources.¹ In particular, the purchase of energy and capacity from hydroelectric resources is consistent with Duke Energy's stated goal of reducing CO₂ emissions 40 percent from 2005 levels by 2030.²

NATURE OF ACTION

This action arises from Duke's refusal to enter into long-term QF PPAs with Cube Yadkin, the owner of three hydroelectric generating facilities that are entitled to sell power to Duke under the PURPA, N.C. Gen. Stat. § 62-156, the Commission's rules, and Duke's own tariffs and schedules. Each of the Cube Yadkin hydroelectric facilities is certified as a QF under PURPA³; each has established a legally enforceable obligation ("LEO") with respect to the sale of energy and capacity to Duke; and each requested a long-term QF PPA with Duke, at rates that reflect Duke's avoided cost as of the date of the respective LEOs. Contrary to its obligations under the law, Duke has refused to negotiate the terms of a long-term QF PPA with each of the Cube Yadkin QFs, taking the preemptive position that Cube Yadkin is not entitled to assert its rights under PURPA. By this action, Complainant seeks to compel Duke to fulfill its legal obligation to enter into a financially viable long-term

¹ See Duke Energy 2017 Climate Report to Shareholders, released March 22, 2018 (available at https://www.duke-energy.com/_/media/pdfs/our-company/shareholder-climate-report.pdf).

² *Id.* at 1. See also *id.* at 7 (stating goal of doubling generation from hydro, wind and solar by 2030).

³ See Letter dated September 30, 2016 from Serena A. Rwejuna of Bracewell LLP on behalf of Alcoa Power Generating, Inc. transmitting FERC Form 556, Notice of Self-Certification of Qualifying Facility Status for FERC Docket Nos. QF16-1309-000 (Falls), QF16-1310-000 (High Rock), and QF16-1311-000 (High Rock), N.C.U.C. Docket No. SP-8651 (Company Folder) (filed Oct. 24, 2016) (collectively, the "FERC Form 556s").

PPA with each of the Cube Yadkin QFs at rates that reflect Duke's avoided cost as of the date that the LEOs were established. Cube Yadkin also seeks a declaration of its rights to sell its energy and capacity, and Duke's obligation to purchase such energy and capacity, under applicable state and federal law. Finally, Cube Yadkin seeks arbitration of all unresolved issues between the parties concerning the PPA.

PARTIES, JURISDICTION AND VENUE

1. Cube Yadkin is a Delaware limited liability company, authorized to transact business in North Carolina. It is in the business of owning, developing and modernizing hydroelectric facilities and is the owner of the hydroelectric QFs that are the subject of this proceeding. Cube Yadkin's principal place of business is located at 2 Bethesda Metro Center, Suite 1330, Bethesda, Maryland 20814. Correspondence in connection with this Complaint should be sent to:

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2 Bethesda Metro Center, Suite 1330
Bethesda, Maryland 20814
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2. Respondents DEC and DEP are electric public utilities operating under the laws of the State of North Carolina for the purposes of generating, transmitting, and distributing electricity in its service territories in North Carolina. Respondents are operating subsidiaries of Duke Energy Corporation. DEC's principal office is located at 526 South Church Street, Charlotte, North Carolina 28202-1802. DEP's principal office is located at 410 S. Wilmington Street, Raleigh, North Carolina 27601.⁴

3. This Commission has jurisdiction over the subject matter and action, and venue is proper.

BACKGROUND ON CUBE YADKIN AND THE CUBE YADKIN QFs

4. Cube Yadkin owns the four hydroelectric facilities⁵—historically referred to as the “Yadkin Project”—that were first operated under a 50-year license issued by the FERC to Carolina Aluminum Company on May 19, 1958.⁶ The FERC approved a transfer of the license to Alcoa Power Generating Inc. (“Alcoa”) on July 17, 2000. Following the expiration of the initial license in April 2008, the Yadkin Project was operated under short-term, annual licenses. In 2006, Alcoa initiated the re-licensing process, and on September

⁴ As discussed herein, the Cube Yadkin QFs are interconnected with both DEP and DEC through Cube Yadkin's affiliate, Cube Yadkin Transmission LLC. Cube Yadkin is willing to sell its QF energy and capacity to either or both Duke utilities.

⁵ The four facilities are High Rock, Tuckertown, Falls, and Narrows. The first three are the subject of this complaint. The fourth facility—Narrows—is not at issue in this proceeding because it exceeds the “small power production facility” size limit.

⁶ Two of the facilities, however, have been in operation for nearly a century and the third for nearly six decades.

22, 2016, the FERC issued a new long-term license to Alcoa for the Yadkin Hydroelectric Project No. 2197 (the “License”).⁷ The License authorizes the operation and maintenance of the Yadkin Project until March 31, 2055.

5. Cube Yadkin signed a contract to acquire the four hydroelectric facilities making up the Yadkin Project from Alcoa on June 30, 2016; it submitted an application to FERC seeking approval of the transfer of the License from Alcoa to Cube Yadkin on July 25, 2016; and the FERC issued an order approving the transfer of the License to Cube Yadkin on December 13, 2016.⁸ Cube Yadkin formally consummated its agreement to purchase the Yadkin Project on February 1, 2017.

6. The Cube Yadkin facilities are interconnected with both DEP and DEC. They are located approximately 130 miles downstream of the W. Kerr Scott Dam and Reservoir along a 38-mile segment of the Yadkin River as it flows through Davidson, Montgomery, Davie, Rowan and Stanly Counties. From upstream to downstream, descriptions of the three facilities in issue here are as follows:⁹

- a. High Rock. The High Rock facility, located at river mile (“RM”) 253, consists of a 14,400-acre reservoir at a full pool elevation with a usable capacity of 217,400 acre-feet. High Rock Reservoir is impounded by a 936-foot-long, 101-foot high dam that includes a non-overflow section, a gated spillway section with ten 45-footwide by 30-foot-high gates, a powerhouse intake, and a non-overflow section. The powerhouse is integral with the dam and contains three turbine/generator units with a total installed capacity of 32.91 MW. The e911 address for the High Rock Powerhouse is 3344 Bringle Ferry Road, Denton, North Carolina 27239.

⁷ Alcoa Power Generating, Inc., *Order Issuing New License*, 156 FERC ¶ 62,210 (2016) (“Order Issuing New License”).

⁸ *Order Approving Transfer of License*, 157 FERC ¶ 62,188, December 13, 2016.

⁹ The fourth facility, Narrows, is located at river mile 236.3 and has a total installed capacity of 110.36 MW.

- b. Tuckertown. The Tuckertown facility, located at RM 244.3, consists of a 2,560-acre reservoir at a full pool elevation of 564.7 feet, with a usable capacity of 6,700 acre-feet. Tuckertown Reservoir is impounded by a 1,370-foot-long, 76-foot-high dam that includes a rock filled section, several non-overflow sections, a gated spillway section with eleven Tainter gates that are 35-foot-wide by 38-foot-high and a powerhouse intake section. The powerhouse is integral with the dam and contains three turbine/generator units with a total installed capacity of 38.04 MW. The e911 address for the Tuckertown Powerhouse is 711 Tuckertown Road, New London, North Carolina 28127.
- c. Falls. The Falls facility, which is located at RM 234, consists of a 204-acre reservoir at a full pool elevation of 332.8 feet, with a usable capacity of 940 acre-feet. The Falls Reservoir is impounded by a 748-foot-long, 112-foot-high dam that includes a powerhouse intake section, a trash gate section, a gated spillway with ten 33-foot-wide by 34-foot-high gates, a gated section with two Tainter gates, and a non-overflow section. The powerhouse is integral with the dam and contains three turbine/generator units with a total installed capacity of 31.13 MW. The e911 address for the Falls Powerhouse is 49156 Falls Road, Badin, North Carolina 28009.

Downstream of the Cube Yadkin facilities are the Tillery and Blewett Falls facilities, which are located at RM 218 and RM 188.2, respectively, and which are licensed to DEP as the Yadkin-Pee Dee Project.

7. On information and belief, the Falls facility was placed into operation on January 1, 1917; the High Rock facility was placed into operation on January 1, 1927; and the Tuckertown facility was placed into operation on January 1, 1962. As each of the QFs was in operation prior to the enactment of the Electricity Act of 1965, Session Law 1965-287, those facilities are not subject to certification under N.C. Gen. Stat. 62-110.1(a). *See also* Order Withdrawing Application, N.C.U.C. Docket No. E-56, Sub 1 (Dec. 2, 1999) (concluding that Alcoa, Tapoco and Yadkin, “by virtue of their current activities, their proposed reorganization and their proposed activities” should not be considered “public utilities” under North Carolina law).

8. The Cube Yadkin QFs have undergone, and will undergo further, substantial modifications, as required by the License in order for Cube Yadkin to generate electricity at the facilities. In general, the modifications required by the License address turbine/generator efficiency and water quality. However, the License includes extensive terms and conditions related the protection of aquatic habitat, fish populations, wetlands, recreational opportunities, and aesthetics. In its Order Issuing New License, the FERC estimated a total capital cost of \$112,629,390 for the turbine/generator modifications and water quality measures alone.¹⁰ While Cube Yadkin’s current scope of work and budget has been reduced below this amount, the required modifications are significant and allow these QFs to be treated as “new” capacity under PURPA. More specifically, the FERC license requires:

- a. High Rock. The License requires that all three turbine/generator units be refurbished to improve hydraulic efficiency. The dissolved oxygen (“DO”) monitoring equipment below the dam must be upgraded to allow for the transmittal of data in 15-minute increments from the DO monitors to the Dispatch Center. A telemetry system must be installed to provide real-time water quality data to researchers and the public via the web. Turbine aerating technology and cone valves must be installed to provide the maximum water quality improvement. These improvements will increase the total installed capacity from 32.9 MW to 40.32 MW. Cube Yadkin is also replacing the balance of plant at High Rock, including all electrical and mechanical systems such as switchgear, transformers, governors, and protective relays. Modern spill control and containment technology will also be installed. New unit controls and governors will be installed, which will improve plant efficiency. High efficiency transformers and power distribution systems will be installed to reduce plant power consumption.

¹⁰ See *Order Issuing New License* at ¶¶ 38, 43, describing certain of the proposed upgrades, with FERC staff cost estimates in 2007 dollars provided in the Final Environmental Impact Statement for Hydropower Licenses, Yadkin Hydroelectric Project - FERC Project No. 2197-073 at 245, 248.

- b. Tuckertown. The License requires that the three turbine/generator units be refurbished to improve hydraulic efficiency. The License requires the installation of aerating cone valves, DO monitoring equipment below the dam, and a telemetry system to provide real-time water quality data. New cooling systems were installed to improve unit efficiency, as well as provide an improvement in spill containment and control. New unit controls were installed in two units, and the third will be installed next year, to provide improved plant efficiency.
- c. Falls. The License requires that three of the turbine/generator units be refurbished to improve hydraulic efficiency. DO monitoring equipment below the dam must be upgraded and telemetry system developed and installed to provide real-time water quality data.
- d. System control. A new master control system will be developed, allowing operation of all the facilities in a coordinated and optimized way. By operating the plants as a single group instead of individual units, the overall efficiency and generated power will be increased.¹¹
- e. Enhancement of aquatic habitat, fish populations, wetlands, recreational opportunities, and aesthetics. In addition to the modifications and upgrade, the License requires that the operations of the Cube Yadkin QFs (and Narrows) be significantly altered to enhance aquatic habitat, fish populations, wetlands, recreational opportunities, and aesthetics. These requirements are detailed more fully in the License, but specifically include elevation controls and flow regimes to protect “aquatic habitat, fish populations, wetlands, recreational opportunities, and aesthetics.”¹² The License requires that significant recreational facility upgrades, including improvements to several existing recreational sites and construction of new fishing piers, campsites, and a swimming area, be implemented.¹³ The License also requires a number of operational changes and studies to identify and protect endangered species within the project boundaries.¹⁴ Finally, the License requires that an Historic Properties Management Plan intended to protect cultural resources in the vicinity be developed and implemented.¹⁵

¹¹ This includes Narrows, as well as the three QFs.

¹² *Order Issuing New License* at ¶ 32.

¹³ *Id.* at ¶ 47.

¹⁴ *Id.* at ¶ 5.

¹⁵ *Id.* at ¶ 49.

Thus, while the Cube Yadkin QFs have been capable of generating hydroelectricity for decades—in two cases nearly a century—the License effectively restarts the useful life of these facilities as hydroelectric generating facilities by requiring sweeping operational and infrastructure changes, including state-of-the-art turbine/generator units, aeration technology, environmental controls, and resource management protocols, all comparable to those applicable to new facilities. The License includes detailed and specific terms and conditions related to the improvement and operation of the Cube Yadkin QFs for the next thirty-eight (38) years.

9. At Duke's suggestion, reflecting the substantial investment in the modernization and renewal of the Cube Yadkin facilities, Cube Yadkin has sought registration of all four of the Yadkin facilities as New Renewable Energy Facilities. *See* Docket Nos. SP-9172, Sub 0; SP-9172, Sub 1; SP-9172, Sub 2; and EMP-94, Sub 0. These registrations were filed on March 16, 2017, and remain pending as of this date.

10. Unlike solar QFs and some other types of renewables, the Cube Yadkin QFs are available 24 hours a day, can be scheduled during peak periods, and can provide significant value to Duke's transmission systems, particularly in counterbalancing existing, and integrating the expected expansion of, intermittent resources. In addition, as explained subsequently herein, a PPA that included all four of Cube Yadkin's hydroelectric facilities would provide significant value in that they could be made subject to Duke's dispatch control, and Duke could use the energy and capacity during the hours Duke needed them the most. Given the large expected increase in solar generation on the Duke system over the next several years, having the ability to fully dispatch all four Yadkin facilities would provide Duke significant operational flexibility and enable the integration of new solar

resources with the clean, renewable energy generated by the Yadkin facilities. In addition, Duke's downstream hydroelectric facilities, Blewett and Tillery, would benefit from the increased dispatch coordination with the Yadkin facilities.

COUNT ONE: COMPLAINT AND DECLARATORY RULING

11. PURPA was part of a package of legislation called the National Energy Act and was designed to combat a nationwide energy crisis by encouraging conservation of oil and natural gas and promoting the development of alternative energy resources. One of the stated goals of PURPA and its implementing regulations is to "encourage" the development of small power production facilities using renewable fuel sources, such as hydroelectric energy. 16 U.S.C. § 824a-3; *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 405 n.1 (1983).

12. Section 210 of PURPA obligates electric utilities to purchase the energy and capacity of cogeneration facilities and small power production facilities that meet the requirements of PURPA Section 201, which are called qualifying facilities or QFs.

13. PURPA charges the FERC with implementing the mandatory purchase and sell obligations, requiring electric utilities to purchase electric power from, and sell power to, qualifying cogeneration and small power production facilities. *S. Cal. Edison Co. v. FERC*, 443 F.3d 94, 95 (D.C. Cir. 2006) (citing PURPA Section 210(a)(1)-(2), 16 U.S.C. § 824a-3(a)(1)-(2)). State regulatory authorities are, in turn, required to implement PURPA in a way that gives effect to FERC's regulations implementing PURPA. *See* PURPA Section 210(f)(1), 16 U.S.C. § 824a-3(f)(1); *FERC v. Mississippi*, 456 U.S. 742, 751 (1982).

14. The regulations promulgated by FERC allow the QF to elect to sell energy “as available” or to sell “energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term.” 18 C.F.R. § 292.304(d).

15. As the Commission has acknowledged in various orders, FERC wrote the “legally enforceable obligation” concept into its PURPA rules knowing that QF and utility negotiations might not proceed smoothly and that a utility might try to frustrate a QF’s exercise of its PURPA rights. The LEO concept protects the QF in such a situation. The concept was explained by FERC in a PURPA enforcement action, where the FERC wrote:

Thus, under our regulations, a QF has the option to commit itself to sell all or part of its electric output to an electric utility. ***While this may be done through a contract, if the electric utility refuses to sign a contract, the QF may seek state regulatory authority assistance to enforce the PURPA imposed obligation on the electric utility to purchase from the QF, and a non-contractual, but still legally enforceable, obligation will be created pursuant to the state’s implementation of PURPA.*** Accordingly, a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments ***result either in contracts or in noncontractual, but binding, legally enforceable obligations.*** The LEO is based upon the QF’s exercise of its options under PURPA and FERC rules.

J.D. Wind, 129 FERC ¶61,148 (2009), *recon. denied*, 130 FERC ¶61,127 (2010) (emphasis supplied). *See also id.* Order on Arbitration, Docket No. E-2, Sub 966 (EPCOR v. Progress Energy Carolinas) (Jan. 26, 2011), at 8-9.

16. In explaining a QF’s rights under PURPA and its regulations, the FERC has said that QFs are entitled to “long-term avoided cost contracts or other legally enforceable obligations [“LEOs”] with rates determined at the time the obligation is incurred, even if the avoided costs at the time of delivery ultimately differ from those calculated at the time the obligation is originally incurred.” *J.D. Wind 1, LLC*, 130 FERC ¶ 61,127, at para. 23

(2010); *see also Order Setting Avoided Cost Input Parameters*, N.C.U.C. Docket No. E-100, Sub 140 (Dec. 31, 2014) (“*Order Setting Parameters*”) at 19 (acknowledging a QF’s legal right to long-term fixed rates pursuant to Section 210 of PURPA under the *J.D. Wind Orders*).

17. The FERC has not, by regulation or by order, specified a minimum or maximum term for PPAs offered by electric utilities to QFs. However, the FERC has held that QFs are entitled to contracts “long enough to allow QFs reasonable opportunities to attract capital from potential investors.” *Windham Solar LLC & Allco Fin. Ltd.*, 157 FERC ¶ 61,134 at para. 8 (Nov. 22, 2016). In other words, the FERC has made clear that a QF is entitled to a PPA with a duration sufficient to justify investment in the underlying project, an issue of particular concern to Cube Yadkin in acquiring the Yadkin facilities. A long-term PPA at fixed rates is the only practical way to provide sufficient certainty for QFs of the size and scope of the Cube Yadkin QFs.

18. On November 15, 2016, Duke filed its Joint Initial Statement and Proposed Standard Avoided Cost Rate Tariffs of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC with the Commission in Docket No. E-100 Sub 148 (the “2016 Duke Avoided Cost Proposal”). The 2016 Duke Avoided Cost Proposal requested sweeping changes to the methodology by which the electric utilities’ avoided costs are calculated, which would have the impact of dramatically reducing the utilities’ avoided costs, and, therefore, rates offered to QFs.

19. The 2016 Duke Avoided Cost Proposal asserted that DEP and DEC “routinely negotiate PURPA PPAs with larger QFs, mitigating concerns raised in 2014 in the Sub 140 [avoided cost] proceeding” about the difficulty of obtaining a negotiated PPA

with DEP or DEC. 2016 Duke Avoided Cost Proposal at 27. On information and belief, however, Duke is currently declining to enter into long-term PPAs with QFs not eligible for the standard offer and is insisting instead on short, five-year agreements. *See, e.g.*, Hearing Transcript, Vol. 5, Docket No. E-100, Sub 148, at p. 73, lines 20-22 (“Q. And I also heard you to say earlier today that now for the negotiated contracts, Duke is offering not a 10-year term but a five-year term. A. That’s correct.”). *See also id.* at pp. 79-82 (colloquy between Chairman Finley and Witnesses Bowman and Freeman concerning the potential for rash of complaints at the Commission concerning the appropriate length of the term of non-standard purchase agreements to appropriately reflect the need for financial viability of renewable energy projects).

20. The Cube Yadkin QFs have self-certified by filing Form 556s with the FERC on September 28, 2016. Hard copies of the FERC Form 556s were mailed to Duke at its principal place of business in Charlotte (Attn: Customer Owned Generation - Mail Code ST13A, P.O. Box 1010, Charlotte, NC 28201) on October 3, 2016. As a result of the consummation of the purchase of the Cube Yakin QFs, Cube Yadkin is now the owner of the QFs and has updated the FERC Form 556s to reflect its ownership. *See Amended Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility*, Docket Nos. QF16-1309-000, QF16-1310-000, and QF16-1311-000 (March 9, 2018).

21. Each of the Cube Yadkin QFs has a nameplate capacity in excess of the maximum size for which the Commission has approved standard contract terms and conditions. *See, e.g., Order Establishing Standard Rates and Contract Terms for Qualifying Facilities*, N.C.U.C. Docket No. E-100, Sub 140 (Dec. 17, 2015), at Finding of

Fact 1. The QFs must therefore negotiate the terms and conditions of their respective PPAs with Duke.

22. Conversations with Duke concerning the purchase of QF capacity began over a year and a half ago. In fact, Cube Yadkin reached out to Duke in March 2016, prior to signing the purchase agreement with Alcoa, as part of the due diligence process to introduce itself and learn how Duke might approach a long-term PPA. Such an agreement was a critical component of Cube Yadkin's business plan to acquire the Yadkin Project facilities from Alcoa, and it was known and supported by Alcoa. As evidenced by Alcoa's submittal of the Form 556s to establish QF rights, it was understood and agreed by the parties that Alcoa would support Cube Yadkin's efforts to enter into a long-term PPA with Duke to sell energy and capacity.

23. Immediately upon executing the purchase agreement with Alcoa, Cube Yadkin again contacted Duke, which resulted in in-person meetings in early August 2016 to discuss a potential long-term PPA for the QFs. On August 23, 2016, Cube Yadkin contacted Duke via email to follow-up an in-person meeting confirming its plan to certify High Rock, Tuckertown, and Falls as QFs and reiterating its request "to have further discussions with Duke regarding longer-term QF contracts for these facilities." *See* email dated August 23, 2016 from John R. Collins, Executive Vice President and Managing Director – Business Development, Cube Hydro Partners to Regis Repko, Senior Vice President and Chief Fossil/Hydro Officer, Duke Energy (attached as Exhibit 1).

24. Again, on or about September 16, 2016, Cube Yadkin contacted Duke to further discuss Duke purchasing the output of the Cube Yadkin QFs. This discussion was confirmed by Duke in a responsive letter dated September 21, 2016, sent by Duke to Cube

Yadkin in “follow up to our conversation of September 16, 2016, during which [Duke] communicated [its] ... positions in response to your inquiry soliciting Duke’s interest in purchasing the output of the Yadkin system.” *See* Letter dated September 21, 2016 from Michael Keen, Business Development Manager, Duke Energy, to John R. Collins, Executive Vice President and Managing Director – Business Development, Cube Hydro Partners (attached as Exhibit 2). In this letter, Duke states that it has no current need for energy or capacity and that “to the extent Cube Yadkin approached Duke under PURPA, that under PURPA’s requirements, Duke would likely have no obligation to purchase any output of energy or capacity from the Yadkin system units that may be certified as qualified facilities.” *Id.*

25. Subsequently, on October 11, 2016, Cube Yadkin transmitted a letter to Duke updating Duke on the Yadkin facilities self-certification as QFs and responding to its assertions regarding eligibility under PURPA. *See* undated letter from John R. Collins, Executive Vice President and Managing Director – Business Development, Cube Hydro Partners to Michael Keen, Business Development Manager, Duke Energy (attached as Exhibit 3). Cube Yadkin further noted Duke’s obligations under PURPA and the FERC’s regulations to purchase energy and capacity made available from QFs and recommended that the parties meet to discuss any concerns relating to the facilities QF status “at your earliest convenience.” *Id.*

26. In response, by letter dated October 14, 2016, Duke rejected Cube Yadkin’s commitment to sell electrical output under PURPA, stating that “this letter serves as Duke’s formal notice under 292.309/310 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.” See Letter dated October 14, 2014 from Michael Keen, Business Development Manager, Duke Energy, to John R. Collins, Executive Vice President and Managing Director – Business Development, Cube Hydro Partners (attached as Exhibit 4). In this letter, Duke goes on to assert—allegedly as a basis for Duke’s position that it is “exempted” from any purchase obligation under PURPA—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.” *Id.*

27. As evidenced by the exchange of communications between the parties, Duke’s LEO to purchase the output of each of the QFs was established as of September 16, 2016, when Cube Yadkin communicated its commitment to sell the output of the facilities to Duke. At the latest, the LEOs were established as of September 28, 2016 upon the filing of the FERC Form 556s, or October 11, 2016, when Duke received Cube Yadkin’s letter confirming its intention to sell to Duke as QFs. The effectiveness of this October 11th letter to establish the LEOs can be determined from Duke’s letter dated October 14, 2016, which is attached as Exhibit 4, rejecting Cube Yadkin’s commitment to sell its QF output. Although Cube Yadkin had not yet consummated its purchase of the QFs at the time the LEOs were established, it had signed a binding contract to purchase the facilities (with only limited regulatory out clauses), had submitted an application to transfer the FERC license as early as July 25, 2016, and had prepared the self-certification Form 556s that had been filed with the FERC.¹⁶ In any event, the obligation established under

¹⁶ The establishment of a LEO has never been premised upon an ability to deliver power at the time the LEO is created. As has been recognized by the FERC, a QF is entitled to choose avoided costs calculated at the time it incurs the obligation even if those avoided costs differ from the avoided costs at the time of delivery. *Final Rule Regarding the Implementation of Section 210*

PURPA attaches to the facility, not to the owner of the QFs. *See, e.g.*, 16 U.S.C. § 824a-3 (describing obligation of public utilities to purchase electric energy from “facilities”); 18 C.F.R. § 292.303(a) (“Each electric utility shall purchase ... any energy and capacity which is made available from a qualifying *facility*”)(emphasis supplied). And just like other situations in which a developer’s establishment of an LEO has occurred at the financing stage of the project, Cube Yadkin’s commitment to acquire the facilities, and its willingness to make the investment required to upgrade and modernize the facilities required as a condition of the transaction, were predicated on the qualification of the facilities as QFs and the requirement under PURPA that Duke purchase the output of the QFs.

28. Consistent with its “formal notice” to Cube Yadkin of its position that it is not required under PURPA to purchase the output of the Cube Yadkin QFs, Duke has refused to provide proposed contract terms, including pricing, for a long-term QF PPA or to otherwise enter into negotiations for such an agreement. Duke did represent that it would enter into good faith negotiations with Cube Yadkin concerning the purchase of the output of the Yadkin facilities on a non-PURPA basis. The conversations with Duke regarding the “alternative” approach first began as early as November 2016. With hopes of furthering these discussions, Cube Yadkin entered into a letter agreement with Duke dated April 25, 2017, which stated that any such discussions would not be deemed to establish any LEO under or pursuant to PURPA.

of the Public Utility Regulatory Policies Act of 1978, Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880, and *J.D. Wind 1, LLC*, 130 FERC ¶ 61,127, at para. 23 (2010). Thus, the LEO is a necessary precondition to a QF beginning the process by which ultimately energy and capacity can be delivered, whether through the construction of a new facility or, as in this case, the upgrading and modification of existing facilities.

29. Relying on the possibility of an alternative path to a PPA, Cube Yadkin filed the currently pending registration statements in mid-March. This included all four Cube Yadkin hydroelectric facilities because the four together could be made subject to Duke's dispatch control, and Duke could use the energy and capacity during peak periods or as necessary for reliability due to intermittent resources such as solar. Recognizing the benefits of this approach, Cube Yadkin delayed the enforcement of its rights as a QF because it was waiting, in good faith, on Duke to engage in the alternative approach. While Duke continued to assure Cube Yadkin that an offer was forthcoming, Duke did not provide an offer until August 10, 2017, nearly four months after the parties entered into the letter agreement and six months after the parties has agreed in principle on the approach. Duke's conduct since the beginning of the discussions between the parties appears to have been designed to discourage Cube Yadkin from pursuing its rights under PURPA.

30. Duke's claim that it is "exempted" from any purchase obligation under PURPA because "Cube Yadkin has sought, and Alcoa currently has, market-based rate authority" is without legal basis. First, the FERC's grant of market-based authority does not have any bearing on QF status and is not tied to any history or ability to sell into competitive markets; rather it is based solely on Cube Yadkin's lack of market power under the applicable FERC regulations. Cube Yadkin is required under federal law to have market-based rate authority, even if it obtains PURPA contracts with Duke, because the three QFs are over the 30 MW threshold for the QF exemption from federal rate regulation. Second, Duke has not sought from the FERC, and certainly has not been granted, an exemption from its obligations under PURPA to purchase from the Cube Yadkin QFs and, therefore, is legally required to enter into a contractual arrangement with Cube Yadkin.

31. As shown above, each of the Cube Yadkin QFs had established a LEO prior to Duke's filing of the 2016 Duke Avoided Cost Proposal with the Commission and is entitled to enter into long-term PPAs with Duke for the purchase of the output of the QFs at Duke avoided cost calculated in accordance with the *Order Setting Parameters*.¹⁷

32. Section 62-156 of the North Carolina General Statutes provides that, in the event that a small power producer and an electric utility are unable to mutually agree to a contract for the sale of electricity or to a price for the electricity purchased by the electric utility, the Commission shall require the utility to purchase the power at a rate and on terms specified in the statute.

33. On July 27, 2017, House Bill 589 (N.C. Session Law 2017-192) was signed into law. Part I of this legislation makes certain revisions to the definition of "small power producer" under G.S. § 62-3(27a) to bring that definition in line with the federal definition and to G.S. § 62-156 governing a utility's obligation to purchase power from small power producers. These statutory revisions, however, are not applicable to the Cube Yadkin QFs as Duke's obligation is effective as of the establishment of the LEO, which predates the new legislation. *See, e.g.*, 18 C.F.R. § 292.304(d)(ii); *Order Setting Parameters*, at 19

¹⁷ As discussed in the introduction to this complaint, the formal LEO process established by the Commission in prior cases is simply not applicable to the facts and circumstances here, which include hydroelectric facilities constructed prior to the enactment of the statutory obligation to secure a CPCN pursuant to G.S. § 62-110.1 that have had long-standing relationships with the electric utilities in question seeking to invoke their rights under PURPA. The Commission's recently-articulated LEO test—which requires that a QF (1) be certified as a QF, (2) have a CPCN (or have filed a report of proposed construction), and (3) have provided to the utility a Notice of Commitment form—has no applicability to the instant situation involving QFs that predate the statutory certification processes. Because this formal LEO process does not by its own terms apply to the Cube Yadkin QFs, its applicability should be waived if the Commission were to determine that it was otherwise applicable to Cube Yadkin, given that Cube Yadkin could not have known that in advance. In any event, Cube Yadkin substantially complied with the substance of the requirement in its communications with appropriate personnel at Duke.

(acknowledging a QF's legal right to long-term fixed rates under Section 210 of PURPA under *J.D. Wind Orders*).

34. Section 62-73 of the North Carolina General Statutes empowers this Commission to hear complaints against public utilities brought “by any person having an interest, either direct or as a representative of any persons having a direct interest in the subject matter of such complaint.”

35. In addition to the Commission's complaint authority pursuant to N.C. Gen. Stat. § 62-73, the North Carolina Declaratory Judgment Act, N.C. Gen. Stat. § 1-253, empowers courts of record to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. Such declarations shall have the force and effect of a final judgment or decree. Pursuant to N.C. Gen. Stat. § 62-60, the Commission may exercise this power under the Declaratory Judgment Act with respect to all subjects over which the Commission has jurisdiction.

COUNT TWO: PETITION FOR ARBITRATION

36. The allegations contained in paragraphs 1 – 35 of this Complaint are realleged and incorporated by reference.

37. Cube wishes to enter into a PPA with Duke to sell energy and capacity from the Cube Yadkin QFs at rates that reflect Duke's avoided cost as of the date of the respective LEOs. Duke has refused to negotiate the terms of long-term QF PPAs.

38. The issues to be resolved in this arbitration are: (1) whether Duke has negotiated freely, openly, and in good faith with respect to entering into new long-term PPAs for the output of the Cube Yadkin QFs with a term of not less than ten years, as required by PURPA, and (2) whether Duke has negotiated freely, openly, and in good faith

with respect to payment to Cube Yadkin of its full avoided costs, including both capacity and energy components, also as required by PURPA.

39. Pursuant to N.C. Gen. Stat. § 62-40 and the orders of the Commission in the avoided costs proceedings, Complainant requests that the Commission act as arbitrator and resolve the unresolved issues arising from the negotiations, including Duke's actual avoided costs, including both capacity and energy components. Cube Yadkin seeks ten-year PPAs and, therefore, meets the two-year commitment of capacity requirement for the Commission to conduct such an arbitration.

40. Complainant requests that the Commission require Duke to: (1) enter into long-term PPAs for the output of the three Cube Yadkin QFs and (2) provide payment pursuant to these new long-term PPA of Duke's full avoided costs, including both capacity and energy components, as of the date of the establishment Cube Yadkin's LEOs.

RELIEF REQUESTED

WHEREFORE, Complainant respectfully requests that the Commission grant the following relief:

1. Treat this matter as a formal Complaint against DEP and DEC pursuant to Section 62-73 of the North Carolina General Statutes and the Commission Rules of Practice and Procedure, and as a request for a declaratory judgment pursuant to Section 1-253 of the North Carolina General Statutes;

2. Declare that DEP and DEC are legally obligated to purchase the output of the Cube Yadkin QFs under PURPA, that the legally enforceable obligations arose as of September 16, 2016 (or, at the latest, October 11, 2016), that the formal processes adopted by the Commission in its avoided cost orders respecting the establishment of a LEO were

not intended to and do not apply to the Cube Yadkin QFs, and that the Cube Yadkin QFs are entitled to avoided cost rates established in accordance with the Commission's Order Establishing Avoided Cost Rates for DEC and DEP issued March 10, 2016, in Docket No. E-100, Sub 140;

3. Issue an Order directing DEP and/or DEC to enter into a PPA with each Cube Yadkin QF incorporating fixed, levelized avoided cost rates for energy and capacity and with a contract term of sufficient length that the investment in the underlying QF projects is justified, not less than ten years;

4. Arbitrate the unresolved issues consistent with the position of the Complainant as set forth herein;

5. Set this matter on an expedited procedural schedule; and

6. Grant such other and further relief as this Commission may find just and reasonable.

Respectfully submitted, this 29th day of March, 2018.



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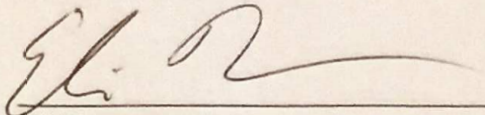
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Attorneys for Cube Yadkin Generation LLC

VERIFICATION

The undersigned, being first duly sworn, deposes and says that he is the Secretary of Cube Yadkin Generation LLC. He furthers states that he has read the foregoing Complaint, Request for Declaratory Ruling, and Request for Arbitration ("Complaint") and that, to his personal knowledge and belief, the matters and statements contained therein are true, except as to those matters or statements made upon information and belief, and as to those, he believes them to be true; and that he verifies the foregoing Complaint on behalf of Complainant.

This the 28th day of March, 2018.


Eli Hopson

Sworn to and subscribed before me
this 28th day of March, 2018.
Notary Public
My Commission Expires: 11-14-2018



EXHIBIT 1

From: John Collins
Sent: Tuesday, August 23, 2016 9:50 AM
To: regis.repko@duke-energy.com
Cc: Kristina Johnson <kjohnson@cubehydro.com>
Subject: Follow-up to Our Meeting

Regis,

I hope this email finds you well and enjoying the end of summer. I am emailing to follow-up on our discussions regarding the Yadkin hydroelectric assets that Cube Hydro is purchasing from Alcoa. As we discussed in our meeting, we plan of registering 3 of the assets, High Rock, Tuckertown and Falls, as Qualifying Facilities and would like to have further discussions with Duke regarding longer-term QF contracts for these facilities. In addition, we discussed the possibility of a long-term PPA arrangement for all four facilities including the Narrows plant with Duke that could provide additional flexibility for Duke to manage its grid due to the continuing impact of solar generation on the Duke network.

As a follow-up to the meeting you were going to put us in contact with the appropriate team members at Duke to begin discussions. I wanted to let you know that Kristian and I plan to be in North Carolina next Thursday, September 1st, and have some availability to meet with your team if their schedules permit.

Let me know if that will work or who we should contact to begin further discussion related to long-term PPAs for the Yadkin hydroelectric plants.

Look forward to hearing from you.

Regards,

John

John R. Collins
Executive Vice President and Managing Director – Business Development
Cube Hydro Partners
Two Bethesda Metro Center, Suite 1330
Bethesda, MD 20814
(240) 482-2703 (Work)
jcollins@cubehydro.com

EXHIBIT 2



September 21, 2016

Cube Hydro Partners
Two Bethesda Metro Center, Suite 1330
Bethesda, MD 20814

Attn: John R. Collins
Executive Vice President and Managing Director – Business Development

Re: Inquiry concerning sale of output of Yadkin system to Duke Energy

Dear John:

This letter is a follow up to our conversation of September 16, 2016 during which I communicated to you Duke Energy Progress, LLC and Duke Energy Carolinas, LLC's (collectively/individually, "Duke") positions in response to your inquiry soliciting Duke's interest in purchasing the output of the Yadkin system. The "Yadkin System" consists of four hydro-electric units as follows: High Rock Station, approximately 33 MW; Tuckertown Station, approximately 39 MW; Falls Station, approximately 30 MW; and Narrows Station, approximately 119 MW.

The Yadkin system is currently owned and operated by Alcoa Inc., and is the subject of a potential purchase by Cube Yadkin Generation, LLC ("Cube Yadkin"). You informed me that Cube Yadkin does not currently own or operate the Yadkin system, but anticipates that it will close on the transaction to own and operate the facilities around November 1, 2016. As I communicated to you previously, Duke does not have any current needs for energy or capacity; however, if a need arises in the future, Duke would likely issue a request for proposals and Cube Yadkin can elect to submit a responsive bid. You further informed me that Cube Yadkin is considering certifying the three smaller units as qualifying facilities under the Public Utility Regulatory Policies Act of 1978 ("PURPA"). In that regard, I informed you that to the extent Cube Yadkin approached Duke under PURPA, that under PURPA's requirements, Duke would likely have no obligation to purchase any output of energy or capacity from the Yadkin system units that may be certified as qualified facilities.

Please feel free to contact me with any questions.

Sincerely,

Michael Keen
Business Development Manager
Duke Energy

EXHIBIT 3



Michael Keen
Business Development Manager
Duke Energy
299 First Avenue North
St. Petersburg, FL 33701

Dear Michael,

I am writing in response to your letter dated September 21, 2016 (the “September 21 Letter”) regarding the discussions between Duke Energy Progress, LLC and Duke Energy Carolinas, LLC (individually and together, “Duke”), and Cube Hydro Partners, LLC (“Cube Hydro”) with respect to the four hydroelectric projects on the Yadkin River (collectively, the “Yadkin Projects”) that are currently owned by Alcoa Power Generating Inc. (“Alcoa”).

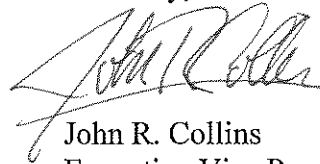
As we discussed, Cube Hydro Carolinas LLC, an affiliate of Cube Hydro, has agreed to acquire the Yadkin Projects from Alcoa. The acquisition is anticipated to occur before the end of 2016. Alcoa has certified three of the four Yadkin Projects – the approximately 30 MW Falls project, the approximately 40 MW Tuckertown project, and the approximately 34 MW High Rock project – as qualifying small power production facilities (“QFs”) under the Public Utility Regulatory Policies Act of 1978 (“PURPA”) and the implementing regulations of the Federal Energy Regulatory Commission (“FERC”).

As you may know, Section 210(m) of PURPA and FERC’s regulations require electric utilities, including Duke, to purchase energy and capacity made available from QFs. *See* 16 U.S.C. § 824a-3(a)(2) (2012); 18 C.F.R. § 292.303(a) (2016). FERC’s regulations further specify that a QF shall have the option of making sales to an electric utility pursuant to a legally enforceable obligation, or on an “as available” basis. *See* 18 C.F.R. § 292.304(d) (2016).

Given that three of the Yadkin Projects are now QFs, we recommend that we meet to discuss your concerns at your earliest convenience. We are happy to come to your offices in late October or early November to discuss the process for making sales from these projects to Duke pursuant to PURPA. We would anticipate that such discussions would, among other things, address the statement in the September 21 Letter that, “under PURPA’s requirements, Duke would likely have no obligation to purchase any output of energy or capacity from the Yadkin system units that may be certified as [QFs].” While electric utilities may petition FERC to be relieved of their mandatory purchase obligations under PURPA, it does not appear that FERC has issued an order relieving Duke of such obligations, or that there are any other applicable exceptions or exemptions.

Thank you for your attention to this matter. We'll be contacting your office to find a mutually agreeable date to meet at your offices.

Sincerely,



John R. Collins
Executive Vice President and
Managing Director – Business
Development

Cc: Kristina Johnson
Dhiala M. Jamil

EXHIBIT 4



October 14, 2016

Via Email and Priority Mail

Mr. John R. Collins
Executive Vice President and Managing Director – Business Development
Cube Hydro Partners, LLC
Two Bethesda Metro Center, Suite 1330
Bethesda, MD 20814

Re: Response to Undated Cube Hydro Letter Received October 11, 2016

Dear John:

This letter is a follow up to your undated letter to Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (“Duke”) which was received on October 11, 2016 (the “Cube letter”).

In the Cube letter you inform Duke, as Cube Hydro Partners LLC, on behalf of Cube Hydro Carolinas, LLC (collectively, “Cube Hydro”), that Alcoa Power Generation, Inc. (“Alcoa”) has certified three out of four units of the Yadkin system as qualifying facilities under PURPA. The “Yadkin system” consists of four hydro-electric units, as follows: High Rock Station, approximately 33 MW; Tuckertown Station, approximately 39 MW; Falls Station, approximately 30 MWs; and, Narrows Station, approximately 119 MW. 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 292.309/310 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 this matter further.

Sincerely,

Michael Keen
Business Developer Manager, Duke Energy