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May 1, 2019

Ms. Lynn Jarvis
Chief Clerk
North Carolina Utilities Commission
430 N. Salisbury Street
Raleigh, NC 27603

RE: ***Petition of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC, Requesting Approval of Green Source Advantage Program and Rider GSA to Implement G.S. 62-159.2***
NCUC DOCKET NO. E-2, Sub 1170 and E-7, Sub 1169

Dear Ms. Jarvis:

On behalf of the North Carolina Clean Energy Business Alliance ("NCCEBA"), we hereby submit **NCCEBA's Motion for Reconsideration** in the above-referenced docket.

If you have any questions or comments regarding this filing, please do not hesitate to call me.

Thank you in advance for your assistance.

Very truly yours,

/s/Karen M. Kemerait
CC: All Parties of Record

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1170
DOCKET NO. E-7, SUB 1169

In the Matter of: **Petition of Duke Energy Progress, LLC, and Duke Energy Carolinas, LLC, Requesting Approval of Green Source Advantage Program and Rider GSA to Implement G.S. 62-159.2**	**MOTION FOR RECONSIDERATION OF THE NORTH CAROLINA CLEAN ENERGY BUSINESS ALLIANCE**

NOW COMES the North Carolina Clean Energy Business Alliance ("NCCEBA"), pursuant to N.C. Gen. Stat. § 62-80 and Commission Rule R1-7, and moves that the Commission reconsider and amend its February 1, 2019 *Order Modifying and Approving Green Source Advantage Program, Requiring Compliance Filing, and Allowing Comments* ("GSA Order") with respect to Duke participation in the GSA Program as a GSA Renewable Supplier. Specifically, NCCEBA respectfully submits that the Commission's ruling in the GSA Order allowing Duke to receive cost-of-service based, rather than "market-based," cost recovery after the term of a GSA Service Agreement between Duke and a GSA Participating Customer ("Post-Term Cost Recovery") was made based on a misapprehension of critical information regarding the context and consequences of that decision.

In its original filing in this proceeding,[1] Duke did not seek market-based Post-Term Cost Recovery as an alternative to cost-of-service based Post-Term Cost Recovery. Duke no doubt properly recognized that, for the reasons discussed below, cost-of-service based Post-Term Cost Recovery is completely inappropriate and unjust. Rather, Duke was doing exactly what it did in connection with the Commission's CPRE rulemaking, which was to seek assurance from the Commission that Duke is not required to recover all of its facility costs and return on equity during the term of the GSA Service Agreement. Such a requirement would make it difficult for Duke to compete with independent renewable suppliers, who do not typically seek to recover all of their costs and return on equity during a twenty-year period. Moreover, the Commission failed to recognize that its decision to allow Duke to participate in the GSA Program as a GSA Renewable Supplier already involves market-based cost recovery by Duke during the term of the GSA Service Agreement and that extending such market-based cost recovery beyond such term is thus not "extraordinary" (as found by the Commission). The Commission also failed to recognize that allowing Duke to recover its unamortized facility costs after the term of the GSA Service Agreement on a cost-of-service basis would provide Duke with a major, unfair advantage in competing with independent renewable suppliers for the business of prospective GSA Participating Customers.[2]

NCCEBA therefore requests that, if Duke is permitted to participate in the GSA Program as a GSA Renewable Supplier, the Commission amend the GSA Order to allow

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[1] NCUC Docket Nos. E-2 Sub 1170 and E-7 Sub 1169, *Duke Energy Carolinas, LLC's and Duke Energy Progress, LLC's Petition for Approval of Green Source Advantage Program and Rider GSA to Implement N.C. Gen. Stat. § 62-159.2* at 28 (Jan. 23, 2018) ("GSA Application").

[2] There might have been less confusion around this issue if Duke had more clearly explained its request in its GSA Program filing. But Duke clearly sought not to call attention to the issue of its participation as a GSA Renewable Supplier, which was only mentioned in a footnote and in a passing reference to Post-Term Cost Recovery.

Duke to continue market-based Post-Term Cost Recovery and not to allow the cost-of-service based recovery now sought by Duke. If the Commission is unwilling to take this action, NCCEBA requests in the alternative that the Commission prohibit Duke from participating in the GSA Program as a GSA Renewable Supplier to prevent the grossly unjust result that would occur if Duke is allowed to recover any portion of the cost it incurs to construct GSA Program facilities on a cost-of-service basis.

PROCEDURAL HISTORY

On February 1, 2019 the Commission issued the GSA Order in this proceeding.[3] In the GSA Order, the Commission denied Duke's request – made in Duke's initial January 23, 2018 GSA Application – that it be allowed to recover the costs of a Duke-owned GSA Facility after the expiration of the GSA Agreement through market-based revenues, "similar to the market-based recovery mechanism contemplated for CPRE assets under N.C. Gen. Stat. § 62-110.8(g)."[4] The Commission stated that it had not found compelling justification to permit Duke to receive market-based cost recovery for the GSA Facility, rather than traditional cost-of-service based recovery, after the conclusion of initial GSA Service Agreement.[5]

On March 18, 2019, Duke submitted its *Compliance Filing* with the Commission ("Duke Compliance Filing") as required by the GSA Order. In Duke's Compliance Filing, Duke stated that the GSA Order established a "reasonable expectation that any Duke-owned GSA facilities will be entitled to cost of service-based recovery on the

[3] The GSA Order followed multiple rounds of comments and reply comments by intervenors to this proceeding and Duke in response to Duke's GSA Application, a September 4, 2018 Oral Argument, and multiple post-oral argument filings by intervenors and Duke.
[4] GSA Application at 28.
[5] GSA Order at 63.

remaining Net Book Value of such assets post-term," but also requested clarification from the Commission's regarding "how the Companies should plan to recover the cost of Duke-owned GSA facilities after the term of the GSA Program PPA expires."[6]

On April 8, 2019, the Public Staff, North Carolina Sustainable Energy Association ("NCSEA"), Southern Alliance for Clean Energy ("SACE") and NCCEBA filed reply comments in response to the Duke Compliance Filing. NCCEBA's April 8, 2019 Comments on Duke's Compliance Filing emphasized that Duke would receive an unfair competitive advantage over third-part GSA Renewable Suppliers if Duke was permitted to receive cost-of-service based recovery after the GSA Service Agreement.[7] NCCEBA requested that the Commission clarify or reconsider its GSA Order relating to cost recovery for Duke-owned GSA Facilities.[8]

On April 18, 2019, Duke filed its *Compliance Filing Reply Comments* in response to parties' reply comments. In its Compliance Filing Reply Comments, Duke again referenced the Commission's holding in the GSA Order and then provided a description of how Duke would plan to include post-GSA Service Agreement costs in the rate base.[9] Duke concluded by again requesting confirmation from the Commission that "some form of post-term recovery of costs will be allowed, either under the default cost-of-service-

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[6] NCUC Docket Nos. E-2 Sub 1170 and E-7 Sub 1169, *Duke Energy Carolinas, LLC's and Duke Energy Progress, LLC's Green Source Advantage Program Compliance Filing Reply Comments* at 20-21. ("Duke Compliance Filing Reply Comments").

[7] NCUC Docket Nos. E-2 Sub 1170 and E-7 Sub 1169, *Comments of the North Carolina Clean Energy Business Alliance* at 3-8 (April 8, 2019) ("NCCEBA Compliance Filing Comments").

[8] *Id.* Since the issue has been raised as to whether a motion for reconsideration can properly be made in the context of the reply comments called for by the Commission in the GSA Order, NCCEBA is separately making this motion pursuant to G.S. § 62-80, as it is clearly entitled to do.

[9] Duke Compliance Filing Reply Comments at 12.

based cost recovery construct referenced in the Order, or through provision of market-based revenues similar to non-utility GSA Facility Owners."[10]

ARGUMENT

I. THE COMMISSION SHOULD AMEND ITS GSA ORDER TO ALLOW ANY DUKE-OWNED GSA FACILITIES TO EARN ADDITIONAL MARKET-BASED COST RECOVERY, RATHER THAN COST-OF-SERVICE-BASED COST RECOVERY, AFTER THE EXPIRATION OF THE GSA SERVICE AGREEMENT.

A. Background Issues

1. Defining Market-Based Cost Recovery

At the outset, it is necessary to discuss two important concepts that have received scant attention in this proceeding despite the hundreds of pages of filed documents. The first is the meaning and significance of "market-based" based cost recovery. As the Commission is well aware and pointed out in the GSA Order, Duke and other investor-owned utilities typically recover their costs and a return on equity through cost-of-service ratemaking. Under this approach, the utility receives Commission approval to build a generation facility and recovers from ratepayers the cost of building that facility and a Commission-approved return on equity, amortized over a fixed period corresponding approximately to the expected useful life of the facility. While standard practice in the world of monopoly utilities, this approach to compensating private enterprises is what is unusual in our market-based economy. Most businesses must recover their costs through the price they are able to secure from customers in a competitive market. Monopoly utilities, on the other hand, in exchange for agreeing to provide electric service in the

[10] This request by Duke underscores that the purpose of its original request was to confirm its ability to obtain Post-Term Cost Recovery in some form, not to seek one form of cost recovery over another, and that Duke continues to view market-based Post-Term Cost Recovery as appropriate. Indeed, no party to this proceeding has ever opposed market-based Post-Term Cost Recovery.

public interest, are insulated from price competition and are guaranteed by the government the return of, and on, their investments.

In contrast to monopolistic cost-of-service ratemaking as a means of cost recovery, market-based cost recovery requires the utility to compete with other suppliers for the right to build generating facilities by offering a price that the utility will accept over a period of time in exchange for furnishing generation supply. In this scenario, the utility is not guaranteed return of, and on, equity from its ratepayers but instead, like independent power producers, only receives its offered price.

In the context of an ongoing system of regulated monopolies, there are two ways in which the monopoly utility may act as a market participant. The first is a competitive solicitation program such as CPRE in which the utility is allowed to compete as a market participant to build generation and furnish power to itself. For such a program to be successful, the utility must participate on a level playing field with other market participants and recover its costs in the same way – i.e., by receiving a bid price over a defined term. Recognizing this fact, the General Assembly expressly authorized Duke to recover the costs of self-owned facilities receiving CPRE awards "on a market basis in lieu of cost-of-service based recover[y.]" G.S. § 62-110.8(g).[11]

The second way in which a monopoly utility can act as a market participant is in the case of programs, such as GSA and community solar, that allow captive customers of the utility to choose a renewable energy supplier who will sell renewable energy to the utility on behalf of the customer so that it can claim the exclusive right to the

[11] It is important to note that this "market-based" cost recovery is essential to the utility being able to fully monetize the federal investment tax credit and thus compete effectively with independent power producers.

environmental attributes, including Renewable Energy Certificates, generated by the supplier's facility. In this scenario, the utility may be allowed to compete with independent power producers to be the customer's renewable supplier under the program, which necessarily requires the utility to offer the customer a contract price over a period of years. Just as in the case of a competitive solicitation program like CPRE, a utility that wishes to engage in this type of competition must do so on a level playing field, meaning that it must be compensated in the same way as other market participants – by recovering its costs through its negotiated contract price.

In the case of the renewable energy procurement program for large customers that has become GSA, established by G.S. § 62-159.2, and the community solar program established by § 62-126.8, the General Assembly did not expressly provide for the market-based cost recovery that is an essential requirement of utility participation in such a program as a competitive market participant. However, NCCEBA submits that there are only two potentially appropriate paths for the Commission in this situation: either allow the utility to participate and recover its costs on a market-basis, or not allow the utility to participate at all. What is patently unacceptable, discriminatory, and unsound policy would be to allow the utility to participate as a market participant but to recover its costs in an unfair and uncompetitive way through cost-of-service ratemaking. Neither Duke, the Public Staff, nor the Commission has suggested that Duke be allowed to recover the costs of a Duke-owned GSA facility through cost-of-service ratemaking during the term of the GSA Service Agreement for the facility, and any discussion of cost-of-service-based recovery by parties in this proceeding came only after the GSA Order.

2. Cost Recovery Mechanism and Cash Flows Where Duke Serves as the GSA Renewable Supplier

The second concept that requires elaboration in order to put this motion in context is the detailed mechanism for Duke's cost recovery if it is allowed to participate in the GSA Program as a GSA Renewable Supplier. Surprisingly, prior to Duke's compliance filing, it had provided no discussion of this important topic, and there is no discussion of the issue in the GSA Order. The issue is further complicated by the extraordinarily complex and counterintuitive cash flow arrangements that Duke has proposed, and the Commission has now approved, for third-party GSA Renewable Suppliers. It would be helpful to start with a description of those.

Based on the plain language of the GSA Statute, one would have thought the cash flows would be relatively simple: (1) the GSA Participating Customer continues to pay its "normal retail bill"; (2) the GSA Participating Customer also pays "the cost of the renewable energy and capacity procured by or provided by the utility for the benefit of the program customer" (which in the case of a third-party supplier would be a GSA Product Charge equal to the PPA price negotiated by the customer and the supplier and to be paid by the utility to the supplier); and (3) the GSA Participating Customer receives a Bill Credit in recognition of the fact that (1) and (2) would otherwise constitute double payment by the customer. *See* G.S. § 62-159.2(e).

However, rather than implementing this straightforward arrangement prescribed by statute, Duke proposed, and the Commission has now approved, the following much more complex arrangement: (1) the GSA Participating Customer continues to pay its "normal retail bill"; (2) the GSA Participating Customer also pays the GSA Product Charge equal to the negotiated PPA price to the utility, but rather than the utility paying

the negotiated PPA price to the supplier, the customer is required to assign its right to receive the Bill Credit to the supplier (which becomes the PPA purchase price); and (3) the supplier is required to assign its right to receive the PPA purchase price (equal to the Bill Credit) to the customer.

Although Duke never explained its purpose in constructing this tortured and counterintuitive arrangement, that purpose has now become clear – it insulates Duke from any risk of default by the GSA Participating Customer because the GSA Renewable Supplier is never entitled to receive more from Duke than the Bill Credit, which is intended to equal Duke's avoided cost. NCCEBA does not seek in this motion to have this arrangement revisited, but NCCEBA does observe that it is difficult to reconcile with the plain and simple wording of the GSA Statute.

NCCEBA also notes a significant complication flowing from this arrangement. Under the straightforward cash-flow arrangement described above, there is no need for a separate compensation agreement between the GSA Participating Customer and the GSA Renewable Supplier (and none was contemplated by the GSA Statute). Where the negotiated PPA price exceeds the Bill Credit, the customer would see an increase in the total it pays to Duke for electric service. Conversely, where the negotiated PPA price is less than the Bill Credit, the GSA Participating Customer would see a decrease in the total it pays to Duke for electric service. Under Duke's alternative arrangement, the only way to account for the potential increase or decrease in the customer's cost of service is through a side agreement between the GSA Participating Customer and the GSA Renewable Supplier, under which the customer pays the supplier any positive difference between the PPA price and the Bill Credit and the supplier pays the customer for any

negative difference between the PPA price and the Bill Credit. This creates additional administrative burdens for both the GSA Participating Customer and the GSA Renewable Supplier and requires them to negotiate and underwrite credit risk and performance security with respect to these obligations.[12]

Turning to the cash-flow arrangement when Duke acts as a GSA Renewable Supplier, NCCEBA can only make inferences regarding Duke's planned implementation because these arrangements have nowhere been explained by Duke (including in its compliance filing and compliance filing reply comments). Since Duke has no reason to complicate the transaction where it is the GSA Renewable Supplier, it may intend to follow the simple cash-flow arrangement contemplated by the GSA Statute, which would look like this:

(1) the GSA Participating Customer continues to pay its "normal retail bill";

(2) the GSA Participating Customer also pays Duke a GSA Product Charge negotiated between it and Duke (since Duke cannot have a PPA with itself); and

(3) the GSA Participating Customer receives a Bill Credit from Duke.

On the other hand, if Duke envisions an arrangement that approximates what it has envisioned for third-party suppliers, it might look like this:

(1) the GSA Participating Customer continues to pay its "normal retail bill";

(2) the GSA Participating Customer also pays the negotiated GSA Product Charge to Duke, but Duke assigns that amount back to the customer (resulting in a wash for the customer);

(3) the GSA Participating Customer is required to assign its right to receive the Bill Credit to Duke (resulting in no Bill Credit Payment to the customer); and

(4) there is an additional arrangement between Duke and the customer with respect to the delta between the Bill Credit and the Product Charge.

[12] Duke's approach also eviscerates one of the fundamental elements of the GSA Program as created by the General Assembly – a PPA price negotiated by the GSA Participating Customer and the GSA Renewable Supplier.

While NCCEBA believes that it is a significant and problematic omission for this arrangement not to have been clearly defined in Duke's filings and approved by the Commission, the purpose of this motion is not to seek that relief. Rather, the purpose of the foregoing discussion is to illustrate that under either arrangement, the cost recovery that Duke will receive for a facility it places in the GSA Program during the term of its agreement(s) with the GSA Participating Customer will be market-based, in accordance with Duke's competitive negotiation with prospective GSA customers, and not based on cost-of-service principles. Neither Duke, the Public Staff, nor the Commission has suggested otherwise.

B. <u>If Duke is Permitted to Participate in the GSA Program as a GSA Supplier, Market-Based Cost Recovery After the Expiration of the GSA Service Agreement is Appropriate and Necessary</u>.

In the GSA Order, the Commission responded to Duke's request made in its initial GSA Application[13] that Duke be permitted to receive market-based Post-Term Cost Recovery.[14] In light of the foregoing discussion, this should have been a straightforward and non-controversial request. If Duke participates in the GSA Program as a GSA Renewable Supplier, that necessarily means that Duke will <u>not</u> recover the cost of any facilities it develops to serve GSA Participating Customers through traditional cost-of-service ratemaking. Rather, Duke would enter into a GSA Service Agreement under which its cost recovery of the GSA Facility during the GSA Service Agreement would take one of two forms: either (i) the GSA Participating Customer would pay Duke a negotiated GSA Product Charge, or (ii) Duke would be assigned the Bill Credit by the

[13] GSA Application at 28.
[14] GSA Order at 63.

GSA Participating Customer with an increment or decrement based on the relationship between the Bill Credit and the Product Charge.[15] Since Duke's cost recovery for its investment in the GSA facility would be in the form of either the GSA Product Charge or the Bill Credit plus the increment or decrement over the life of the GSA Service Agreement, Duke would not receive cost-recovery for its investment in a traditional manner during the term of the GSA Service Agreement, but would do so on a market basis. Indeed, Duke would only be able to build the facility if it successfully competed in the market with other suppliers and, by offering a competitive GSA Product Charge to the customer, was able to persuade the customer to transact with Duke rather than with an alternative supplier. The recovery of its cost of building and operating the facility would be solely in the form of the price negotiated with the customer, not an amount set by the Commission. This is the essence of market-based cost recovery.

Given Duke's market-based cost recovery during the term of the GSA Service Agreement, there is nothing extraordinary about continuing market-based recovery after that term. Yet the Commission rejected Duke's request, stating that

> [t]he Commission understands that Duke's proposed market-based recovery follows naturally from Duke's misplaced view that the CPRE Program and the GSA Program are integrally linked. For reasons discussed above, the Commission does not agree with the view that the two programs should be linked in the way Duke proposed. The Commission also disagrees that Duke's proposal for market-based recovery beyond the term of the GSA agreement should be approved. The recovery allowed under N.C.G.S. § 62-110.8(g) is extraordinary in the context of the economic regulation of public service companies, which are generally entitled to recover the costs of service, plus a reasonable return on capital invested to serve the utility's customers. The Commission finds

[15] This arrangement corresponds with the discussion above regarding the cash flow mechanisms Duke has established in this proceeding. This arrangement is separate from Duke's recovery of the GSA Bill Credit from non-participating customers under the fuel clause, which would take place regardless of whether Duke was participating as a GSA Renewable Supplier.

> no compelling justification for departing from the general rule in this case.[16]

As an initial matter, it is not correct that Duke's proposed market-based recovery was a function of its attempt to link the GSA program with CPRE. On the contrary, the proposal has nothing to do with that linkage and everything to do with the market-based cost recovery that is a necessary feature of Duke's participation in the GSA Program as a GSA Renewable Supplier. Or to put it differently, allowing Duke market-based Post-Term Cost Recovery in no way links the GSA Program to CPRE or runs afoul of the Commission's justifications in its GSA Order for keeping separate the CPRE and GSA procurement programs.[17]

As noted, the Commission went on to say that "[t]he recovery allowed under N.C.G.S. § 62-110.8(g) is extraordinary in the context of the economic regulation of public service companies, which are generally entitled to recover the costs of service, plus a reasonable return on capital invested to serve the utility's customers. The Commission finds no compelling justification for departing from the general rule in this case."[18] As explained above, the Commission failed to recognize that Duke's participation in the GSA Program as a GSA Renewable Supplier already involves market-based cost recovery during the term of the GSA Service Agreement. There is therefore nothing extraordinary about extending such market-based cost recovery beyond

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[16] GSA Order at 44.

[17] The Commission's decision in the GSA Order not to link the CPRE program to the GSA program for purposes of GSA Facility procurement was based primarily on the finding that CPRE and GSA linkage would be (1) difficult to administer for practical and administrative reasons related to the timing of the CPRE RFP Solicitations; (2) unnecessary given the structure of the GSA Program set out in the GSA Statute; and (3) unjustified by the provisions that reallocate unused GSA Program capacity to the CPRE Program at the end of the 5-year GSA Program.

[18] GSA Order at 44.

that term. On the contrary, it would be extraordinary, as well as unfair and anticompetitive, not to do so.

As noted above, under the CPRE program, the General Assembly expressly permitted Duke to recover revenue for any Duke-owned renewable energy facilities on a market basis in lieu of cost-of-service based recovery.[19] The market basis in the case of CPRE is the applicable competitive procurement bid pricing. In the context of GSA, if Duke participates as a GSA Renewable Supplier, Duke would similarly enter the market to negotiate a GSA Product Charge price with a GSA Participating Customer, in competition with other potential GSA Renewable Suppliers. Duke would recover the cost of the GSA Facility during the term of the GSA Agreement solely through the GSA Product Charge (or the assigned Bill Credit plus an increment or decrement based on the relationship of the Bill Credit to the Product Charge) from the GSA Participating Customer.[20]

This cost-recovery structure during the term of the GSA Service Agreement is wholly distinct from the traditional general cost-of-service based recovery for regulated monopoly utilities. Based on the unique market-based structure presented by Duke's participation as a GSA Renewable Supplier, it is entirely appropriate for Duke to continue its market-based recovery of any Duke-owned GSA Facilities after the term of the GSA Service Agreement expires as well. Such market-based Post-Term Cost Recovery would put Duke and third-party GSA Renewable Suppliers on more equal footing and would be entirely appropriate in the unique context of the GSA Program. In

[19] G.S. § 62-110.8(g). The Commission established additional rules addressing this cost recovery in Commission Rule R8-71.

[20] As Duke notes, Duke also would separately recover the cost of the GSA Bill Credit paid to the GSA Customer through the fuel clause. Duke Compliance Filing Reply Comments at 15.

contrast, allowing Duke to suddenly depart from this methodology and revert back to cost-of-service based recovery after the expiration of the GSA Service Agreement would be inconsistent, arbitrary, inappropriate, and discriminatory. Duke initially acknowledged this by properly seeking market-based treatment in its original GSA Application.[21] Further, in its compliance filing, while Duke did not go so far as to bring the Commission's error to it attention, Duke showed a reluctance to accept that error and therefore asked the Commission for additional guidance as to its intent. In its Compliance Filing Reply Comments, however, Duke now refuses to acknowledge that it has erroneously been granted an enormous windfall by the Commission.

As noted above, the issue of market-based Post-Term Cost Recovery was expressly raised by Duke and addressed by the Commission in the case of CPRE. In Commission Rule R8-71(j), the Commission has provided that after the initial market-based cost recovery term under the CPRE program, Duke may recover additional facility costs through market-based mechanism or some other means.[22] It would be odd and arbitrary for the Commission to allow for additional market-based cost recovery following the initial term of one market-based program but not the other.

As discussed in NCCEBA's April 8, 2019 Comments responding to Duke's Compliance Filing, Duke will have a significant and unfair competitive advantage over third-party GSA Renewable Suppliers if, as it now proposes, Duke is allowed cost-of-service based recovery on the remaining Net Book Value of a GSA facility after the expiration of the GSA Service Agreement. Duke will have every incentive to offer

[21] GSA Application at 28.

[22] The point of this rule was to make clear that Duke was not expected to recover all of its cost during the initial CPRE procurement term.

pricing as low as it thinks it can to secure the business of a prospective GSA Participating Customer, knowing that it has guaranteed Post-Term Cost Recovery, with a handsome return (that likely exceeds the returns being made by independent GSA Renewable Suppliers on their GSA projects).

But even if Duke does not try to game the process by offering unreasonably low pricing, it would have an immense competitive advantage. The economics of competitive energy contracting work as follows. The developer of a renewable generation facility with, for example, a 35-year useful life is typically only able to secure contracted cash flows for an initial term of 10 to 20 years. In determining the price it can offer to its counterparty, the developer must calculate its likely revenue recovery after the initial contract term. Because the developer's ability to contract subsequently, and the rate that it will be able to obtain (if any), are highly uncertain, the developer must discount its assumption about that future revenue. The greater the uncertainty and discount rate, the higher the developer must price its initial contract in order to be able to secure project financing. Conversely, if Duke is guaranteed recovery of the Net Book Value of its GSA facilities after the term of the GSA Service Agreement, it faces zero risk with respect to future revenues and therefore is not required to increase its front-end price to cover that

risk.[23] Under this circumstance, it is hard to imagine that any rational GSA Participating Customer would contract with an independent power producer rather with Duke.[24]

This outcome of allowing Duke to dominate the GSA Program cannot be what the General Assembly intended. It is important to keep in mind that H.B. 589 was comprehensive legislation that greatly limited the principal form of access to the North Carolina generation market available to independent power producers – PURPA – in exchange for providing two primary new forms of market access: CPRE and GSA. We have already seen how the design of the CPRE program has allowed Duke to dominate that program. The Commission should not facilitate a similar result in the case of GSA.

II. IF THE COMMISSION ELECTS NOT TO AUTHORIZE MARKET-BASED COST RECOVERY BY DUKE AFTER THE TERM OF THE GSA SERVICE AGREEMENT, IT SHOULD NOT PERMIT DUKE TO PARTICIPATE IN THE GSA PROGRAM AS A GSA RENEWABLE SUPPLIER.

NCCEBA, with some reluctance, does not oppose Duke's acting as a GSA Renewable Supplier provided that the Commission approves market-based Post-Term Cost Recovery rather than cost-of-service recovery of the unamortized Net Book Value of Duke's GSA Facilities, as Duke has now proposed. However, if for some reason, the Commission continues to object to market-based Post-Term Cost Recovery, it should not

[23] The Public Staff acknowledged this problem in its comments on Duke's Compliance Filing but appears to have accepted it as the inevitable result of the Commission's decision regarding Post-Term Cost Recovery. *See,* NCUC Docket Nos. E-2 Sub 1170 and E-7 Sub 1169, *Public Staff Comments on DEC & DEP's Compliance Filing* at 15 (April 8, 2019) ("[T]his expectation of future cost recovery provided to Duke may provide more certainty to Duke-owned GSA Facilities than may otherwise be available to GSA Facilities, since non-utility owners may have to make assumptions regarding their ability to renew GSA Service Agreements, seek to sell their output as QFs, or other options that might be available.")

[24] It is worth noting that cost-of-service based Post-Term Cost Recovery also gives Duke a perverse incentive to favor GSA Participating Customer Default, which will likely be financially advantageous to Duke.

allow Duke to act as a GSA Renewable Supplier at all.[25] In addition to the gross unfairness discussed above, Duke's participation as a GSA Renewable Supplier is fraught with administrative challenges, uncertainty, and inequity.

The GSA Order did not address the significant lack of information regarding the administration of the GSA Program provide by Duke regarding its participation as a GSA Renewable Supplier. In its January 23, 2018 GSA Program Application, Duke provided lengthy and detailed descriptions of its proposed GSA program, emphasizing the relationship between (1) Duke; (2) the GSA Customer; and (3) the GSA Renewable Supplier.[26] This included visual graphics of the proposed program structure,[27] as well as narrative descriptions of key program elements including Rate Design; Billing and Administrative Charges; and GSA Facilities.[28] However, Duke entirely failed to describe or provide documentation relating to how critical aspects of the GSA Program would function if and when Duke participated as a GSA Renewable Supplier.[29] For example, Duke provided a draft GSA Service Agreement that clearly contemplated and described

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[25] Alternatively, the Commission could not allow Duke any Post-Term Cost Recovery at all. While that would certainly disadvantage Duke, its ability to participate as a GSA Renewable Supplier should not be the Commission's paramount concern. That would be a far better outcome than the Commission's current decision, which will allow the monopoly utility to completely dominate a program that was clearly intended to provide market access to independent renewable suppliers.

[26] *See, e.g.* Duke GSA Application at 21-25.

[27] *Id.* at 21.

[28] *Id.* at 18, 23-24.

[29] NCCEBA notes that Duke's participation as a GSA Renewable Supplier was referenced only twice in its GSA Application: (1) in Duke's request for market-based cost recovery and (2) in a footnote in which Duke stated "[f]or simplicity, the Companies have characterized the "Renewable Supplier" as a third-party developer of renewable energy projects. However, for the avoidance of doubt, Eligible GSA Customers may also directly negotiate with DEC or DEP to develop a GSA Facility under the Self-Supply option." GSA Application at 7, n. 4. Throughout the remainder of Duke's GSA Application, in Duke's subsequent filings in this proceeding, and at the September 4, 2018 oral argument held in this proceeding, Duke made almost no reference to its proposed participation as a GSA Supplier. The next substantive reference to Duke-owned GSA Facilities appeared in the February 1, 2019 GSA Order, in which the Commission denied Duke's request to receive market-based Post-Term Cost Recovery.[29] Duke subsequently referenced Duke-owned GSA Facilities in its March 18, 2019 Compliance Filing in the context of GSA Facility eligibility and Post-Term Cost Recovery,[29] and in its April 18, 2019 Compliance Filing Reply Comments.

transactions involving Duke, the GSA Customer , and the GSA Renewable Supplier, but Duke did not provide any description or explanation regarding how the GSA Service Agreement would differ in the event that Duke was a GSA Supplier.[30] Duke has had over a year to furnish this information to the Commission and to allow it to be commented on by other parties to this proceeding, but has failed to do so. It should not be allowed at this late date to correct this failure.[31]

Duke's participation as a GSA Supplier would also remove the need for a PPA between Duke and the GSA Renewable Supplier, because Duke itself would own and operate the GSA Facility.[32] Duke's participation as a GSA Renewable Supplier, without a PPA, would put Duke at a significant competitive advantage relative to third-party GSA Renewable Suppliers. Duke would not face termination by itself for events of default and would not be subject to damages to itself for failure to perform or be required to post substantial performance security which impose significant costs and risks on third-party developers. A third-party GSA Renewable Supplier must factor these PPA requirements into the purchase price of the PPA it negotiates with a prospective GSA Customer, placing the third-party supplier at a competitive disadvantage relative to Duke.[33]

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[30] *See,* Duke GSA Application, Attachment B; Duke Compliance Filing, Exhibits A and B. Notably, in the GSA Service Agreement Duke attached to its Compliance Filing, Duke removed references to the PPA between Duke and the Renewable Supplier but did not provide a description of or explanation for this change.

[31] Alternatively, the Commission should not allow Duke to act as a GSA Renewable Supplier without providing this missing information to the Commission and providing other parries an opportunity to comment.

[32] Duke notes this dynamic in a similar program filing before the South Carolina Public Service Commission in which Duke has requested the opportunity to participate in the proposed GSA Program as a GSA Supplier. *See,* South Carolina PSC, Docket No. 2018-320-E, *Supplemental Reply Comments of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC* at 11, n. 21 ("A PPA would not be required in these circumstances because DEC or DEP would own the GSA Facility.").

[33] This is similar, and additional to, the effect of Duke receiving rate-based recovery post-GSA Agreement.

The GSA Order also does not appear to consider the advantage that Duke will have with respect to information regarding GSA Program pricing, specifically with reference to the applicable Bill Credit information for the hourly bill credit option. During the GSA Oral Argument, the Commission specifically asked Duke whether Duke would have better information about what Duke's hourly rates would be, stating "[Duke] knows what [the day-ahead hourly pricing] is going to be better than anyone knows what it's going to be," and Duke acknowledged that it has "more information about how those numbers are forecast."[34] Similarly, Duke has not addressed in this proceeding other competitive advantages that it would hold over third-party GSA Renewable Suppliers with respect to existing information about and business relationships with potential GSA Customers. In a particular, Duke could unfairly leverage its existing relationships with its customers to assist it in securing their business as a GSA Participating Customer. While it is possible that the Commission could establish safeguards against such practices, these issues were not adequately addressed during the course of this proceeding and such assurances do not presently exist.

III. THE COMMISSION SHOULD CLARIFY THAT DUKE AFFILIATES ARE NOT PERMITTED TO PARTICIPATE IN THE GSA PROGRAM AS A GSA RENEWABLE SUPPLIER.

In its very limited references to Duke-owned GSA Facilities in its GSA Program Application and subsequent filings in this proceeding, Duke never indicated or requested that Duke affiliates would be able to participate in the GSA Program as GSA Renewable

[34] GSA Oral Argument Transcript at 38, ln. 4-5; p. 39, ln. 22-23. To NCCEBA's knowledge, no independent renewable suppliers have access to this information, and Duke has not offered to provide that information (and is unlikely to do so even if requested by a renewable supplier).

Suppliers.[35] Nor does the GSA Statute or the GSA Order make any reference to such a possibility. Duke's first reference to this extraordinary proposition – which would require a generally impermissible contract between Duke and its affiliate – was in Duke's Compliance Filing, in which Duke stated "[p]er the Commission's direction, GSA Customers are also permitted to utilize either of the Companies or an affiliate of the Companies to serve as the GSA Facility Owner."[36] As the Commission is aware, the purchase of power by Duke from an affiliate is generally prohibited and would require the waiver of regulatory conditions or code of conduct requirements. Such an exceptional arrangement was expressly authorized by the General Assembly in connection with CPRE but not GSA. Nor, despite Duke's erroneous assertion to the contrary, was it authorized by the GSA Order. NCCEBA requests that the Commission clarify that Duke affiliates are not permitted to participate in the GSA Program as GSA Renewable Suppliers.

CONCLUSION

For the reasons discussed herein, NCCEBA respectfully requests that the Commission reconsider and modify its February 1, 2019 GSA Order (1) to provide that if Duke is permitted to participate in the GSA Program as a GSA Renewable Supplier, Duke be permitted to receive market-based recovery on any Duke GSA Facility after the expiration of the GSA Service Agreement, or (2) if the Commission is unwilling to provide for such market-based cost recovery, to not allow Duke to participate in the GSA Program as a GSA Renewable Supplier. In addition, NCCEBA requests that the

[35] As stated above, Duke referenced opportunities for GSA Suppliers to negotiate directly with DEC or DEP and, more generally, "company-owned" facilities.
[36] Duke Compliance Filing at 2.

Commission clarify that Duke affiliates are not allowed to act as GSA Renewable Suppliers.

Respectfully submitted, this the 1st day of May 2019.

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CERTIFICATE OF SERVICE

I hereby certify that all persons on the docket service list have been served the foregoing MOTION FOR RECONSIDERATION OF THE NORTH CAROLINA CLEAN ENERGY BUSINESS ALLIANCE by hand delivery, first class mail deposited in the U.S. mail, postage pre-paid, or by email transmission to all parties of record.

Respectfully submitted, this the 1st day of May, 2019.

FOX ROTHSCHILD LLP

BY: _____

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