STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1177
DOCKET NO. E-7, SUB 1172

CUBE YADKIN GENERATION LLC, Complainant, v. DUKE ENERGY CAROLINAS, LLC, and DUKE ENERGY PROGRESS, LLC Respondents.	)	**COMPLAINANT'S RESPONSE TO RESPONDENTS' JOINT ANSWER AND MOTION TO DISMISS**

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 the Commission's Order dated May 8, 2018, and files this Response to the Joint Answer and Motion to Dismiss of Duke Energy Carolinas, LLC ("DEC"), and Duke Energy Progress, LLC ("DEP") (collectively, "Duke") in the above-captioned proceedings.

RESPONSE

Cube Yadkin respectfully informs the Commission that it is not satisfied with Duke's substantive response, as contained in its Joint Answer and Motion to Dismiss, and Cube Yadkin therefore requests a hearing to present evidence and offer argument in this matter. In further reply to Duke's Joint Answer and Motion to Dismiss, as permitted by the Commission's Order Serving Joint Answer and Motion to Dismiss, Cube Yadkin shows the Commission as set forth below.[1]

[1] The following reply is offered in response to the Commission's permissive invitation in its Order Serving Joint Answer and Motion to Dismiss (May 8, 2018) ("The Commission advises

COMPLAINANT'S REPLY
TO DUKE'S JOINT ANSWER AND MOTION TO DISMISS

This action arises from Duke's unilateral refusal to negotiate with Cube Yadkin concerning entry into long-term Qualifying Facility ("QF") purchase power agreements ("PPAs") under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), N.C. Gen. Stat. § 62-156, the Commission's rules, and Duke's own tariffs and schedules. As Complainant alleged in its Verified Complaint initiating this matter, each of the three Cube Yadkin hydroelectric facilities in issue is certified as a QF under PURPA[2]; each has established a legally enforceable obligation ("LEO") with respect to the sale of energy and capacity to Duke prior to November 16, 2016; 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 not negotiated in good faith the terms of a long-term QF PPA with each of the Cube Yadkin QFs. As set out in Cube Yadkin's Complaint and admitted by Duke in its Answer, Duke has "not provided proposed contract terms, including pricing, for a long-term PURPA PPA or to otherwise enter into negotiations for such an agreement." *See* Answer at ¶ 28a. To the contrary, in its October 14, 2016 letter to Cube, Duke unilaterally and summarily rejected Cube's assertion of PURPA rights, citing "provisions under which Duke would be exempted from PURPA

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that the Complainant may file a reply to the Answer and Motion to Dismiss."), at 2. The following preliminary arguments and authorities are provided for the convenience of the Commission, without waiving Complainant's right to fully brief and argue the legal issues raised by Duke at the appropriate point in the proceeding as directed by the Commission.

[2] *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), NCUC Docket No. SP-8651 (Company Folder) (filed Oct. 24, 2016) (collectively, the "FERC Form 556s").

with regard to the Yadkin system." *See* Complaint, at Exh. 4; Answer at ¶ 30. Duke further gave unequivocal "formal notice under 292.309/310" stating 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." *Id.* In other words, regardless whether Cube was a QF, had properly asserted rights under PURPA, or had provided Duke with a Notice of Commitment ("NoC") form, the parties were destined to end up where they are now—with Cube Yadkin forced to defend its federal rights before the Commission—given Duke's clearly stated legal position that "it is exempted from any purchase obligation under PURPA with respect the Yadkin system."

Duke's Answer clearly establishes that it made only non-PURPA offers and indicated willingness to negotiate only on a non-PURPA basis even after the consummation of Cube's purchase of the facilities; i.e., between February 1, 2017, and February 23, 2018. *See* Answer at ¶ 28a. Duke's Answer further admits that Respondents have not sought from FERC, nor have been granted, an exemption from their obligations under PURPA. Their only defense appears to be that refusing to negotiate on a PURPA basis somehow was necessary to properly reserve and not waive their entitlement to petition the FERC for authority to grant this exemption under 18 C.F.R. 292.309. *See* Answer at ¶ 28a. But Duke has never pursued FERC exemption, and Duke now concedes its claim of blanket "exemption" was erroneous and legally unsupportable and that "without FERC authorization for the exemption, [the Duke entities] are legally required to purchase the output of the Cube Yadkin facilities under PURPA …." *Id.*

Thus, even if one were to flip the motion to dismiss standard on its head and view the facts in the light most favorable to Duke, Duke has admitted that, for over a year during which its legally questionable reasons for claiming Cube was not entitled to a PURPA PPA had been removed by the consummation of Cube's purchase, Duke continued to refuse to negotiate a PURPA PPA.[3] Respondents' position apparently is that they could refuse to negotiate on a PURPA basis indefinitely for no other reason than they wanted to preserve and not waive their right to petition FERC for the termination of their PURPA obligation. This failure to negotiate in good faith with Cube is a flagrant violation of the federal PURPA requirements and of the Commission's long-standing requirement that North Carolina utilities negotiate in good faith with QFs not eligible for standard rates and contracts. *See, e.g.*, Docket No. E-100, Sub 140, at p. 11; Docket No. E-100, Sub 87, at p. 8; and Docket No. E-100, Sub 57, at p. 10 (requiring DEC to offer QFs not eligible for the standard long-term levelized rates the option of "contracts and rates derived by free and open negotiations"). Moreover, Duke's posture vis-à-vis a federal "exemption" has the effect of forcing a QF like Cube Yadkin to initiate a proceeding at the Commission to enforce its federal rights. This is precisely the sort of burden that PURPA sought to avoid. *See Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61187, 61894 (Mar. 15, 2013) (finding that the Idaho Commission's requirement that a QF file a meritorious complaint to the Idaho Commission

[3] The well-established standard on a motion to dismiss for failure, generally applicable in North Carolina courts, and recognized by the Commission, requires the court to construe the complaint liberally and prohibits dismissing the complaint unless it appears to a legal certainty that the plaintiff is not entitled to relief under any state of facts which could be proved in support of the claim. *See, e.g., BellSouth Telecomms., Inc. v. HALO Wireless, Inc.*, Order Denying Halo's Motion to Dismiss, Docket No. P-55, Sub 1841 (June 27, 2012), at 3 (quotations and citations omitted). For purposes of a motion to dismiss, any written instrument attached as an exhibit to a pleading is treated as part of the pleading and may be considered without converting a motion to dismiss into a motion for summary judgment. *Id.*

before obtaining a legally enforceable obligation "would both unreasonably interfere with a QF's right to a legally enforceable obligation and also create practical disincentives to amicable contract formation."). Moreover, Duke's position, if not reined in, will have the effect of further clogging the Commission's dockets with disputes that should be negotiated rather than litigated.

During two years of negotiations entered into by Complainant in good faith, Duke took the preemptive position—now exposed as lacking any legal basis—that Cube Yadkin was only entitled to negotiate outside of the PURPA context and refused to entertain PURPA negotiations. While Complainant tried diligently to obtain PPAs through negotiations with Duke, the long, drawn-out, and, ultimately, unsuccessful process Duke required left Cube Yadkin with no choice but to ask the Commission to compel Duke to fulfill its legal obligations. Duke now protests that this delay—which it caused—results in application of a regulatory approach that is no longer available to QFs. But having caused the delay by denying Cube Yadkin the option to negotiate under PURPA—based on the assertion of a legal immunity that Duke now concedes was, and is, not available to it—Duke cannot be heard to complain of this delay. Accordingly, Complainant is asking the Commission to compel DEP and DEC to enter into financially viable long-term PPAs with the Cube Yadkin QFs at rates that reflect Duke's avoided cost as of the date that the LEOs were established, and not reward Duke for its delay tactics, and admittedly false statements regarding its obligations under the law. 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 PPAs.

In its Joint Answer and Motion to Dismiss, Duke asserts that (1) Cube Yadkin has failed to establish a legally enforceable obligation ("LEO") as required by the Commission's rules; and (2) even if Cube Yadkin has established a LEO, it is not entitled to a ten-year PPA as a result of House Bill 589. These arguments are wrong as a legal matter, and in any event, premature. Cube Yadkin has pled facts establishing its entitlement to long-term PPAs with Duke pursuant to PURPA, and Duke's arguments to the contrary cannot and should not be resolved until a hearing, with the benefit of testimony, briefing, and argument, has occurred.

I. Cube Yadkin Has Pled Facts Establishing the Existence of a LEO Under PURPA Prior to November 16, 2016, and Is Entitled to Discovery and a Hearing on its Claims.

Duke grounds much of its defense in this case in the legal argument that Cube Yadkin has failed to establish a LEO prior to November 16, 2016, which is the operative date entitling a QF to avoided costs under the 2014 Sub 140 Order. (Ans. pp. 23-31). Because Cube Yadkin has pled facts establishing the existence of all of the necessary preconditions for establishing a LEO prior to November 16, 2016, Duke's argument should be rejected. *See, e.g.*, *BellSouth Telecomms., Inc. v. HALO Wireless, Inc.*, Order Denying Halo's Motion to Dismiss, Docket No. P-55, Sub 1841 (June 27, 2012), at 3.

Under the Commission's implementation of PURPA, QFs are entitled to PPAs with avoided cost rates calculated as of the date of their respective LEOs were established. The Commission's requirements for establishing a LEO prior to October 11, 2017, were: (i) the QF has self-certified with FERC as a QF; (ii) the QF has filed a report of proposed construction or been issued a certificate of public convenience and necessity ("CPCN"); and (iii) the QF has made a commitment to sell the QF's output to a utility under PURPA

using the approved Notice of Commitment form ("NoC form"). *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities*, Docket No. E-100, Sub 140, issued December 17, 2015 ("*Sub 140 Order*") at 52.

Here, Cube Yadkin has properly pled all of the necessary elements in its Verified Complaint for the establishment of a LEO prior to November 16, 2016, or otherwise explained why those elements are either inapplicable or should be waived. Duke's artificial construction, were it accepted by the Commission, would eliminate the environmental and transmission system benefits offered by Cube Yadkin's QFs, frustrating a clearly articulated Congressional policy to the detriment of the consuming public, the environment, and the public interest.

(a) PURPA obligations attach to the QF, not to the owner, and the hydroelectric facilities in question had been self-certified in September 2016.

As to the first element, the Verified Complaint shows that "[t]he Cube Yadkin QFs have self-certified by filing Form 556s with the FERC on September 28, 2016." (Compl. ¶ 20). Duke seeks to thwart Cube Yadkin's assertion of rights by claiming that Cube could not assert QF rights prior to the consummation of ownership of the facilities, but this argument is based on a strained and unwarranted interpretation of applicable regulations. The plain language of PURPA makes clear that a PURPA obligation or right attaches to the *facility*, not to the owner of the facility. *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). Cube is unaware of any authority for the proposition that a QF purchaser is prohibited from relying on prior periods

of QF certification in asserting its rights under PURPA, and Duke has cited no such authority. Duke's position would, if adopted, frustrate the core Congressional purpose underlying PURPA, which mandates that FERC, and, by extension, the States foster the development of small electrical generation facilities such as those owned and operated by Cube Yadkin. 16 U.S.C. § 824a-3.

Cube Yadkin has invested hundreds of millions of dollars in efficient, clean, hydroelectric power, including a multi-million-dollar upgrade to replace all of the existing equipment with aerating turbines at the High Rock facility that will improve the environmental quality of the Yadkin River and benefit the citizens of North Carolina. It is precisely the type of qualifying facility that Congress had in mind when it mandated that FERC "encourage . . . small power production." 16 U.S.C. § 824a-3.

As stated in its Complaint, Cube Yadkin committed to purchase and upgrade the Yadkin facilities in reliance, at least in part, upon the QF status of three of the facilities. To this end, 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 facilities and committing to the facility upgrades required by the FERC in connection with the acquisition. (Compl., at p. 2). Cube Yadkin's plan to sell QF energy and capacity to Duke was known and supported by Alcoa, as evidenced by Alcoa's submittal of the Form 556s to establish QF rights and, but for Duke's unilateral refusal to enter into PURPA negotiations, Alcoa might have entered into the PPA with Duke and assigned that agreement to Cube as part of the underlying transaction. (Compl. ¶ 22). In the context of this transaction, the date of the consummation of the transaction simply is not relevant to the PURPA rights in issue, and Duke has cited to no authority that suggests otherwise.

(b) The Cube Yadkin QFs were constructed prior to the CPCN requirement being enacted, and Cube Yadkin had no reason to believe any filing by it was required by North Carolina law or the Commission's rules and regulations.

As to the second element, while the current LEO test assumes the relevance of a CPCN, Cube Yadkin has explained why that process does not apply to it, or why the CPCN requirement should otherwise be waived under the circumstances. In particular, all of Cube Yadkin's hydroelectric facilities were "constructed prior to the enactment of the statutory obligation to secure a CPCN pursuant to G.S. § 62-110.1." (Compl. p. 21 n. 17). Cube Yadkin has further pled that the current LEO test—or at least the portion of the test requiring the procurement of a CPCN "has no applicability to the instant situation involving QFs that predate the statutory certification processes." (*Id.*)

Duke cites the Commission's *Order Approving Transfer of Certificates* in Docket No. SP-122, but fails to explain how that decision has any bearing on the question of whether a CPCN is required under the present circumstances. In that proceeding, DEC and Northbrook Carolina Hydro, LLC ("Northbrook"), filed a petition seeking approval of the transfer of certificates from DEC to Northbrook in conjunction with a filing in Docket No. SP-100, Sub 11, for a declaratory ruling that Northbrook would be entitled to capacity payments for the pre-1978 North Carolina hydroelectric facilities DEC proposed to remove from rate base and sell to Northbrook. The parties in Northbrook apparently concluded that certificates were required under G.S. § 62-110.1(a), which, by its terms, requires a certificate for the construction of generation capacity. Given that the hydro facilities in issue in Northbrook had been operated by DEC historically, possibly without certification, the Commission approved the transfer to Northbrook of the certificates "issued or deemed to have been issued" to DEC for the four facilities. This decision lends no support for

DEC's claim here that Cube Yadkin was required to obtain a CPCN in connection with its PURPA request, where Cube Yadkin is not a public utility, no new construction was required to operate the facilities, and no transfer of certificates was envisioned.[4]

Duke also cites Commission Rule R8-64 in support of its contention that Cube Yadkin is required to obtain a CPCN. Subsection (a)(3) of this rule states that the construction of a facility for the generation of electricity includes the building of a new building, structure or generator, as well as the renovation or reworking of an existing building, structure or generator in order to enable it to operate as a generating facility. Nowhere does the rule establish any applicability to an operational generation facility, such as is the case here. Cube Yadkin bought *operational* hydroelectric facilities that needed substantial investment in turbine efficiency and water quality to comply with the terms of its new FERC license (as discussed in ¶ 8 of the Complaint), but no renovations or reworkings were required in order for those generating facilities to operate. For this reason, Rule R8-64 has no application to the present circumstance.

As set forth in the Complaint, there are multiple reasons supporting Cube Yadkin's belief that the CPCN requirement expressed as a component of the LEO test has no application to it and, instead, merely illustrates how the applicable test was designed for circumstances not applicable to Cube.

First, the Commission has recognized that the certificate requirement imposed in connection with the PPA process is merely intended to establish procedures "to assist the

[4] To the contrary, the Northbrook case shows that, were a CPCN required here, the appropriate course of the action would be for the Commission to simply conclude that any required certificates were "deemed granted" in connection with the operation of the facilities. *See also* Order Granting Judgment on Pleadings, Docket No. E-7, Sub 1000 (May 31, 2012) (finding failure to obtain CPCN by party to PPA was cured by later events).

supplier in complying with the requirements of obtaining a CPCN." *Green Energy Trans, LLC v. Duke Energy Carolinas, LLC*, Order Granting Judgment on the Pleadings, Docket No. E-7, Sub 1000 (May 31, 2012), at 5. Where there is no underlying statutory requirement to obtain a certificate, the policy has no application. In any event, Duke itself has not consistently enforced the policy. *See id.* (accepting DEC's argument that PPA was not invalidated where party to PPA had failed to obtain a CPCN).

Second, as stated, because each of the QFs was in operation prior to the enactment of the Electricity Act of 1965, Session Law 1965-287, these facilities are not subject to certification under N.C. Gen. Stat. § 62-110.1(a).

Third, Cube Yadkin is not a "public utility" under applicable law because it is not furnishing electricity to or for the public for compensation under G.S. § 62-3(23) and this Commission's decisions. Of particular relevance, the Commission has expressly concluded in connection with an intra-corporate reorganization by Cube Yadkin's predecessor—Alcoa—that the proposed corporate reorganization and transfer of the assets did not make Alcoa a "public utility". *See* Order Withdrawing Application, 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).

Finally, it bears noting that Cube Yadkin filed for registration of the QFs as new renewable energy facilities on March 16, 2017, which remain pending before the Commission. At no time following these filings was Cube Yadkin advised, including subsequent to meeting with the Public Staff, that CPCN applications were advisable or required.

Because the statutory CPCN requirement clearly did not apply to Cube Yadkin, it reasonably and in good faith believed that the NoC form requirement addressing CPNC status was addressed to other types of QFs, particularly those constructing new generation capacity, which were the specific facilities of concern to the Commission in establishing the NoC requirement in the first place. Again, the NoC form's focus on conditions which are inapplicable to Cube further supports the conclusion that the NoC form is simply inapplicable to facilities such as Cube Yadkin's.

(c) The use of the NoC form is not applicable to Cube's circumstances and/or should be waived, particularly given the evidence showing Cube communicated clearly to Duke that it was committing itself to sell the output of the three QFs to Duke.

As to the third, and final, element of the LEO test, Cube Yadkin has pled that it made a commitment to sell its output to under PURPA as of September 16, 2016, based on its communications with Duke on that subject matter. (Compl. ¶ 27). All of its communications with Duke were clear that Cube Yadkin was ready to, and desired to, commit, albeit on terms that complied with PURPA. Because of Cube's unique circumstances, no harm results from either concluding that Cube is exempt from the NoC requirement or waiving the form requirement upon the specific facts of this case.

Cube Yadkin asserts that the use of the NoC is not applicable to a QF in Cube's circumstances, or that if it is, Cube Yadkin should be relieved of that obligation under the unique circumstances of this case. As Cube Yadkin alleged in its Verified 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.

(Compl. p. 21, n. 17). The inflexible application of the form requirement here—where the facts clearly show that Duke was well aware that Cube was asserting PURPA rights—would only serve to frustrate the purposes of PURPA and unfairly deny Cube the benefits of federal law. *See, e.g., Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61187, 61894 (Mar. 15, 2013) (finding that the Idaho Commission's requirement that a QF file a meritorious complaint to the Idaho Commission before obtaining a legally enforceable obligation "would both unreasonably interfere with a QF's right to a legally enforceable obligation and also create practical disincentives to amicable contract formation."); *Hydrodynamics Inc. et al.*, 146 FERC ¶ 61193, 61845 (Mar. 20, 2014) (finding that that a State utilities commission rule requiring a QF to win a competitive solicitation as a condition to obtaining a long-term contract imposed an unreasonable obstacle to obtaining a legally enforceable obligation in violation of PURPA's regulations). Having conceded that it unilaterally refused PURPA negotiations based on a false assertion that it was "exempted"—and having further sent Cube Yadkin on a fruitless and time-consuming wild goose chase seeking to negotiate non-PURPA rates—Duke can hardly be heard now to claim that it was not aware that Cube was seeking to invoke PURPA rights or to otherwise protest the assertion of rights back to the

date of Duke's initial misrepresentation. Such a result would be inequitable and only encourage similar gamesmanship by Duke in the future.

Examination of the form itself demonstrates its futility in these circumstances. *See* Exhibit A, attached hereto. Of principal concern, the form requires the Seller to select among four options relating to the status of the party's CPCN—(i) the party has a CPCN under G.S. § 62-110.1 and Rule R8-64; (ii) the party is exempt from CPCN requirement under G.S. § 62-110.1(g) and has filed a report of proposed construction with the Commission; (iii) the party has applied or will apply for a CPCN for the construction of its facility; or (iv) the party is exempt from the CPCN requirements under G.S. § 62-110.1(g) and will file a report of proposed construction with the Commission. These options illustrate the problem, as the form assumes that the party invoking rights under PURPA is subject to the CPNC requirement or that the facility qualifies for an exemption under G.S. § 62-110.1(g) because the facility is either (a) a nonutility owned facility fueled by renewable resources under two MWs, (b) is new construction intended primarily for the person's own use, or (c) a solar facility subject to Article 6B. None of these options apply for an existing generator such as Cube, and the problem is compounded for Cube because the NoC form ties the LEO date to CPCN date or report of proposed construction date. In other words, if Cube had used the form it would have found itself in the exact same situation as is presented here, where Duke is contending Cube has no rights under PURPA, and Cube's problem would have been compounded by the NoC form's circular LEO data loop which conveniently (for Duke) has the effect of preventing Cube from ever establishing a LEO date.

Use of the form, under these circumstances, would literally and directly serve to deny Cube Yakin's rights under federal law, a result which is not permitted under PURPA. *See, e.g., Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61187, 61894 (Mar. 15, 2013)

As demonstrated by the foregoing, Cube Yadkin has properly pled its entitlement to relief based on the claims in its Verified Complaint. Whether Duke disagrees with these contentions is beside the point. What matters is that Cube Yadkin has sufficiently pled claims for relief under PURPA against Duke, and this matter should therefore proceed past the pleading stage, through discovery, and ultimately to a hearing on these matters of great public and private importance. Because of Duke's failure to negotiate in good faith with Cube Yadkin's QFs, Cube Yadkin has been harmed in the pursuit of its business objectives, including its substantial investment in upgrading the Cube Yadkin facilities and has been denied its rights under federal law.

II. Duke's Other Claims and Arguments Are Insubstantial and Should Be Rejected.

In their Answer, the Respondents state that G.S. § 62-40 requires all parties to a controversy to agree in writing to submit the controversy to the Commission as arbitrator and that they do not agree or consent to arbitration. (Answer at ¶ 39.) This overlooks the fact that Cube Yadkin also requested that the Commission act pursuant to its avoided cost orders, which do not, and cannot, require the utility to consent.

The Commission adopted the arbitration process for the first time in Docket No. E-100, Sub 96, as an alternative to the filing of a complaint by a QF not eligible for the standard rates and contract. It has discussed this arbitration option in subsequent orders, and the only limitation imposed by the Commission has been that the QF be prepared to commit its capacity to the utility for a period of at least two years. *See* Order Establishing

Standard Rates and Contract Terms for Qualifying Facilities, Docket No. E-100, Sub 100 (September 29, 2005), at pp. 16-17; Order Establishing Standard Rates and Contract Terms for Qualifying Facilities, Docket No. E-100, Sub 140 (December 17, 2015), at p. 12.

When the Commission implements and enforces Section 210 of PURPA, it is acting pursuant to federal law. As the United States Supreme Court made clear in *FERC v. Mississippi*, 456 U.S. 742 (1982), a state commission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules. *Id.*, at 751. It may not contravene a QF's rights by imposing a requirement that a utility consent to an action taken by a QF to enforce its PURPA rights.

Duke also argues that the Commission's avoided cost orders do not apply to QFs that are not eligible for Duke's standard offer. More specifically, Duke states in the Summary of Answer and Defenses section of its Joint Answer and Motion to Dismiss that Cube Yadkin's request for a PPA established in accordance with the Commission's Order Establishing Avoided Cost Rates in Docket No. E-100, Sub 140, is unavailable because this order does not apply to QFs that are not eligible for Duke's standard offer. (Answer at p. 2) To the contrary, the Commission has made clear that, under PURPA, a larger QF is just as entitled to full avoided costs as a smaller QF and has stated that the exclusion of larger QFs from the long-term levelized rates in the standard rate schedules was never intended to suggest otherwise. *See* Order Establishing Standard Rates and Contract Terms for Qualifying Facilities, Docket No. E-100, Sub 100, issued September 29, 2005, p. 16.

In addition, the Commission more recently has held that while in a bilateral negotiation the specific characteristics of a particular QF can be taken into consideration, the method by which avoided costs are calculated should, to the extent possible, remain consistent in both standard and negotiated contracts. If a method is not applicable to calculating the avoided costs of a QF smaller than five MW, the fact that a QF is greater than five MW does not validate such a method. The Commission in fact went so far as to state that the utilities were not authorized when negotiating contracts with QFs that are not eligible for standard contracts to employ methods found by the Commission to be inappropriate in the application of the peaker method when calculating standard contract rates. *See* Order Setting Avoided Cost Input Parameters, issued December 31, 2014, p. 21.

Finally, it must be noted that if the Commission's generic avoided cost orders do not apply to QFs that are not eligible for Duke's standard offer, then the NoC requirement established in such orders do not apply to Cube Yadkin.

CONCLUSION

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. Deny Duke's Motion to Dismiss and 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 in compliance with the license granted by the Federal Energy Regulatory Commission is justified, not less than ten years;

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

5. To the extent the Commission needs evidence beyond that provided in the Verified Complaint, set this matter for hearing on an expedited procedural schedule; and

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

Respectfully submitted, this 23rd day of May, 2018.

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Certificate of Service

I hereby certify that a copy of the foregoing *Complainant's Response to Respondents' Joint answer and Motion to Dismiss* has been served this day upon counsel of record by electronic mail or by delivery to the United States Post Office, first-class postage pre-paid.

This the 23rd day of May, 2018.

BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, LLP

By: _____

EXHIBIT A

NOTICE OF COMMITMENT FORM

Kendrick C. Fentress
Associate General Counsel

Mailing Address:
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January 8, 2016

VIA ELECTRONIC FILING

Ms. Gail L. Mount
Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4300

Re: Duke Energy Carolinas, LLC and Duke Energy Progress LLC's Joint Motion to Deem Revised LEO Form Timely Filed & LEO Form Docket No. E-100, Sub 140

Dear Ms. Mount:

Please find enclosed for filing in the above-referenced docket the Duke Energy Carolinas, LLC and Duke Energy Progress, LLC's Joint Motion to Deem Revised LEO Form Timely Filed and LEO Form.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Kendrick C. Fentress

Enclosure

cc: Parties of Record

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-100, SUB 140

In the Matter of	)	
	)	DUKE ENERGY CAROLINAS AND
Biennial Determination of Avoided Cost	)	DUKE ENERGY PROGRESS' JOINT
Rates for Electric Utility Purchases from	)	MOTION TO DEEM REVISED LEO
Qualifying Facilities – 2014	)	FORM TIMELY FILED
	)	

NOW COME Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (collectively, the "Movants") and, pursuant to Commission Rule R1-7, respectfully move the North Carolina Utilities Commission (the "Commission") to deem timely filed the Movants' revised form to establish a legally enforceable obligation ("Revised LEO Form") in the above-captioned docket. In support of this motion, the Movants show the following:

1. The Commission issued its *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities* on December 17, 2015, wherein it mandated the use of a simple form clearly establishing a qualifying facility's commitment to sell its electric output to a utility and the date of the legally enforceable obligation. Further, the Commission approved the format submitted by Dominion North Carolina Power ("DNCP") in its reply comments and required Movants to adapt the contents of the DNCP form for their use and to submit a Revised LEO Form for approval within 15 days of the issuance of the order, *i.e.*, January 1, 2016.[1]

2. Due to the press of other business, the Movants were not able to file the Revised LEO Form by January 1, 2016. The Revised LEO Form has been prepared and

[1] See page 52 of the December 17, 2015 *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities*, Docket No. E-100, Sub 140.

is ready for Commission review. The Movants apologize for the delay and respectfully request that the Commission accept the Revised LEO Form as timely filed.

WHEREFORE, the Movants respectfully request that the Commission deem the Revised LEO Form as having been timely filed.

Respectfully submitted, this the 8th day of January, 2016.

Kendrick C. Fentress
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Counsel for DUKE ENERGY CAROLINAS, LLC and DUKE ENERGY PROGRESS, LLC

NOTICE OF COMMITMENT TO SELL THE OUTPUT OF A QUALIFYING FACILITY TO Duke Energy Carolinas, LLC or Duke Energy Progress, LLC

Instructions to QF: The QF shall deliver, via certified mail, courier, hand delivery or email, its executed Notice of Commitment to:

Director – Power Contracts
400 South Tryon Street
Mail Code: ST 13A
Charlotte, North Carolina 28202
Attn.: Wholesale Renewable Manager
DERContracts@duke-energy.com

Any subsequent notice that a QF is required to provide to Company pursuant to this Notice of Commitment shall be delivered to the same address by one of the foregoing delivery methods.

1. [_____] ("Seller") hereby commits to sell to Duke Energy Carolinas, LLC or Duke Energy Progress, LLC (the "Company") all of the electrical output of the Seller's qualifying facility ("QF") described in Seller's self-certification of QF status filed with the Federal Energy Regulatory Commission in Docket No. QF_____ (the "Facility").

2. The name, address, and contact information for Seller is:

_____ Telephone: _____

_____ Email: _____

3. By execution and submittal of this commitment to sell the output of the Facility (the "Notice of Commitment"), Seller certifies as follows:

(Select the applicable certification below)

i. ____ Seller has received a certificate of public convenience and necessity ("CPCN") for the construction of its ____ kW (net capacity ac) Facility from the North Carolina Utilities Commission ("NCUC") pursuant to North Carolina General Statute § 62-110.1 and NCUC Rule R8-64, which CPCN was granted by NCUC on [insert date] in Docket No. _____.

ii. ____ Seller is exempt from the CPCN requirements pursuant to North Carolina General Statute § 62-110.1(g) and has filed a report of proposed construction for its ____ kW (net capacity ac) Facility with the NCUC pursuant to NCUC Rule R8-65 ("Report of Proposed Construction") on [insert date] in Docket No. _____.

iii. ____Seller has applied or will apply for a CPCN for the construction of its____ kW (net capacity ac) Facility on [insert date] in Docket No. _____. If the Seller does not know the docket number on the date of submission of this Notice of Commitment, Seller shall notify the Company of the docket number when it is assigned by the NCUC. Seller shall notify the Company upon issuance of an order by the Commission granting the CPCN.

iv. ____ Seller is exempt from the CPCN requirements pursuant to North Carolina General Statute § 62-110.1(g) and will file a Report of Proposed Construction for its ____ kW (net capacity ac) Facility with the NCUC pursuant to NCUC Rule R8-65 and shall notify the Company at the address specified in paragraph 1 of the docket number of such filing when it is assigned by the NCUC.

4. This Notice of Commitment shall take effect on its "Submittal Date" as hereinafter defined. "Submittal Date" means (a) the receipted date of deposit of this Notice of Commitment with the U.S. Postal Service for certified mail delivery to the Company, (b) the receipted date of deposit of this Notice of Commitment with a third-party courier (e.g., Federal Express, United Parcel Service) for trackable delivery to the Company, (c) the receipted date of hand delivery of this Notice of Commitment to the Company at the address set forth in paragraph 1, above, or (d) the date on which an electronic copy of this Notice of Commitment is sent via email to the Company if such email is sent during regular business hours (9:00 a.m. to 5:00 p.m.) on a business day (Monday through Friday excluding federal and state holidays). Emails sent after regular business hours or on days that are not business days shall be deemed submitted on the next business day.

5. By execution and submittal of this Notice of Commitment Seller acknowledges that:

a. The legally enforceable obligation date ("LEO Date") for the Facility will be determined in accordance with subsections (c) or (d) below. For QFs of 5 MW or less, the LEO Date will be used to determine Seller's eligibility for the rates, terms and conditions of the Company's currently effective Schedule PP. If the Seller's Facility does not qualify for Schedule PP, rates for purchases from the Facility will be based on the Company's avoided costs as of the LEO Date, calculated using data current as of the LEO Date.

b. If on the Submittal Date, Seller has a CPCN from or has filed a Report of Proposed Construction with NCUC for the Facility, the LEO Date will be the Submittal Date.

c. If on the Submittal Date, Seller does not have a CPCN for the Facility or has not filed a Report of Proposed Construction with the NCUC for the Facility, the LEO Date will be the date on which the NCUC issues a CPCN for the Facility or the filing date of the Report of Proposed Construction for the Facility, as applicable.

6. This Notice of Commitment shall automatically terminate and be of no further force and effect in the following circumstances:

   a. Upon execution of a PPA between Seller and Company.

   b. For a seller eligible for Schedule PP, if such Seller does not execute a PPA within thirty (30) days of the Company's delivery of an "executable" PPA. An executable PPA shall mean a PPA delivered to the QF by the Company that contains all information necessary for execution and that the Company has requested that the QF execute and return.

   c. For a Seller that is not eligible for Schedule PP, if such Seller does not execute a PPA within six months (as such period may be extended by mutual agreement of Seller and Company) after the Company's submittal of the PPA to the QF, provided, however, that if no interconnection agreement for the Facility has been tendered to Seller prior to the expiration of such deadline, the deadline for execution of the PPA shall be automatically extended until the date that is five days after the date that the interconnection agreement is tendered to the Seller. Notwithstanding the foregoing, if the PPA proposed by the Company becomes the subject of an arbitration or complain proceeding, the six month deadline for execution of the PPA shall be tolled upon the filing of the pleading commencing such proceeding and thereafter the deadline for execution of the PPA will be as directed by the NCUC.

The undersigned is duly authorized to execute this Notice of Commitment for the Seller:

_____
[Name]

_____
[Title]

_____
[Company]

_____
[Date]

CERTIFICATE OF SERVICE

I certify that a copy of Duke Energy Carolinas and Duke Energy Progress' Joint Motion to Deem Revised LEO Form Timely Filed, in Docket No. E-100, Sub 140, has been served by electronic mail, hand delivery, or by depositing a copy in the United States Mail, 1st Class Postage Prepaid, properly addressed to parties of record.

This the 8th day of January, 2016.

Kendrick C. Fentress
Associate General Counsel
Duke Energy Corporation
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Raleigh, NC 27602-1551
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