LAW OFFICE OF
ROBERT W. KAYLOR, P.A.
353 EAST SIX FORKS ROAD, SUITE 260
RALEIGH, NORTH CAROLINA 27609
(919) 828-5250
FACSIMILE (919) 828-5240

November 17, 2020

Via email to Gray.Styers@Foxrothchild.com and First Class Mail

Gray Styers, Esq,
Fox Rothschild, LLP
434 Fayetteville St., Suite 2800
Raleigh, NC 27601

Re: Fifth Restated and Amended Renewable Power Purchase Agreement dated 21st day of June, 2016 (the "Agreement") between North Carolina Renewable Power-Lumberton LLC ("Seller") and Duke Energy Progress, LLC ("Buyer"), Docket No. SP-5640, Sub 0

Dear Gray:

As you know, I am Buyer's counsel with respect to the above-referenced Agreement.

Buyer is in receipt of Seller's proposal from Steve Dailey dated November 5, 2020, Attachment 1 hereto, seeking modifications of the Agreement, notwithstanding Buyer's many and consistent communications reminding Seller that Seller must comply in full with the Agreement and that Buyer is entitled to damages for Seller's non-performance.

I am also in receipt of your letter dated November 11, 2020, Attachment 2 hereto. In the last paragraph, you purported to give "written notice of such dispute" pursuant to Section 26.11 of the Agreement. You also said "NCRP has not failed to perform ANY material covenant or covenant [sic] or obligation not remedied within 30 days of notice." (emphasis in original).

You are mistaken. By letter of May 28, 2020, Buyer exercised its right to Performance Assurance. Although Performance Assurance is due within five business days of demand, Buyer gave Seller extra time, until June 11, 2020. Buyer and Seller met by teleconference on June 8, 2020. On June 10, 2020, Seller replied that Seller would not provide the demanded Performance Assurance and asked for a meeting. Since then, Buyer and Seller each corresponded concerning meetings, and the parties met again. On July 20, Seller wrote to Buyer that "We understand the articulation of your legal position in your May 28 and July 8 letters, but I also trust that you can recognize the benefits of our continued relationship and the negative consequences - to everyone - of shutting down the Lumberton facility."

Seller's own letters recognize that the parties have been in dispute since at least June 10, 2020, when Seller notified Buyer of Seller's refusal to provide Performance Assurance. It has been at least 160 days since Seller delivered its notice that Seller would not perform the Agreement, and the same period during which parties began requesting and holding meetings.

This is more than 90 days. It has been at least 159 days since Seller failed to post the Performance Assurance. This failure to perform a material covenant is more than the 30-day period that you claim has not elapsed. Our first filing in the NCUC Docket No. SP-5460 Sub 0 was made on October 23, 2020, which was 135 days after your notice. All these material disputes have been pending and under discussion by the parties for more than 90 days, and throughout this period Seller has refused to perform.

Your statement in your November 11, 2020 letter that Seller has "agreed to post the Performance Assurance as requested" is demonstrably misleading, because it is not what was previously communicated by Seller. By letter dated November 5, 2020, Seller offered to post the Performance Assurance by November 30, but only if ***eight*** other listed preconditions imposed by Seller were first accepted by Buyer, including avoiding Seller's accumulated liquidated damages obligation to Buyer for Seller's failure to meet its guaranteed performance obligations, which Seller's performance to date has demonstrated Seller cannot meet.

In my letter of November 5, 2020, I invited your client "to discuss an orderly termination of the Agreement, taking into account Seller's defaults and accumulated damages owed to Buyer. If Seller desires to engage in discussions with Buyer for purposes of an orderly termination and liquidation of obligations under the Agreement, please contact me." This remains the case. Additionally, Buyer will agree to discuss Seller's performance under the Agreement and Buyer's accumulated damages, for an additional period of 90 days from November 11, 2020. During this period, neither party will "pursue any legal remedies at law or in equity." We emphasize again that Buyer is not agreeing to forgive accumulated liquidated damages, and any resolution must resolve all damages to which our ratepayers are entitled.

For discussions to have a chance at success, however, Seller must be prepared to address its lack of transparency. For example, in my November 5 letter, I stated "according to Paragraph 105 of the Amended Complaint in civil action 1:2016-cv-03690, Northern District of Georgia, *Five on Fifty v. Bean et al.*, Seller, but not Buyer, was in possession of an independent 'Milbank' due diligence report that reported it was impossible for the Facility to meet the guaranteed production obligations." You responded that this is "simply the product of gross misinformation and careless research" and that the *Five on Fifty* lawsuit was "based on inaccurate allegations" and "summarily dismissed." The *Five on Fifty* lawsuit was filed in 2016 and was perhaps finally dismissed in 2020. Nearly five years of ongoing litigation is not "summarily dismissed," as you attempt to characterize the case. Returning focus to what I said, the *Five on Fifty* First Amended Complaint, filed June 1, 2017, alleged in paragraph 105 (emphasis supplied):

> ... Defendant Entities had failed to disclose known problems with the Lumberton plant that would delay its ability to comply with the requirements in the PPA for use of fuel, which the Defendant Entities knew could cause liquidated damages under the PPA and thus impact the profitability and performance of the plant. It was not until Plaintiffs saw the Milbank diligence report in 2016 that they ***learned that the Defendant Entities had known of this problem and yet failed to disclose it***. As noted in that diligence report: ...

> ***If the Lumberton Facility fails to comply with such Fuel Requirement, GRP is required to pay liquidated damages, and if such failure continues for 2 consecutive calendar years, Progress ... is entitled to terminate the PPA.***
>
> We understand that compliance with Fuel Requirement will not be feasible until the boiler installation at the Lumberton Facility is completed and that ***such installation is expected to take up to 2 years***. However, GRP has communicated to us that commercial operations have commenced at the Lumberton Facility. Accordingly, GIP should confirm whether GRP has obtained all necessary waiver from Progress in respect of Fuel Requirement to avoid being charged liquidated damages. ...

These allegations in the ***Five on Fifty*** pleadings can be compared with Seller's contemporaneous representations to Buyer in Seller's February 8, 2016, letter to Buyer:

> Additional plant improvements ***to be completed in 2016*** will result in significantly higher poultry REC production (and correspondingly lower biomass REC production) through the term of the PPA. ... [T]he Production Obligations (Section 7.11.) of the PPA, including the fuel mix requirements of Section 7.11.1 (Section 7.10.1 of the RECs Sales and Purchase Agreements) do not apply until we reach commercial operation in the spring of 2017. At present , NCRP-L is still refining its operational parameters. ***When we have completed these modifications, we expect to meet all the obligations of the PPA.***

With respect to the litigation that Seller threatens against Buyer on the basis of a claim of "reliance," we do not see anything in the correspondence between the parties on which your client could have "relied," including with respect to Buyer's November 22, 2019, letter, as claimed in Seller's November 5 and November 11 letters.

On August 30, 2018, Buyer told Seller it was "a hard no on switching away from the current capacity language." On January 7, 2019, Seller made "one more amended request on the nameplate capacity", and Buyer responded within three hours that Buyer would "never agree" to the request. Buyer's November 22, 2019, letter to Seller said (emphasis supplied):

> Duke Energy would like to suggest revisions to the Agreements, or entering into new Agreements ***that will provide realistic estimates and production volumes*** for NCRP. One possible option is removing the Swine Waste Production Obligation as prescribed in Section 7.10.2 of the RPPA.
>
> ***Within 14 days from the date of this letter, please provide***:
>
> 1. A detailed timeline for a new boiler, and proof of that purchase;

2. A revised poultry forecast.

If this information is not received, Duke Energy hereby reserves and may resort to any one or more of its rights and remedies as provided in the Agreements, up to and including damages and termination.

On December 9, 2019, Seller wrote to Buyer "to request an extension to your request until the end of January 2020." On January 28, 2020, Buyer wrote to Seller "I wanted to remind you that we are nearing the end of the time extension that was given in regards to the attached [November 22, 2019] letter. Please let me know your plan to cure these items by the end of the week." Despite the extension and January 28, 2020 reminder, there was no communication to Buyer from Seller providing the requested information. Indeed, in your June 10, 2020 letter to Buyer, you admitted:

> In its November 22, 2019 letter to [Seller], Duke inquired about a timeline for the new boiler, proof of that purchase, as a revised poultry [RECs] forecast. [Seller] - rightly or wrongly - did not want to provide an incomplete or impartial response to this inquiry, as they continued to work to refine their plans, and did not immediately respond to the letter. ... [Seller] believes that it is now at a point to provide a detailed explanation of its plans ..."

Seller by its own admission missed all deadlines. Seller did not provide the requested information, and the invitation to open discussions expired by its terms. Seller cannot claim to rely upon an invitation that it failed to act upon and knowingly declined.

Consistent with belying any reliance upon our communications by Seller, on July 29, 2020 Steve Dailey of Seller wrote to Buyer "We have completed all of our contracts in order for us to move forward with the I Squared Capital construction loan. Based on this and a positive response back from Duke, we can still maintain our August start date and be online the 2nd quarter of 2021." Less than two hours later, Buyer responded, ***"No positive response from Duke."***

Any discussions occurred in the context of the binding Agreement already existing between the parties, and not some unsolicited term sheet. The Agreement governs discussions between the parties. The Agreement provides in Section 26.7: "No amendment, modification or change to this Agreement shall be enforceable unless agreed upon in a writing executed by both Parties." and in Section 26.12: "Any waiver shall be in writing signed by the waiving Party." The Agreement provides that commercial communications between the parties, and due diligence invitations to discuss possibilities that could potentially develop into proposals, are not amendments unless and until signed by both parties. There is nothing here upon which Seller can allege it "relied." I point out to you that Buyer's commercial contact witness in this matter has a reputation of being fair and straightforward. His communications to Seller's commercial contacts demonstrate that there is no legitimate basis for any claims of reliance or forgiveness of

damages, as you attempt to suggest. To the extent Seller pursues any claims of reliance, Seller's commercial contact witnesses will be subject to impeachment as to both facts and credibility. Buyer will use vigorously defend against any attempt to mischaracterize the communications by its representatives.

Buyer has given Seller ten years to perform, and Seller has not done so, despite now being on its ***fifth*** amendment and restatement. Our requests for information were uniformly met with incomplete information, untruths, and obfuscations, including as recently as your November 11, 2020 letter. Our sincere invitation of November 22, 2019 to talk was not only not rejected by Seller, it is now being alleged by Seller as a source of reliance liability ***against*** Buyer despite the very clear evidence to the contrary.

Buyer understands that it has a compliance obligation, and Buyer will take steps to meet its compliance obligations. Central to this is entering into transactions with counterparties that have credible deal teams, are adequately capitalized, can provide adequate collateral, have the capacity to perform, and do not press negotiations under threat of litigation.

We intend to file this letter in Docket No. SP-5640, Sub 0 at the North Carolina Utilities Commission. Without going into further specifics, Buyer denies everything else in your letter. This letter is without prejudice to and not in limitation of any and all rights and remedies of Buyer under the Agreement and applicable law and does not in any respect waive any remedies for any period or for any purpose. All rights and remedies are reserved. Holding the discussions that Seller has requested, and any exchange of documents in connection therewith, does not and will not constitute an agreement to amend the Agreement.

Please contact me to begin the discussions that Seller has requested. These discussions are more likely to be successful if Buyer is represented by the new team that it indicates in its letters that it has put in place.

Very truly yours,

/Robert W. Kaylor

Robert W. Kaylor

cc: Chief Clerk, North Carolina Utilities Commission, Docket No. SP-5640, Sub 0
Tim R. Dodge, Public Staff-North Carolina Utilities Commission

VIA FIRST CLASS MAIL AND EMAIL c/o nadene.wallace@duke-energy.com

Mr. David B. Johnson
Director, Business Development & Compliance
Duke Energy Progress, LLC
400 South Tryon Street
Charlotte, NC 28202

Dear David,

Thanks for taking the time to talk to me last week. During that conversation, you mentioned that Duke Energy Progress was willing to consider a proposal from North Carolina Renewable Power-Lumberton (NCRP), which I am outlining below in this letter.

But first, let me say that -- based upon our conversation and from the letters exchanged by our respective attorneys -- I continue to feel that we have failed to accurately communicate what NCRP has done in reliance upon, and since the time of, Travis Payne's letter dated November 22, 2019 to upgrade the facility so that we can produce the quantity of poultry waste RECs originally contemplated in the PPA and desired by the parties. NCRP has taken the following steps:

- Dave Shaffer was terminated and Steve Dailey was hired as the new President and COO of Georgia Renewable Power, parent of NCRP
- Executed new Operations and Maintenance Agreement with Veolia
- Agreed on fuel-mix and boiler specification targets
- Finalized design with Wellons Power Group for plant upgrade
- Received and have agreed to EPC proposal with Wellons Power Group
- Executed new fuel contract agreement with Canal Wood
- Executed drying offtake agreement with Enviva
- Revised PSD air permit for the facility
- Received indicative financing terms from I Squared Capital for the facility upgrade. (Note that a formal commitment is subject to agreed-upon terms with Duke Energy.)

All of these steps were taken while representatives of NCRP were in dialogue with representatives of Duke Energy, and with the understanding, based upon those conversations,

that NCRP and Duke Energy would reach a business agreement to amend the PPA so that the facility could be upgraded, would then continue to operate, and would meet the intent of the PPA as well as its terms in the long run, for the mutual benefit of all parties.

As you may know, in late February, we had scheduled a face-to-face meeting with Travis Payne on March 18 to introduce me and to lay-out this new plan. That meeting never occurred as we intended because of the COVID-19 outbreak, and the substitute call was only an introduction. The pandemic has made it difficult to build the personal relationships and your trust in our intentions and efforts, but it should not cause the end of our business relationship or the permanent closure of the plant.

However, I recognize that everything I've written above is in the past, and that we are both talking with our respective attorneys about contingencies in the future. What I want to now address, businessman-to-businessman, is what we can do in the present in order to advance matters.

In that regard, and as a follow up to our conversation, I would propose the following as constituent parts of a mutually acceptable business solution:

1) NCRP will be increasing the financial assurance (currently in the form of a letter of credit) from $3.5MM to $7.0MM no later than November 30, 2020.

2) Further, in the context of a larger, global resolution outlined below, NCRP would consider increasing the letter credit beyond the $7MM threshold during the period when the facility is being upgraded. This additional increase would be in an amount mutually acceptable to both parties, and there would be identified milestones at which this additional financial assurance could be stepped back down over time, as discussed below.

3) NCRP will re-start and continue to operate the plant and generate RECs until construction work on the plant upgrades necessitates a temporary shutdown during the retrofit. Further, NCRP will complete the third commercial grade dryer which will allow for an increase in thermal REC generation. (NCRP will receive payment in full for all energy and RECs produced, pursuant to the current PPA.)

4) As offered previously, we would decrease Duke Energy's current total purchase obligation from 350,000 poultry RECs down to 250,000. We think it makes sense to clarify that this reduction would apply to "Duke Energy's <u>and</u> The Poultry Buyers Group's combined obligation." This is a 28.57% decrease in the purchase obligation.

5) Correspondingly, the rolling two-year average production obligation requirement would be decreased by the same 28.57%. The new 2 year rolling average would be 168,575.

6) The first time-period following COD over which this reduced production obligation (168,575) must be met would be a three-year period of 2019-2021, and would then be a two-year rolling average obligation thereafter.

7) We should clarify that the rolling two-year average would be based on total facility production / RECs sold to both Duke Energy and the current members of The Poultry Buyers Group.

8) We are open to your preferences with regards to swine waste RECS under the PPA.

9) As mentioned in 2) above, once the upgrade to Lumberton is complete, the financial assurance would step down from the negotiated level above $7MM to $7MM. Then, once the new 2-year rolling average has been met, the financial assurance further would step down again to $3.5M.

I would greatly appreciate your reaction and thoughts about this proposal, and I would be glad to join you on a WebEx or Zoom call (or to come to Charlotte and meet in person) to discuss any refinements and adjustments to these terms that you would suggest. Time is of the essence for both parties. In the interim, George and I would like to schedule a conference call with you and Travis on Monday if possible.

I know you had said to direct questions to Robert Kaylor, but I see this proposal as the last, best chance for us to negotiate a business solution that works for both parties, before we turn the lawyers loose to start fighting over how the details of the PPA are to be interpreted and what parts are or are not enforceable. That's not the path we want to go down. We want to find a deal that works for everyone.

My cell number is below and I would welcome a telephone call at your convenience to discuss next steps.

With best regards,

Steve Dailey

Steve Dailey

Cell: 205-914-3487

Fox Rothschild LLP
ATTORNEYS AT LAW

434 Fayetteville Street
Suite 2800
Raleigh, NC 27601
Tel (919) 755-8700 Fax (919) 755-8800
www.foxrothschild.com

GRAY STYERS
Direct No: 919.755.8741
Email: GStyers@Foxrothschild.com

November 11, 2020

Via email to bkaylor@rwkaylorlaw.com and First Class Mail

Robert W. Kaylor, Esq.
Law Office of Robert W. Kaylor, P.A
353 East Six Forks Road, Suite 260
Raleigh, NC 27609

Re: North Carolina Renewable Power-Lumberton, LLC / PPA with Duke Energy Progress, LLC

Dear Bob:

Your letter to me dated November 5, and Steve Dailey's letter to David Johnson, crossed in transit. I have also received a copy of Mr. Dailey's letter, and as indicated therein, North Carolina Renewable Power-Lumberton, LLC (NCRP) wishes to respond that, in fact, it also "desires to engage in discussions" with Duke Energy Progress ("Duke") as your letter proposes (and as NCRP has suggested on numerous occasions), but for the purpose of finding a mutually beneficial solution so that it can continue operations and provide energy and RECs to Duke and the Poultry Waste RECs Buyers collaborative, and not related to any alleged termination or liquidation of obligations under the Power Purchase Agreement (PPA).

NCRP categorically and emphatically denies and disputes, and will vigorously contest, any allegations that it has triggered any Event of Default under the PPA, as alleged in your letter. The only party that is approaching an Event of Default of the agreement is Duke if it fails to pay by November 17 (20 days from receipt of written notice) for energy and RECs it has indisputably received, as required by Section 7.8 and as an Event of Default pursuant to section 20.1

NCRP has not abandoned operation of the Facility for more than thirty days in violation of Section 20.17, but rather has been forced to temporarily stop receipt of fuel for its boilers (and therefore is prevented from operating) because of Duke's abuse of its monopolistic market position and refusal to pay NCRP what it owes.

NCRP has not failed to perform ANY material covenant or covenant or obligation not remedied within 30 days of notice. Given the lack of specificity of this catch-all allegation, no further response is necessary.

NCRP has not only agreed to post the Performance Assurance requested, but has agreed to negotiate in good faith to post MORE than the Posting Cap of $7 million dollars in the context of a negotiated business solution. Notwithstanding its willingness to make this concession for the purposes of compromise and settlement, communicated pursuant to Rule 408 of the North Carolina Rules of Evidence, NCRP intends, if necessary, to contest, and assert defenses to, any efforts by Duke to collect liquidated damages pursuant to Section 7.10.1 of the PPA. Furthermore, any effort by Duke to draw upon the existing Letter Credit while the plant is unable to produce RECs because of Duke's own refusal to pay amounts that it owes will be vigorously opposed and contested to the fullest extent of the law.

Finally, NCRP denies that it has made any false representation or warranty to Duke, and charitably deems Duke's references to the two legal actions cited on page two of your letter to suggest otherwise as simply the product of gross misinformation and careless research. The truth is that the frivolous *Five on Fifty* lawsuit based on inaccurate allegations was summarily dismissed with prejudice pursuant to Rule 12(b)(6), and the court further denied a futile request to amend the complaint and an additional motion for reconsideration. Though Georgia Renewable Power chose not to appeal the denial of its request for attorney fees, we believe such an award was warranted given the falsity of the plaintiff's allegations. Duke's reliance on allegations so roundly rejected by a federal court to suggest some impropriety is misplaced and, frankly, troubling. Likewise, unsupported and unverified statements from a letter exhibit in the *NRG Energy Services* case, which were included solely to seek leverage in settlement negotiations on wholly unrelated claims, provide no support for an artificial theory of breach of the PPA. Those assertions by NRG totally ignored the facts that NCRP has consistently sought to stay in compliance with its air permit, entered into a Special Consent Order with the North Carolina Department of Environmental Quality (NCDEQ), and has communicated regularly and cooperated fully with NCDEQ regarding air emissions from the facility since then. The merit of the assertions in the *NRG Energy Services* case is belied by the stipulated dismissal with prejudice of the action. That lawsuit is over. Candidly, NCRP is surprised that a company as sophisticated as Duke (with its own history of being named as defendant in lawsuits of varying degrees of merit) would resort to relying on such unsubstantiated and ultimately rejected allegations as "evidence." This tactic raises serious concerns by NCRP's management about Duke's true motivations and intent in sending such a letter (and filing it with the North Carolina Utilities Commission).

NCRP also notes, more generally, that the facts set forth in Mr. Dailey's November 5 letter to Mr. Johnson describing NCRP's reliance upon ongoing dialogue with Duke while NCRP was making plans to upgrade the facility this year serve as the foundation for numerous legal arguments and claims regarding Duke's conduct and obligations of good faith and fair dealing in its business relationship with NCRP.

In response to the last sentence or your letter: no, your letter was perfectly clear, as I hope this one is as well -- there is a serious "dispute, controversy, or claim arising out of, under, or related to [the PPA, which] shall be resolved by the Parties first attempting to resolve such dispute through good faith negotiations" as required by Section 26.11 of the PPA. Unlike the multiple oral communications and letters that have been sent from NCRP to Duke over the past several months – seeking good faith negotiations and documenting that fact – NCRP considers Duke's responses, in general, and your letter, in particular, to be just the opposite (and believes that a court would agree). Recognizing that Section 26.11 does require written notice of such dispute to trigger a ninety-day period for such negotiations before either "party may pursue any legal remedies available at law or in equity," please consider this letter to be such notice and let us know a date and time when, and a place where, NCRP can engage in such negotiations. If you prefer, NCRP would also deem your letter and your offer "to engage in discussions" to be such notice.

We look forward to your response.

Very truly yours,

M. Gray Styers, Jr.

M. Gray Styers, Jr.

Cc: Mr. Steve Dailey