

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-2, SUB 1177
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)
 In the Matter of:)
 Cube Yadkin Generation, LLC,)
 Complainant)
)
 v.)
)
 Duke Energy Progress, LLC,)
 Respondent)
)
 DOCKET NO. E-7, SUB 1172)
)
 In the Matter of:)
 Cube Yadkin Generation, LLC,)
 Complainant)
)
 v.)
)
 Duke Energy Carolinas, LLC,)
 Respondent)

**RESPONDENTS' JOINT
REQUEST FOR APPROVAL
OF PROCEDURAL
SCHEDULE ON REMAND**

NOW COME Duke Energy Progress, LLC (“DEP”) and Duke Energy Carolinas, LLC (“DEC”) (collectively “the Companies” or “Respondents”) by and through counsel and pursuant to Rule R1-9 of the North Carolina Utilities Commission (“Commission” or “NCUC”) Rules and Regulations submit the following request for approval of procedural schedule on remand.

Background

1. On March 29, 2018, Cube Yadkin Generation, LLC (“Cube Yadkin”) filed a complaint against the Companies, seeking to enforce its right under PURPA to sell the energy from three of its hydroelectric facilities.

2. On May 7, 2018, the Companies filed a joint answer and motion to dismiss, stating Cube Yadkin had failed to meet the Commission’s requirements for establishing a legally enforceable obligation (“LEO”) prior to November 15, 2016, in particular, and had failed to establish a LEO in general.

3. On July 16, 2018, the Commission issued an Order Granting Motion to Dismiss, holding that allowing an exception for the required use of the Notice of Commitment Form (“NoC Form”) would undermine the Commission’s intent in adoption to the NoC Form to provide clarity to qualifying facilities (“QFs”) and utilities and reduce the number of complaints related to the date of the LEO and denying Cube Yadkin’s request for a waiver of the required use of the NoC form.

4. On September 13, 2018, Cube Yadkin filed its Notice of Appeal to the Court of Appeals of North Carolina.

5. On January 23, 2020, the Court of Appeals issued its judgment affirming the Commission’s decision in part, reversing in part, and remanding. The Court of Appeals held that the Commission had the authority to create its three-part test for the establishment of a LEO and that the requirement of QFs to file the NoC form did not unreasonably interfere with a QF’s right to a LEO. However, the Court of Appeals agreed with Cube Yadkin that the Commission erred by determining upon a motion to dismiss that Cube Yadkin was not entitled to a waiver of the NoC Form requirement.

6. The Court of Appeals listed several issues of fact it deemed to have material bearing on whether Cube was entitled to a waiver of the NoC Form requirement—such as whether Duke acted in bad faith; when Cube committed to sell its energy to Duke; and whether Cube had "substantially complied with the substance" of the Commission's requirements. The Court held the decision on the waiver was decided by the Commission without the benefit of either party being able to submit additional evidence besides the pleadings.

Procedural Request

7. Recognizing that the Court of Appeals affirmed the Commission's decision in large part, the only issue remaining before this Commission is the question of whether Cube Yadkin should be granted a waiver of the NoC Form requirement.

8. Therefore, in accordance with the Court of Appeal's judgment, the Companies request that they and Cube Yadkin be afforded the opportunity to outline their positions on the issue of the waiver and submit additional evidence through a paper hearing, narrowly tailored for determining the single issue at hand. Similar to the process for complaints, the Companies propose that Cube Yadkin would file first, followed by the Companies. Then, because Cube Yadkin carries the burden of proof, Cube Yadkin should be afforded to opportunity to file a rebuttal. The documents on which Cube Yadkin relies are already part of the record in this docket, and most information has been verified. To the extent that any additional information needs to be verified, that can be accomplished through affidavits. Because of the extensive information already in the record, the scheduling of an evidentiary hearing is unnecessary, would involve unnecessary costs to all participants and amount to judicial inefficiency.

9. If, after reviewing the filings, the Commission finds that it needs further clarification, the Commission can schedule a proceeding requiring both the Companies and Cube Yadkin to make persons available to respond to questions from the Commission. The Commission, in its discretion, can afford counsel the right to ask questions on the Commission's questions, as appropriate. This is consistent with recent procedures sometimes followed by the Commission in resolving matters that are more efficiently resolved through analysis than through a long, protracted evidentiary hearing, which, in this matter, is likely to repeat information that is already before the Commission.

WHEREFORE, Duke Energy Progress and Duke Energy Carolinas respectfully request the Commission to approve a procedural schedule as outlined herein.

Respectfully submitted this 19th day of May, 2020.

By: _____


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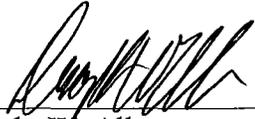
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ATTORNEYS FOR DUKE ENERGY PROGRESS, LLC
AND DUKE ENERGY CAROLINAS, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of **RESPONDENTS' JOINT REQUEST FOR APPROVAL OF PROCEDURAL SCHEDULE ON REMAND** has been served by electronic mail (e-mail), hand delivery, or by depositing a copy in the United States Mail, first class postage prepaid, properly addressed to parties of record.

This, the 19th day of May, 2020.



Dwight W. Allen

ATTORNEY FOR DUKE ENERGY
PROGRESS, LLC. AND DUKE ENERGY
CAROLINAS, LLC