

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

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

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

Docket No. E-2, Sub 1177)
)
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)

**COMPLAINANT CUBE YADKIN
GENERATION, LLC'S POST
HEARING BRIEF**

Contents

- I. INTRODUCTION 3
- I. BACKGROUND 5
 - A. Cube Yadkin 5
 - B. PURPA QF Obligations and Establishing a LEO..... 6
 - C. The Qualifying Facilities 9
 - D. The Purchase of the Cube Yadkin QFs..... 11
 - E. PPA Negotiations between Cube Yadkin and Duke..... 11
- II. PROCEDURAL HISTORY..... 15
- III. ARGUMENT 17
 - A. There is Good Cause to Grant Cube’s Request for a Waiver of the Technical NoC Form Requirement. 18
 - 1. Cube Yadkin Could Not Complete the NoC Form 18
 - 2. The Unique and Specific Circumstances of the Cube Yadkin Facilities Justify Waiving the NoC Form Requirement and Establishing a LEO for the QFs Based on Cube’s October 11, 2016 Letter to Duke..... 19
 - 3. Cube Provided all the Applicable Information Required by the NoC Form, and Duke Was Aware of Cube’s Intent to Sell the Output of the Cube Yadkin QFs. 21
 - 4. Cube Could Not Reasonably be Expected to have filed an Incomplete or Modified NoC Form..... 23
 - 5. Duke has Not Produced Any Record of a North Carolina QF Predating the CPCN Requirement Completing a NoC Form in North Carolina without a CPCN. 24
 - B. Equitable Considerations Also Support a Waiver. 26
 - 1. Cube Acted Diligently and Reasonably During the Course of Negotiations..... 26
 - 2. Cube Yadkin Risked Potentially Impairing Its Right To Establish A LEO By Submitting a NoC Form. 28
 - 3. Waiver of the NoC Form Requirement Is Appropriate Based on Duke’s Actions. 28
 - 4. An Unwaivable Requirement that Cube Yadkin Submit a NoC Form would be Harmful to Ratepayers. 32
 - C. The Commission Should Confirm A LEO Date For The Cube Yadkin QFs of October 11, 2016, or at the Latest, a LEO Date of February 1, 2017. 33
- IV. CONCLUSION..... 34

Complainant Cube Yadkin Generation, LLC (“Cube Yadkin”) submits this post-hearing brief in accordance with the Notice of Due Dates For Proposed Orders and/or Briefs dated March 17, 2021 and subsequent modifying orders issued by the North Carolina Utilities Commission (“Commission”) in the above referenced dockets. Cube Yadkin respectfully asks that the Commission: (1) grant Cube Yadkin a waiver from Respondents’ Notice of Commitment Form (the “NoC Form”) given the unique facts and circumstances presented here, and (2) enter a declaratory order finding that Cube Yadkin established a legally enforceable obligation (“LEO”) for Respondents to purchase the output from Cube Yadkin’s Tuckertown, Falls, and High Rock hydroelectric facilities (the “Cube Yadkin Facilities,” the “Facilities” or the “Cube Yadkin QFs”), on or before October 11, 2016.¹

I. INTRODUCTION

The evidence presented supports Cube Yadkin’s request for a waiver of the NoC Form requirement and a finding that the Cube Yadkin QFs established a LEO on or before October 11, 2016. Cube Yadkin contractually obligated itself to purchase these Facilities (together with the Narrows facility) from Alcoa Power Generating Inc. (“Alcoa”) in July 2016. Through a sustained course of negotiations, Cube committed to sell their output to Duke Energy Progress, LLC and Duke Energy Carolinas, LLC (collectively, “Duke”), with Alcoa’s knowledge and cooperation, on or before October 11, 2016. Cube did not tender a NoC Form to Duke during these negotiations, both because of the inherent incompatibility of the NoC Form with projects, such as the Cube Yadkin QFs, which were constructed before the CPCN statute was enacted; and also because Duke was fully aware of the existence of the Cube Yadkin QFs and Cube’s intent to sell to Duke the output of the Facilities under PURPA.

¹ A fourth, larger hydroelectric facility, Narrows, is not a QF and is not at issue in this proceeding.

Duke, however, has steadfastly sought to avoid its statutory obligation to purchase that output under the Public Utility Regulatory Policies Act, 16 U.S.C. §§ 824a-3 *et seq.* (“PURPA”), based on an evolving set of arguments. Duke now claims that the lack of NoC Form prevents Cube from establishing a LEO for the Facilities and that the Commission should not waive this requirement, even if unique facts and circumstances fully justify it. Duke disregards the unusual difficulties that Duke’s NoC Form presented for the Cube Yadkin QFs and the other circumstances supporting waiver of the NoC Form and the establishment of a LEO on or before October 11, 2016.

The Commission has previously held in this docket that Cube Yadkin did not meet the general requirements for establishing a LEO in North Carolina because it did not file a NoC Form. Order Granting Motion to Dismiss (July 16, 2018). Cube Yadkin submits that there is good cause for the Commission to partially waive this requirement, and find that Cube established a LEO for the Facilities on or before October 11, 2016, for the following reasons: (1) Cube Yadkin could not complete the NoC Form as approved by the Commission because the Facilities predated the CPCN statute, and therefore did not have (or require) CPCNs; (2) Cube Yadkin provided to Duke all of the applicable information required by the NoC Form, and Duke was fully aware of the Cube Yadkin QFs’ intent to sell their output to Duke on or before October 11, 2016; (3) Cube Yadkin’s failure to complete the NoC form was not evidence of a lack of diligence or bad faith on Cube’s part; and (4) Duke’s attempts to evade its PURPA obligations through protracted negotiations concerning power purchase agreements (“PPAs”) support issuance of a waiver.

This docket presents straightforward requests to waive the NoC Form Requirement and establish a LEO date for Cube Yadkin’s legacy Facilities based on the unique circumstances presented here. It does not, as Duke suggests, present a collateral attack on the NoC Form requirement, which would continue to apply to facilities for which it could be completed – *i.e.*,

almost all the facilities in North Carolina, which will be newer than the Yadkin facilities and will either be in the process of receiving a CPCN or have already received a CPCN. Nor is Duke correct in asserting that Cube Yadkin is seeking stale rates. Cube Yadkin simply wants the benefit of the LEO it established. Once the Commission confirms that the establishment of a LEO and its effective date, then as is required under PURPA, Cube Yadkin will negotiate with Duke in good faith to establish appropriate rates based on the circumstances and the law. If there is mutuality in this undertaking, there will be no need for the parties to return to the Commission in this docket.

I. BACKGROUND

A. Cube Yadkin

Cube Yadkin is a Delaware limited liability company that was created to own, develop, and modernize hydroelectric facilities, and it is the owner of the three Facilities at issue. Transcript of Testimony Heard on 3 March 2021, Volume 1 (“Tr. Vol. 1”), Commission Docket No. E-2 Sub 1177, E7 Sub 1172, at 23:10-11, 23:22 – 24:1 (Cube Yadkin Witness John Collins Testimony). Cube Yadkin is an affiliated company of Cube Hydro Partners, LLC (“Cube Hydro”)² through Cube Yadkin’s managing member, Cube Hydro Carolinas, LLC.³ *Id.* at 23:9-10. As the affiliate of Cube Yadkin, Cube Hydro was responsible for all stages of the acquisition and operation of four hydroelectric power facilities on the Yadkin River, including the three Facilities that are the subject of this proceeding. *Id.* at 23:13-15. Cube Yadkin, and its affiliates, are skilled in all aspects of hydroelectric project acquisition, development, and operation, including knowledge of

² Cube Hydro and Cube Yadkin have since been purchased by Ontario Power Generation and merged with Eagle Creek Renewable Energy (“Eagle Creek”). Tr. Vol. 1 at 24:23-25:1 (Cube Yadkin Witness John Collins Testimony).

³ Cube Hydro Carolinas LLC serves as the managing member of Cube Yadkin and is an affiliate of Cube Hydro. Tr. Vol. 1 at 23:7-17 (Cube Yadkin Witness John Collins Testimony). As these entities are affiliated companies, Cube Yadkin is used throughout this brief to represent the company owning the Cube Yadkin Facilities.

federal, state, and local permitting processes and requirements. *Id.* at 24:2-4. Cube Yarkin has also been recognized by FERC as a “qualified operator.”

B. PURPA QF Obligations and Establishing a LEO

PURPA was enacted in 1978 to encourage conservation of oil and natural gas and to promote the development of alternative energy resources. One of the stated goals of PURPA and its implementing regulations is to encourage the development of small power production facilities with renewable fuel sources. 16 U.S.C. § 824a-3; *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 405 n.1 (1983). Under Section 210, a QF is entitled to sell its energy and capacity to a utility “pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term.” 18 C.F.R. § 292.304(d)(2). A “legally enforceable obligation,” or LEO, may take the form of a contract or may arise by operation of law. A QF may elect to sell its output to the utility at rates equal to avoided cost calculated at the time of delivery, or at the time the LEO is incurred. 18 C.F.R. § 292.304(d)(2).

FERC created the LEO concept to prevent utilities from circumventing their obligation to purchase from a QF “by refusing to enter into a contract with a qualifying facility.” *See, e.g., Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 (2011) (“Cedar Creek”) (explaining that Section 292.304(d) and the requirement that a QF can sell, and a utility must purchase pursuant to a legally enforceable obligation were adopted to prevent utilities from circumventing the requirement of PURPA that utilities purchase energy and capacity from QFs). A QF creates a LEO when it commits itself to sell its output to the utility, whether or not a contract has been signed. *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187, P 40 (2013) (“In order to protect the rights of a QF, once a QF makes itself available to sell to a utility, a legally enforceable obligation may exist prior to the formation of a contract”). A QF that commits itself “to sell to an electric utility . . . ‘also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-

contractual, but binding, legally enforceable obligations.” *Id.* As this Commission acknowledged has acknowledged, FERC has held that “the establishment of a LEO turns on the QF’s commitment, and not the utility’s actions.” Order Establishing Standard Rates and Contract Terms for Qualifying Facilities, Docket E-100, Sub 148 (Oct. 11, 2017) (“Sub 148 Order”) at 105-06. The Commission has also noted that the LEO was designed to protect both “the generator from delays in PPA negotiations” and “the utility from having to expend time unnecessarily engaging in negotiations to sign a PPA when a generator might never obtain a CPCN to build its proposed facility or make a commitment to sell its electricity to the utility.” Order Establishing Date of Legally Enforceable Obligation, Docket No. E-22, Sub 521 (Sep. 22, 2015) at 6-7.

In December 2015,⁴ for the purposes of “provid[ing] clarity” and “reduc[ing] the number of disputes” between QFs and utilities concerning the establishment of a LEO, the Commission held that delivering a NoC Form to the utility was an appropriate method by which QFs should demonstrate their “commitment to sell” so as to establish a LEO. Order Establishing Standard Rates and Contract Terms for Qualifying Facilities, Docket No. E-100, Sub 140 (Dec. 17, 2015) at 52.

The NoC Form used by Duke, which the Commission approved, requires that the QF provide the following information:

- Identification of the seller and seller contact information as shown in Section 1 and 2 of the NoC Form; and.

⁴ Prior to 2016, the Commission held that a QF incurs a LEO when it: (1) obtains a Certificate of Public Convenience and Necessity (“CPCN”) or (for facilities two megawatts or smaller) files a Report of Proposed Construction (“ROPC”) under N.C. Gen. Stat. § 62-110.1; and (2) indicates to the utility that it seeks to commit itself to sell its output to that utility. N.C. Util. Comm’n Docket No. E-100, Sub 136, Biennial Determination of Avoided Cost Rates for Elec. Util. Purchases from Qualifying Facilities – 2012, Order Establishing Standard Rates and Contract Terms for Qualifying Facilities (Feb. 21, 2014).

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: _____

- A certification by Seller in Section 3 of the form that it has received a CPCN; it has filed a ROPC; or it is applying for a CPCN or will file a ROPC.

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.

NoC Form, Ex. 1 (John Collins Rebuttal Testimony Exhibits). Cube Yadkin could not complete this section of the Form because its QFs predated the CPCN requirement and, as a result did not

have a CPCN. In its testimony, Duke acknowledged that Cube Yadkin could not complete this section of the NoC Form.

The NoC Form also includes a section that defines the submittal date of the NoC Form for the purposes of establishing the LEO. *Id.* at 2-3. It requires the submitting party to acknowledge that the LEO date is the later of either the submittal date or the date on which a CPCN is issued by the Commission or a ROPC is filed. *Id.* The NoC Form and Commission Order approving it do not address what should happen when a QF predated the CPCN requirement that began with the enactment of the Electricity Act of 1965, Session Law 1965-287. *See* 148 Order. The Commission has not previously addressed whether QFs that predate the CPCN requirements can provide a partially completed or modified NoC Form, nor did Duke provide any guidance for how to complete the NoC Form for these types of QFs. Transcript of Testimony Heard on 3 March 2021, Volume 2 (“Tr. Vol. 2”), Commission Docket No. E-2 Sub 1177, E-7 Sub 1172, at 124:14-18 (noting that the Duke website does not mention any option for writing N/A on the NoC Form); 158:15-20 (Duke Witness Glen Snider Testimony).

C. The Qualifying Facilities

The Cube Yadkin Facilities were purchased from Alcoa and include four hydroelectric stations, dams and reservoirs along a 38-mile stretch of the Yadkin River as it flows through Davidson, Montgomery, Davie, Rowan and Stanly Counties. Tr. Vol. 1 at 25:19-21 (Cube Yadkin Witness John Collins Testimony). The four purchased facilities are commonly referred to as: High Rock, Tuckertown, Falls, and Narrows, with the first three being QFs under PURPA and the subject of this proceeding. *Id.* at 25:21 – 26:1. From upstream to downstream, the three QFs can be described as follows:

- (1) The High Rock facility, placed in service on or about January 1, 1927, consists of a 14,400-acre reservoir at full pool elevation with a usable capacity of 217,400

acre-feet. Its reservoir is impounded by a 936-foot-long, 101-foot-high dam. The powerhouse is integral with the dam and contains three turbine/generator units with a total installed capacity of 32.91 MW. The powerhouse's address is 3344 Bringle Ferry Road, Denton, North Carolina 27239.

(2) The Tuckertown facility, placed in service on or about January 1, 1962, consists of a 2,560-acre reservoir at a full pool elevation of 564.7 feet, with a usable capacity of 6,700 acre-feet. Its reservoir is impounded by a 1,370-foot-long, 76-foot-high dam. Its powerhouse is integral with the dam and contains three turbine/generator units with a total installed capacity of 38.04 MW. The powerhouse's address is 711 Tuckertown Road, New London, North Carolina 28127.

(2) The Falls facility, placed in service on or about January 1, 1917, consists of a 204-acre reservoir at a full pool elevation of 332.8 feet, with a usable capacity of 940 acre-feet. Its reservoir is impounded by a 748-foot-long, 112-foot-high dam. Its powerhouse is integral with the dam and contains three turbine/generator units with a total installed capacity of 31.13 MW. The powerhouse's address is 49156 Falls Road, Badin, North Carolina 28009.

Id. at 26: 1-21. Together with the non-QF Narrows facility, the Cube Yadkin QFs have a total generating capacity of 215 megawatts ("MW"). They are expected to produce nearly 800,000 MWh of clean, reliable electricity per year – enough to power approximately 72,000 homes with renewable energy. *Id.* at 26:22-27:2. Downstream of these facilities are two additional hydroelectric facilities, Tillery and Blewett Falls, both of which are owned and licensed by Duke as the Yadkin-Pee Dee Project. *Id.* at 27:2-4.

The Cube Yadkin QFs originally operated under a 50-year FERC license originally issued to Carolina Aluminum Company on May 19, 1958, and later transferred to Alcoa on July 17, 2000. Tr. Vol. 1 at 27:5-6 (Cube Yadkin Witness John Collins Testimony). After initiating the re-licensing process, Alcoa operated under short-term, annual licenses for a number of years. On September 22, 2016, FERC issued a new long-term license to Alcoa authorizing the operation and maintenance of the facilities until March 31, 2055 (the "License").⁵ *Id.* at 27:6-9.

⁵ The three Cube QFs have undergone, and will undergo further, modifications as required by the License. Tr. Vol. 1 at 27: 10-11 (Cube Yadkin Witness John Collins Testimony). These modifications include addressing the following:

D. The Purchase of the Cube Yadkin QFs

In 2016, Alcoa sought to sell the Cube Yadkin QFs (as well as the Narrows facility) (collectively, “the Yadkin Project”) to prospective purchasers, including Cube Yadkin and Duke. *Id.* at 25:10-11. Ultimately, Alcoa agreed to sell the facilities to Cube Yadkin. *Id.* at 25:13-14. After performing significant due diligence, Cube Yadkin and Alcoa signed a contract to acquire the Yadkin Project from Alcoa on June 30, 2016. *Id.* at 25:11-14.

During the period immediately after the execution of the purchase agreement, Cube Yadkin sought FERC authorization to transfer the License from Alcoa to Cube Yadkin on July 27, 2016. The License was transferred to Cube Yadkin on September 30, 2016. *Id.* at 25:14-16; Collins Duke Cross-Examination Ex. 4. At Cube Yadkin’s request and with Alcoa’s full cooperation, the Cube Yadkin QFs self-certified as QFs by filing Form 556’s with FERC on or about September 28, 2016. Form 556’s, John Collins Duke Cross-Examination Exhibit No. 1. Cube Yadkin and Alcoa formally consummated the transfer of the Yadkin Project to Cube Yadkin on February 1, 2017. Tr. Vol. 1 at 25:16-17 (Cube Yadkin Witness John Collins Testimony).

E. PPA Negotiations between Cube Yadkin and Duke

Cube Yadkin’s QFs are interconnected to Duke’s power grid and are components of hydroelectric operations with which Duke is quite familiar. Accordingly, in March 2016, as part of its pre-acquisition due diligence activity,⁶ Cube Yadkin initiated discussions with Duke concerning the purchase of the Yadkin River Facilities’ energy and capacity. Tr. Vol. 1 at 29:12-14 (Cube Yadkin Witness John Collins Testimony). The sale of the QFs’ energy and capacity to

turbine/generator efficiency, water quality, protection of aquatic habitat, fish populations, wetlands, recreational opportunities, and aesthetics. *Id.* at 27:11-13.

⁶ As early as January 2016, Cube Yadkin through its CEO Kristina Johnson reached out to Duke’s Chief Operating Officer, Dhia Jamil, concerning partnership on hydro plants.

Duke at the then-prevailing avoided cost rates was material to Cube Yadkin’s decisions to acquire the Yadkin Project and to commit to facility upgrades required in connection with the acquisition. *Id.* at 27:19 – 28:2. During its due diligence, Cube Yadkin, relied not only upon its own experience, but also on advice from its internal and outside counsel and the Public Staff, to determine how these requirements would be applied to the Cube Yadkin Facilities. *Id.* at 28:20 – 29:3. Both Cube Yadkin and the Public Staff determined that the general CPCN requirement did not apply to the Facilities; consequently, Cube Yadkin could not submit a completed NoC Form for the three Facilities to Duke. *Id.* at 51:23 – 52:3; John Collins Rebuttal Testimony, Ex. 4. The fact that Duke’s late-filed exhibit cited only to non-utility-owned *South Carolina* facilities conclusively demonstrates that Duke’s North Carolina NoC Form has not been – and cannot be – completed for QFs in existence before the CPCN requirement. Duke’s Late Filed Exhibit p. 1-3 (stating that “seven (7) of the NOC forms were submitted by QFs located in DEC’s and DEP’s South Carolina service territory” and that the only North Carolina facility – owned by Duke – was “issued or deemed to have been issued” a CPCN in 1996).

With Duke’s full understanding that Cube Yadkin was purchasing and would soon fully own the hydroelectric facilities, Cube Yadkin had multiple meetings and communications with Duke between August⁷ and October 2016 concerning Cube Yadkin’s intention to enter into long-term PPAs to sell the energy and capacity provided by the Yadkin Project. *Id.* at 30:4 – 32:10. While Cube Yadkin informed Duke that it would welcome the opportunity to sell from all four facilities, Cube clearly and repeatedly communicated its intent to sell the output of the three QFs under PURPA PPAs. *Id.* at 30:21 – 31:1; 32:19 – 33:4. In August 2016, Cube Yadkin executives Kristina Johnson and John Collins communicated with Duke employees Dhia Jamil, Regis Repko,

⁷ Duke was aware of the purchase of the Cube Yadkin Facilities as its employees received news updates confirming Cube Yadkin’s purchase of the facilities in July 2016.

Mathew Palasek, and Michael Keen concerning the sale of power from the Cube Yadkin Facilities. *Id.* at 48:8-14. These communications apprised Duke of the status of the QFs and their intent to sell the output of those facilities to Duke pursuant to PURPA. *Id.* On September 21, 2016, however, Mr. Keen submitted a letter to Mr. Collins stating that “Duke would likely have no obligation to purchase any output of energy or capacity from the Yadkin system units that may be certified as qualified facilities.” Collins Testimony Ex. 1; *see also* Tr. Vol. 1 at 48:12-14. He did not claim that Duke’s obligation to purchase was contingent on some unsatisfied ownership requirement, nor did he mention any requirements for a CPCN or NoC Form. *Id.* In that letter, Mr. Keen merely stated that the Facilities were “currently owned and operated by Alcoa Inc., and [are] the subject of a potential purchase by [Cube Yadkin].” John Collins Direct Examination Exhibit 1. Mr. Keen later testified that he was responsible for ensuring that a seller had submitted a NoC Form and that he has on a number of occasions helped other similarly-situated legacy generators populate and submit the NoC Form. Tr. Vol. 2 at 30:1-17; 141:4 -24 (Duke Witness Michael Keen Testimony). Notably, Mr. Keen offered no such support or guidance to Cube Yadkin. *Id.* at 39:19 – 40:8; 85:14 – 86:4.

By letter sent to Duke on or about October 11, 2016, Mr. Collins responded that the Cube Yadkin Facilities were self-certified with FERC and that Cube Yadkin wanted to meet to discuss the process for making sales from the facilities to Duke pursuant to PURPA. John Collins Direct Examination Exhibit 2 (“We are happy to come to your offices in late October or early November to discuss the process for making sales from these projects to Duke pursuant to PURPA”). On October 14, 2016, Duke notified Cube Yadkin that it would not honor Cube Yadkin’s assertion of rights under PURPA at that time or in the future. John Collins Direct Examination Exhibit 3. Duke claimed an exemption from any obligation to purchase the QFs’ energy and capacity

pursuant to PURPA Section 210(m). *Id.* However, a utility may obtain such an exemption only by filing a successful petition with FERC under 18 C.F.R. § 292.209, which Duke had not done. And as Duke later conceded, it could not meet the requirements for obtaining an exemption in any event. Tr. Vol. 2 at 148:14-149:18 (Duke Witness Michael Keen Testimony). Though Duke asserts that it did not intend to impede Cube Yadkin's PURPA rights, it is unclear why a party such as Duke, with a sophisticated understanding of PURPA and its exemptions, would state an unwillingness to honor PURPA rights, or why it claimed a plainly unavailable exemption.

Despite Duke's failure to honor its obligations under PURPA, Cube Yadkin diligently sought further discussions with Duke concerning the purchase of the energy from the Cube Yadkin Facilities under an alternative non-PURPA arrangement beginning in November 2016 and continuing through March 2018. Tr. Vol. 1 at 32:15 – 33:18 (Cube Yadkin Witness John Collins Testimony). While Cube Yadkin believed that it had established a LEO for each of the three Cube Yadkin QFs and was entitled to sell their output to Duke under PURPA, Cube Yadkin was also open to having a more expansive discussion to sell power from all four facilities, including the non-QF Narrows facility. Cube Yadkin believes that such discussions with Duke would be advantageous to both Duke and North Carolina ratepayers. *Id.* at 32:19-22. Such an arrangement would provide clean energy to the grid from facilities that could be coordinated with Duke's downstream hydroelectric facilities. It would enable Duke to take full advantage of ponding capabilities to coordinate supply when needed. And, the sale of power from all four facilities would promote North Carolina's clean energy and grid-diversification policies. *Id.* at 53:12-20. At no time, however, did Cube Yadkin waive its right to a PURPA PPA. *Id.* at 33:4-5.

In November 2016, Duke and Cube Yadkin met to further discuss the sale of energy. Tr. Vol. 1 at 33:6-8 (Cube Yadkin Witness John Collins Testimony). In February 2017, Cube Yadkin

reached out to Duke to continue these discussions after the consummation of the purchase agreement between Cube Yadkin and Alcoa. *Id.* at 39:8-10; 47:23 – 48:2. Duke drew out the negotiations on a non-PURPA PPA through requiring confidentiality agreements and requesting the signing of a letter agreement, and ultimately taking an inordinately long time to propose terms. The letter agreement, dated April 25, 2017, acknowledged that Cube Yadkin and Duke would enter into non-PURPA discussions. John Collins Rebuttal Testimony Ex. 5. While the confidentiality agreement and letter agreement were executed by the end of April 2017, Duke did not provide its first term sheet containing terms for the purchase of power from the Cube Yadkin Facilities until roughly 4 months later, on August 10, 2017. Tr. Vol. 2 at 10:9-17; 32:3-4 (Duke Witness Michael Keen Testimony). In less than a month, Cube Yadkin submitted a responsive term sheet. *Id.* at 32:19 – 33:1. The parties exchanged term sheets throughout the remainder of 2017 and into 2018, with Cube providing its final counteroffers to Duke on or about January 3, 2018. *Id.* at 10:18 – 11:14; 32:3 – 33:18. Despite further communications between the parties, Duke rejected the term sheet. *Id.* at 33:9-18. Cube Yadkin then terminated the letter agreement and filed its complaint.

II. PROCEDURAL HISTORY

On March 29, 2018, Cube Yadkin filed a verified complaint, request for declaratory ruling, and request for arbitration against Duke. In its Complaint, Cube Yadkin requested the following relief: (1) a declaration that Duke was obligated to purchase the electric output of the Yadkin River QFs at rates established in accordance with the Commission’s Order issued on March 10, 2016 in Docket No. E-100, Sub 140; (2) an order requiring Duke to enter into PPAs with Cube Yadkin for the sale of the energy from the Cube Yadkin Facilities for a term of not less than 10 years; (3) arbitrate any unresolved issues; and (4) settling the matter on an expedited procedural schedule.

Duke filed its joint answer and motion to dismiss on May 7, 2018. Duke moved to dismiss the Complaint for failure to state a claim upon which relief may be granted. In its motion to dismiss, Duke argued that Cube Yadkin's failure to complete the NoC Form, Cube Yadkin failed to meet the Commission's requirements for establishing a LEO. On May 23, 2018, Cube Yadkin responded to Duke's motion to dismiss and requested argument before the Commission. Cube Yadkin argued that dismissal was inappropriate, and the NoC Form requirement should be waived, because it could not complete the NoC Form as the form was not designed for facilities like the Cube Yadkin Facilities which pre-dated the CPCN requirement.

On July 16, 2018, the Commission issued an Order granting Duke's motion to dismiss. It specifically held that Cube Yadkin had failed to establish a LEO because it had not submitted a NoC Form. The Majority also weighed legal, factual, and equitable considerations and concluded that Cube Yadkin's request for a waiver of the NoC requirement should be denied. Dissenting opinions filed by Commissioners Brown-Bland and Clodfelter, recognized that the Commission was issuing its Order without the benefit of a fully developed factual record or an evidentiary hearing, and without assuming the truth of Cube Yadkin's well-pleaded allegations.

Cube Yadkin appealed the Commission's decision. The Court of Appeals reviewed two dispositive issues on appeal: first, whether the Commission erred in ruling that Cube failed to establish a LEO by not submitting the NoC Form; and second, whether the Commission erred at the motion to dismiss stage by holding that Cube Yadkin was not entitled to a waiver of the NoC Form. The Court of Appeals held that as to the first issue, that the Commission did not err in concluding that Cube Yadkin failed to establish a LEO when it did not submit the NoC Form. With respect to the second issue, the Court of Appeals held that the Commission's order denying waiver of the NoC Form requirement was not supported by competent, material, and substantial

evidence because the Commission resolved factual issues at the motion to dismiss stage without the benefit of a developed record. The Court therefore reversed the portion of the Commission's order dismissing Cube Yadkin's claim for a waiver of the NoC Form requirements.

On remand to the Commission, the Commission issued an Order Scheduling Hearing and Establishing Procedural Schedule on Remand that established new deadlines for discovery, pre-filed testimony, and a hearing on the issue of waiver of the NoC Form. After the parties' sought extensions of time, Cube Yadkin filed its pre-filed testimony on or about December 14, 2020. Duke filed its own pre-filed testimony on January 15, 2021. On February 16, 2021, Cube Yadkin filed its rebuttal pre-filed testimony. On March 3, 2021, the Commission conducted a hearing for the purpose of receiving expert witness testimony on remand of the case from the North Carolina Court of Appeals on the sole issue of whether Cube Yadkin should be granted a waiver of the NoC Form requirement with respect to establishing a LEO for the Cube Yadkin Facilities. By order entered on March 17, 2021, the Commission provided that any proposed orders and/or post-hearing briefs be filed by April 16, 2021. By subsequent order, the Commission extended the time in which to file proposed orders and post-hearing briefs to May 6, 2021.

III. ARGUMENT

The Commission has the power to waive its non-statutory rules and standards, but such waiver determinations involve a case- and fact-specific inquiry. *Gemini Drilling & Found., LLC v. Nat'l Fire Ins. Co. of Hartford*, 192 N.C. App. 376, 382, 665 S.E.2d 505, 509 (2008); *In re BellSouth Telecomms., Inc.*, Docket No. P-100, Sub 99, 2005 WL 588333, at *3 (N.C.U.C. Jan. 31, 2005). The Commission may grant waivers of rules and Commission orders where "the equities or other circumstances warrant without obviating the requirements being waived." *In the*

Matter of Cube Yadkin Generation, LLC, Complainant, No. E-2, 2018 WL 3533334, at *13 (July 16, 2018) (Comm. Brown-Bland, dissenting).

A. There is Good Cause to Grant Cube’s Request for a Waiver of the Technical NoC Form Requirement.

1. Cube Yadkin Could Not Complete the NoC Form

Duke’s Form requires disclosure of the date a facility received a Certificate of Public Convenience and Necessity (“CPCN”), and ties the LEO date to the date of issuance of the facility’s CPCN. Cube Yadkin has shown – *and Duke has now conceded* – that the Cube Yadkin QFs were exempt from the CPCN requirement because their construction significantly predated N.C. Gen. Stat § 62-110.1, which first established the requirement. The Cube Yadkin QFs did not have CPCNs, so this information about the Facilities could not be provided on the NoC Form and could not be used to set the Facilities’ LEO date as the NoC Form envisions.

Submitting a NoC form under the circumstances would have created significant risk for Cube Yadkin. Duke proposes that the NoC Form requirement should nonetheless apply inflexibly because Duke insisted – for the first time at the March 3, 2021, evidentiary hearing – that it would have accepted an incomplete or modified form and would have worked with Cube Yadkin in unspecified ways to establish a LEO date. Duke presented no evidence, however, that it has accepted incomplete or modified NoC Forms from other North Carolina facilities predating the CPCN requirement. If Cube Yadkin had attempted to submit an incomplete or self-modified NoC Form, it risked Duke arguing that the language of the NoC Form excused Duke from recognizing a LEO until Cube Yadkin obtained a CPCN. In its testimony Duke attempted to assure the Commission that it would not make that argument, but Duke conveniently forgets that, when this matter was appealed, Duke argued in its brief that the CPCN requirement probably applied to the Cube Yadkin QFs. Appellee’s Br. 25-27, *State of N.C. ex. rel. Util. Comm’n, et al. v. Cube Yadkin*

Generation, LLC, Case No. COA18-1203 (filed Apr. 17, 2019) (hereinafter “Duke’s Appellate Br.”).⁸

2. *The Unique and Specific Circumstances of the Cube Yadkin Facilities Justify Waiving the NoC Form Requirement and Establishing a LEO for the QFs Based on Cube’s October 11, 2016 Letter to Duke.*

In its Order Establishing Date of Legally Enforceable Obligation in Docket No. E-22, Sub 521, the Commission reasoned that a “LEO . . . protects the utility from having to expend time unnecessarily engaging in negotiations to sign a PPA when a generator might never obtain a CPCN to build its proposed facility or make a commitment to sell its electricity to the utility,” and that is in part why the Commission determined the NoC Form is needed. N.C. Util. Comm’n Docket No. E-22, Sub 521, Order Establishing Date of Legally Enforceable Obligation at 8 (Sep. 22, 2015). Stated differently, a utility should not be required to negotiate PPAs for facilities that might never be constructed or might not wish to sell output to the utility if they are constructed. The present case does not involve such either such potential problem.

The Cube Yadkin Facilities are not hypothetical to-be-constructed facilities. They have been in operation for decades, with the oldest facility in operation for over 90 years. When the Commission considered implementing the NoC Form requirement, it did not openly consider facilities that were already in operation prior to the CPCN requirement. The Commission has never ruled that a facility that is already producing energy must retroactively receive a CPCN for construction that, in the case of the Cube Yadkin Facilities, was completed prior to the

⁸ The Commission has judicial notice of this public filing. N.C. Gen. Stat. § 62-65(b) (“The Commission may take judicial notice of its decisions, the annual reports of public utilities on file with the Commission, published reports of federal regulatory agencies, the decisions of State and federal courts, State and federal statutes, public information and data published by official State and federal agencies and reputable financial reporting services, generally recognized technical and scientific facts within the Commission's specialized knowledge, and such other facts and evidence as may be judicially noticed by justices and judges of the General Court of Justice.”).

establishment of the CPCN requirement. Rather, the purpose of the CPCN requirement is to make sure that a facility is viable before requiring a utility to commit to buy the electricity from the facility. Cube Yadkin's facilities have been and continue to be viable and in operation.

Second, Cube Yadkin unambiguously expressed its intent to sell the Facilities' electricity to Duke in August 2016 when Mr. Collins initiated communications with Duke concerning the sale of Cube Yadkin's electricity. Mr. Keen acknowledges this by noting in his own pre-filed testimony that rather than being an anticipatory request for the sale of power, Mr. Collins sought to have further conversations concerning longer term QF contracts for the Cube Yadkin Facilities. Tr. Vol. 2 at 26:10-18 (Duke Witness Michael Keen Testimony). Duke attempts to avoid this fact by contending that Cube Yadkin could not commit to sell the electricity from the Cube Yadkin Facilities because it was not yet the technical owner of the facilities until February 2017. *Id.* at 30:8-10. This Commission has never required technical ownership of a QF to commit its output, and no such requirement should be imposed where, as here, Cube Yadkin was awaiting only ministerial approvals to close on the contract for sale, and during that time, Cube Yadkin and Alcoa cooperated in attempting to negotiate PURPA rates with Duke, as evidenced by Alcoa's filing of Form 556s at Cube Yadkin's direction a week after Cube Yadkin received the September 21, 2016 letter from Duke noting the need for them. Tr. Vol. 1 at 40:19-20; 60:3-6; 140:5-12 (Cube Yadkin Witness John Collins Testimony).

Even if one assumes technical ownership is required, Duke has no justification for its decision not to work with Cube Yadkin on and after February 1, 2017 when the transaction with Alcoa closed. By its own testimony, Duke should have worked with Cube Yadkin and assisted it in affirming its PURPA-sale rights, but Duke did not do so. These facts support waiver of the NoC Form requirement.

3. Cube Provided all the Applicable Information Required by the NoC Form, and Duke Was Aware of Cube's Intent to Sell the Output of the Cube Yadkin QFs.

While it did not submit a NoC Form, Cube Yadkin complied with the Commission's underlying, applicable substantive requirements for establishing a LEO. The first requirement is that a facility be self-certified as a qualified facility ("QF") with the Federal Energy Regulatory Commission ("FERC"). Cube Yadkin met this requirement on September 28, 2016, with Alcoa's cooperation after Cube Yadkin contracted to purchase the three Facilities.

The second requirement is that a seller commit the output of a facility, generally by using the NoC Form. Cube Yadkin met this requirement on October 11, 2016 when it wrote Duke and gave notice that it would sell the output of the Facilities to Duke, thereby establishing the LEO date. This commitment bound Cube Yadkin as the contractual and effective seller of the Cube Yadkin Facilities' output. As indicated above, Cube Yadkin could not complete the NoC Form.

The third requirement is that a facility have a Certificate of Public Convenience and Necessity ("CPCN") for the construction of the facility. This requirement does not apply to the Cube Yadkin QFs, as Duke now concedes. The General Assembly enacted the CPCN requirement to provide the Commission notice that new facilities are being constructed or existing facilities are being materially expanded so that the Commission can better oversee the inflow of new power to the grid. The Cube Yadkin QFs, and others of the same vintage, have been selling power into the grid for decades, and well before passage of the CPCN-implementing legislation, and the Cube Yadkin QFs involved no new material construction that would require a CPCN.

Thus, Cube Yadkin met the first and second requirements and could not meet the third requirement. Duke's NoC Form unnecessarily conflates the second and third requirements (written commitment and CPCN) because it is designed to address LEOs for much newer facilities than the Cube Yadkin QFs, and the present dockets present a rare circumstance in which this flaw

in the Form is manifesting itself. The Cube Facilities' exemption from the general CPCN requirement prevented Cube Yadkin from certifying receipt of a CPCN on the NoC Form. Further, by the terms of the NoC Form, Cube Yadkin would lose the LEO rights it sought which would have set the LEO date to some uncertain date because the three Facilities could not possess a valid CPCN. Cube Yadkin should receive a waiver of the NoC Form requirement because Cube Yadkin complied with all applicable substantive requirements of the Commission's test for establishing a LEO and Cube Yadkin could not complete the NoC Form.

Duke attempts to defeat this practical outcome by insisting that Cube Yadkin was not a seller which could provide this information, notwithstanding its status as the contractual and effective owner of the Facilities with the right and obligation to close the purchase of the facilities when basic pre-closing regulatory approvals were provided and notwithstanding that that the outgoing owner fully supported Cube Yadkin's efforts to sell the Facilities output under PURPA. Duke claims to have a policy that only a QF's technical owner can provide the NoC Form and then negotiate with Duke. Duke did not produce a written policy and could not explain the source of any putative policy at the hearing.

The NoC Form belies Duke's claim that it only negotiates with technical owners, as the Form requires only that a seller submit the form, not an owner. Duke's course of conduct also undercuts the claim of such a policy. Duke's leadership requested that Mr. Keen communicate with Cube Yadkin concerning the purchase of the Cube Yadkin Facilities while Cube Yadkin was the contractual and effective owner of the Facilities. *Id.* at 21:19 – 23:7. Mr. Keen acknowledged Cube Yadkin's request to discuss longer term QF contracts. *Id.* at 63:21 – 64:22. Rather than being a mere anticipatory set of communications, the parties understood that Cube Yadkin had the authority to sell the output of the Cube Yadkin Facilities.

But even if there were an informal actual ownership requirement, Duke's related argument was completely moot as of February 1, 2017 – the date that Cube Yadkin closed on the transaction to purchase the facilities. *See id.* at 24:16-20; 84:17-20. Duke has no defense to the establishment of a LEO as of that date, particularly, where, as here, it has conceded that the NoC Form could not be fully completed anyway.

4. *Cube Could Not Reasonably be Expected to have filed an Incomplete or Modified NoC Form.*

Cube Yadkin sought good faith negotiations with Duke, but throughout the negotiations, Duke never once mentioned to Cube Yadkin the supposed requirement of the NoC Form. Tr. Vol. 2 at 39:19 – 40:8; 85:14 – 86:4 (Duke Witness Michael Keen Testimony). Mr. Keen testified that it was his job to ensure that all parties with whom he negotiated power purchase agreements had filed a NoC Form. (Cite). And yet, throughout the almost 18 months of negotiation, not once did he or any other Duke representative advise Cube Yadkin of the existence of such a requirement or direct Cube Yadkin to submit the NoC form. That evidences the parties' mutual – and correct – belief that no NoC Form was required to establish a LEO for the three Cube Yadkin QFs.

Duke now asserts that, as a sophisticated entity, Cube Yadkin should have known to submit an incomplete NoC Form or to cross out certain sections and should have known that Duke would accept an incomplete or modified form. Cube Yadkin does not have the ability to project, anticipate or conjure what Duke may or may not have “expected.” Given Duke's changing justifications for not complying with its obligations to negotiate terms with Cube Yadkin, Duke's belated, unsupported assertion that it would acknowledge a LEO based on an incomplete or seller-modified NoC Form is highly dubious. Duke's lack of cooperation throughout the discussions with Cube Yadkin demonstrates that Duke likely would have contested a LEO for the Cube Yadkin QFs regardless of what course of action Cube Yadkin pursued.

If Cube Yadkin submitted an incomplete NoC Form, it would risk Duke refusing to acknowledge a LEO based on the incompleteness or claiming that the Form's language limited Cube Yadkin's ability to establish a LEO date unless it obtained a CPCN for the Facilities. If Cube Yadkin applied for a CPCN for its QFs as a precautionary measure when no CPCN was not required, Duke might use the language contained in its NoC Form to claim that the future date of issuance for the CPCNs should establish the LEO date even though Cube Yadkin committed the output of its longstanding Facilities on an earlier date. In either of those scenarios, the parties would be involved in the kind of additional proceedings before the Commission that the LEO requirement was created to limit. The best course was instead to follow the advice of the Public Staff, which confirmed the determination by Cube Yadkin and its counsel that the Facilities did not need to have a CPCN. Because the facilities did not need a CPCN, Cube Yadkin reasonably believed that it was not required to submit the NoC Form, which relied so heavily on a CPCN-issuance date that newer facilities would have. Cube Yadkin therefore established a LEO for Duke to purchase electricity from the QFs by notifying Duke in October 11, 2016, correspondence that Cube Yadkin was committing the QFs' output.

5. *Duke has Not Produced Any Record of a North Carolina QF Predating the CPCN Requirement Completing a NoC Form in North Carolina without a CPCN.*

At the hearing, Duke's witnesses mentioned on a several occasions that Cube Yadkin had the option of sending an incomplete NoC Form to Duke to establish a LEO. One witness mentioned crossing out Section 3 of the NoC Form and writing "N/A" where the section requests information related to a CPCN or an ROPC. Tr. Vol. 2 at 52:24 – 53:9 (Duke Witness Glen Snider Testimony). The other witness testified that in early 2021 he saw 8 hydroelectric facilities that submitted NoC Forms for facilities that were decades old like the Cube Yadkin Facilities and these facilities likely pre-date the requirement for a CPCN. *Id.* at 59:21 – 60:2; 148:4-13 (Duke

Witness Michael Keen Testimony). Commissioner Clodfelter asked Duke to provide a summary of these facilities, including dates of service and whether they filled out the NoC Form. *Id.* at 171:18-12.

The late-filed exhibit clarifies that Duke has no record of any facility “crossing out” sections of the North Carolina NoC Form nor did it establish that other QFs like the Cube Yadkin Facilities have submitted a North Carolina NoC Form at all. Tr. Vol 2, pp. 164:20 – 166:22 (Duke Witness Michael Keen Testimony). Specifically, the late filed exhibit established that 7 of the 8 facilities mentioned by Mr. Keen were located in South Carolina. Duke’s Late Filed Exhibit pp. 1-3. South Carolina’s NoC Form does not require a CPCN date.⁹ As is obvious, North Carolina’s CPCN requirement is inapplicable to any facility in South Carolina.

The last facility listed on the late-filed exhibit did fill out a North Carolina NoC Form. *Id.* While that facility predated the CPCN requirement, it nonetheless was required to receive a CPCN because North Carolina state law requires an acquiring incumbent utility, in this case Duke itself, to obtain a CPCN. This is because of the unique problems sometimes presented by an incumbent utility’s self-generation, which is inconsistent with small power production, competition in the marketplace, and a diversified power grid.

Duke has provided *no evidence* that it allowed other, similarly situated *North Carolina* facilities to submit modified NoC Forms. Nor was such a possibility suggested by the Public Staff or implemented by Cube’s counsel. Indeed, Duke itself never suggested such a “solution” until the hearing, when it was required to confront the evidence of Public Staff’s views about the

⁹ Cube Yadkin has attached as Exhibit 1 to this brief a copy of the South Carolina NoC Form, filed on January 17, 2020, in S.C. PSC Docket No. 2019-186-E, and requests that the Commission take judicial notice of the same. N.C. Gen. Stat. § 62-65(b) (“The Commission may take judicial notice of . . . public information and data published by official State and federal agencies . . . and such other facts and evidence as may be judicially noticed by justices and judges of the General Court of Justice.”).

inapplicability of the CPCN requirement to the three Cube Yadkin QFs. And it is a questionable solution at best. It is far from clear that Duke would honor a modified NoC Form when it has no proof that it has ever done so and when it has worked so hard to avoid Cube Yadkin's attempts to establish a LEO. Waiver is thus appropriate.

Because of the uniqueness of these factual circumstances, waiver of the NoC requirement should be granted, and the Commission should rule that Cube Yadkin established a LEO for the Facilities on October 11, 2016.

B. Equitable Considerations Also Support a Waiver.

1. Cube Acted Diligently and Reasonably During the Course of Negotiations.

Cube Yadkin's actions also show that the equities should be balanced towards finding waiver of the NoC Form requirement appropriate. Cube Yadkin reached out to Duke through multiple channels of communication early in the process to attempt to establish a negotiating process for the QF PPAs. Tr. Vol. 1 at 30:1 – 31:5 (Cube Yadkin Witness John Collins Testimony). Not only did the primary line of communication occur between Mr. Collins and Mr. Keen, but Cube Yadkin's CEO also reached out to members of Duke's executive team. *Id.* See also Duke Cross Examination Ex. 9 (email from Kristina Johnson of Cube Yadkin to Dhia Jamil of Duke). As acknowledged by Mr. Keen, Mr. Collins communicated that Cube Yadkin was seeking longer term QF contracts as early as August 2016. Tr. Vol. 2, 22:14 – 24:3 (Duke Witness Michael Keen Testimony).

Moreover, at every stage of the process, Cube Yadkin obtained Alcoa's cooperation. This cooperation manifested itself in a variety of ways. First, Alcoa helped to facilitate the transfer of the license to operate the Cube Yadkin Facilities in July 2016. Tr. Vol. 1 at 25:9-16 (Cube Yadkin Witness John Collins Testimony) Second, Alcoa filed the QF self-certification forms at Cube

Yadkin's request immediately upon receiving Duke's first letter dated September 21 noting the need for self-certification. *Id.* at 40:19-20; 56:17-20.

During the due diligence process both before and after execution of the purchase agreement in the summer of 2016, Cube Yadkin, internally, and through the hiring of expert local counsel reviewed the NoC Form issue and any requirements for a CPCN. The Public Staff's confirmation that no CPCN was required supported Cube's determination that it could not submit a NoC Form for the facilities. *Id.* at 51:23 – 52:3; John Collins Rebuttal Testimony, Ex. 4. Duke's conduct further confirmed Cube's and Staff's conclusions because Duke never broached the subject of CPCNs or the NoC Form. *Id.* at 39:19 – 40:8; 93:10-18.

Contrary to Mr. Keen's testimony that Cube Yadkin disappeared for five months between October 2016 through March 2017, the evidence establishes that Cube Yadkin did not cause any delays. Specifically, Cube Yadkin and Duke exchanged letters in October and met at least once in November 2016. *Id.* at 47:9 – 48:23. Cube Yadkin then reached out to Duke in February 2017 concerning the consummation of the purchase agreement between Alcoa and Cube Yadkin. *Id.* at 47:23 – 28:2. In March 2017, the parties began non-PURPA negotiations. The only delays were those caused by Duke, including the roughly four-month period before Duke submitted its first term sheet. *Id.* at 33:14 (noting the letter agreement concerning non-PURPA discussions was executed on April 25, 2017); Tr. Vol. 2 at 32:4 (noting Duke's first proposal was provided to Cube Yadkin on August 10, 2017) (Duke Witness Michael Keen Testimony).

Finally, there is no question that Cube Yadkin had the experience to operate the Cube Yadkin Facilities. Duke has not questioned this, nor could they, as the parties are familiar with one another as evidenced by the relationships that were created on the executive levels. Accordingly, Cube Yadkin's diligence and reasonableness during the process is another reason as

to why the equities and circumstances establish that Cube Yadkin should be granted a waiver of the NoC Form requirement.

2. *Cube Yadkin Risked Potentially Impairing Its Right To Establish A LEO By Submitting a NoC Form.*

As indicated above, Section 5 of the NoC Form states that the LEO date is the date of either the submission of the NoC Form if the seller has a CPCN or has filed a ROPC or the date a facility obtains a CPCN if it does not have one. John Collins Direct Testimony Ex. 1. By filling out the form and arguably consenting to this provision, Cube Yadkin would have risked creating a circumstance in which Duke would argue that Cube Yadkin could not establish a LEO date for the Facilities unless it received a CPCN (which it was not required to do to operate) and that obtaining a CPCN should delay the Cube Yadkin QFs' effective LEO date. Tr. Vol. 1 at 51:14-21 (Cube Yadkin Witness John Collins Testimony). Accordingly, this case presents an unusual situation in which submitting the NoC Form would create less clarity and would increase the proceedings before the Commission. *Id.* at 139:2-9 (noting that Cube Yadkin's application for a CPCN would have taken longer to resolve than typical).

3. *Waiver of the NoC Form Requirement Is Appropriate Based on Duke's Actions.*

As FERC has stated, its goal in creating the LEO concept was to prevent utilities from circumventing their obligation to purchase from a QF "by refusing to enter into a contract with a qualifying facility." *See, e.g., Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 (2011) ("Cedar Creek"). There are several aspects of Duke's conduct in negotiations that are consistent with an attempt to evade its PURPA obligations by drawing out PPA negotiations. These considerations weigh in favor of finding that a LEO was established even without a NoC form.

First, Duke withheld its apparent position that Cube Yadkin should submit an incomplete NoC Form. Mr. Keen testified that a *first* step in negotiating a PPA is to submit a NoC Form. *Id.*

at 56:12-14 (stating that it was his “responsibility was to make sure that they have a NoC Form in place and that they own the facility”). But at no time during the more than 18 months of discussions with Cube Yadkin did Mr. Keen ever mention the NoC Form, notwithstanding his testimony that he has advised others to submit the Form. *Id.* at 30:1-17; 141:4-24. He even testified (incorrectly, as it turns out) that Duke was especially accommodating of legacy facilities that predate the CPCN requirement, but Mr. Keen made no such accommodation for Cube Yadkin. *Id.* at 141:16-24. Notably, Mr. Keen did not mention anything related to the NoC Form even after Duke agreed that Cube Yadkin owned the Cube Yadkin Facilities on February 1, 2017.

In fact, Duke never suggested that Cube Yadkin must submit a NoC Form – not when Cube Yadkin engaged Duke in discussions related to the sale of the electricity from the Cube Yadkin Facilities beginning as early as March 2016, not when Cube Yadkin engaged Duke in earnest in August 2016, not when Cube Yadkin committed the Facilities’ output on October 11, 2016, and not during the roughly 18 months of negotiations and communications between the parties.

Second, Duke dismissed Cube Yadkin’s contractual ownership interest in the Facilities as a basis to avoid PURPA negotiations. Mr. Keen testified that his role in negotiating PPAs first involved determining whether the counter-party is the owner of the facility. *Tr.* Vol. 2 at 56:5-14 (Duke Witness Michael Keen Testimony). But Mr. Keen could not explain the source of this requirement and was not aware how it supposedly works in practice. *Id.* at 60:10-14 (stating “I don’t know the answer” when asked “does the Company do anything to ensure the form is filled out by the actual owner?”).

With respect to ownership, Duke was clearly aware of the deal between Alcoa and Cube Yadkin. They had knowledge of the purchase agreement that was in place in July 2016. John Collins Rebuttal Testimony Ex. 5, p. 4 (noting “Cube Hydro will buy Yadkin River power plants,

including High Rock dam, from Alcoa”). Duke also had knowledge of some of the potential terms of any potential purchase agreement as it was also pursuing the purchase of the Cube Yadkin Facilities. More to the point, the purchase agreement essentially completed the sale of the Facilities with only perfunctory regulatory approvals being required. The License was transferred to Cube Yadkin by FERC on September 30, 2016 – a recognition by a U.S. government agency that Cube Yadkin was the de facto owner and operator of the Cube Yadkin facilities. As FERC noted, these regulatory approvals, including transfer of the license, are “ministerial actions” that do “not involve any significant changes in the license and does not provide an opportunity to reopen the licensing proceeding.” Tr. Vol. 1 at 140:7-12 (Cube Yadkin Witness John Collins Testimony). There was no question in Duke’s mind that the Cube Yadkin Facilities were owned by Cube Yadkin and that Cube Yadkin had the authority to bind the facilities. Mr. Keen was aware of this, as he acknowledged that there were high-level communications between others at Cube Yadkin. Tr. Vol. 2 at 22:4-11 (Duke Witness Michael Keen Testimony). Presumably, these individuals believed that Cube Yadkin had authority to pursue the sale of electricity from the Cube Yadkin Facilities because they requested that Mr. Keen communicate with them regarding the same. Moreover, Duke does not have any explicit policy on not conducting negotiations under these circumstances. *Id.* at 28:8-11 (stating that Mr. Keen “continued communications with Cube Yadkin although it was contrary to my usual policy of not communicating with anyone that did not own the facilities that were the subject of the discussions”). Nor does Duke have an official policy on establishing ownership. *Id.* at 57:2-5.

Duke stated that Cube Yadkin was not the owner of the facilities when Duke knew of the purchase agreement between Cube Yadkin and Alcoa. Duke never inquired about Alcoa’s involvement in its multiple discussions with Cube Yadkin prior to the transfer of ownership of the

Facilities to Cube Yadkin on February 1, 2017. Duke's testimony establishes there is no formal written policy requiring negotiations only with owners. Even if legitimate, Duke's putative ownership concern was assuaged, at the latest, on February 1, 2017 when Cube Yadkin fully closed on the acquisition of the Facilities. At that time – at the latest – Duke should have negotiated a PPA for the three Cube Yadkin QFs, but Duke did not do so.

Third, Duke also erroneously stated that Duke had no obligation to purchase the Facilities' electricity under PURPA, an unsubstantiated and blatantly false claim. During the ongoing communications, Duke never asserted that the lack of a NoC Form or the lack of a CPCN was a basis for refusing to negotiate PURPA PPAs.

Fourth, Duke has changed its position on the NoC Form multiple times. Throughout the course of negotiations, Duke remained silent concerning the supposed requirement to complete and submit the NoC Form. Once Cube Yadkin filed its initial complaint in this docket, and throughout the subsequent proceedings, Duke now maintains that Cube Yadkin should have submitted a completed NoC Form. Duke's Appellate Br. 27-37. Finally, although it never made such a contention earlier, Duke claimed at the hearing in this docket that it would have accepted the NoC form with information crossed out or ignored, and Duke hypothesizes that it would have given Cube Yadkin the advice to modify the NoC Form if only it had been asked. The record casts doubt on this late-presented assertion, and it is doubtful that Duke would consider itself bound by any guidance it says it would have given. Indeed, Duke made this contention based on its recollection that it supposedly proceeded in such a fashion previously and has assisted other legacy facilities in completing the North Carolina NoC Form. Duke's late-filed exhibit, however, demonstrates that Duke's testimony was incorrect. The late-filed exhibit purports to list the legacy facilities for which Duke has accepted a NoC Form. All but one of these facilities is in *South*

Carolina, which has a different NoC Form that does not tie the LEO date to that state's CPCN requirement. The only North Carolina facility listed on the late-filed exhibit was purchased by Duke, a circumstance that required an incumbent utility to obtain a CPCN independent of the facility's age. Thus, there is no actual evidence that Duke really would have been willing to accept an incomplete or modified NoC Form as it now belatedly contends. That is not a risk the Commission should require of Cube Yadkin.

Duke understands that non-PURPA rates are lower than PURPA rates, and PURPA rates have decreased over time. Here, Duke used 18 months of delay to attempt to reduce the rates which it might be obligated to pay Cube Yadkin, which is inconsistent with purpose and intent of PURPA. Duke's position now is that it wants to protect its ratepayers from paying increased rates. Duke offered a sticker-shock number, but the reality is that, even if Cube receives the benefit of October 2016 rates, Duke's estimated four million customers in the Carolinas would pay, at most, an additional \$2.50 in additional fees per year for clean renewable energy that would support the reduction in coal fired plants (and coal ash disposal). Tr. Vol. 2 at 131:6-13 (where Mr. Snider testified that he estimated the additional cost for Duke's compliance with PURPA would cost approximately \$10 million a year). And even that assumes, erroneously, that Cube Yadkin is unwilling to negotiate the rates.

4. *An Unwaivable Requirement that Cube Yadkin Submit a NoC Form would be Harmful to Ratepayers.*

The Cube Yadkin Facilities are established, reliable, renewable energy facilities that can provide clean energy to the grid at lower or substantially the same costs to consumers as an expensive Duke gas facility self-build. Moreover, the Cube Yadkin Facilities' output could be coordinated with Tillery and Blewett, Duke's downriver hydroelectric facilities. This capability would provide enhanced capacity to Duke during peak periods of energy use.

Importantly, during its negotiations with Duke, Cube Yadkin indicated that it was willing to provide dispatch rights to Duke that would provide additional benefits to Duke's ratepayers by improving Duke's ability to meet the impact of intermittent solar generation resources on the reliability of Duke's electric grid and thus reduce the need for new transmission and storage investments. Tr. Vol. 1 at 53:15-18 (Cube Yadkin Witness John Collins Testimony). Essentially, the Cube Yadkin Facilities through their ponding capacity would operate as a battery for the Duke grid, providing a benefit to Duke beyond the mere presence of additional renewable energy resources.

C. The Commission Should Confirm A LEO Date For The Cube Yadkin QFs of October 11, 2016, or at the Latest, a LEO Date of February 1, 2017.

For the reasons discussed above, the Commission should grant Cube Yadkin a waiver of the NoC Form requirement. The Commission should also confirm the LEO date for the three QFs.

The fair, equitable and appropriate LEO date is October 11, 2016. As of that date, the QFs were self-certified with FERC, FERC had formally approved the transfer of the FERC license to Cube Yadkin, Cube Yadkin was contractually obligated and entitled to own the QFs subject only to the completion of ministerial approvals, and Alcoa supported Cube Yadkin's efforts to negotiate with Duke. Under those circumstances, which were known to Duke, Cube Yadkin sent its October 11, 2016 letter to Duke stating that Cube Yadkin sought to directly pursue the sale of the QFs' power pursuant to PURPA. Duke acknowledges that Cube Yadkin sought to discuss long-term QF contracts with Duke on or before this date. Tr. Vol. 2, 22:14 – 24:3 (Duke Witness Michael Keen Testimony). The October 11, 2016 LEO date is also consistent with Duke's NoC Form, which requires a commitment from a "seller," not a technical owner of a facility.

Duke advocates for no LEO date at all and provides no alternative LEO date if the Commission grants a waiver. Accordingly, Duke is not entitled to contest the appropriateness of

the October 11, 2016 LEO date. Duke, however, has asked the Commission to relieve it of the burden of paying pre-November 2016 avoided cost rates. That argument is not a legitimate defense to the establishment of a LEO or payment of appropriate avoided cost rates under PURPA, which the parties would need to negotiate in any event. To the extent Duke intends to make an argument that the Commission should establish a post-2016 LEO date, and to the extent the Commission is persuaded by the argument, the Commission should set a LEO date of not later than February 1, 2017, which is the date that Cube Yadkin closed on purchase of the three Facilities.

IV. CONCLUSION

This Commission has broad authority to wave technical requirements when the facts and circumstances so warrant. This unique case – involving a legacy facility, a form that did not fit the circumstances, good faith by the petitioner and evasion by the utility – fully justifies the exercise of that authority here. Cube Yadkin therefore respectfully requests that the Commission grant a waiver of the NoC Form requirement, establish a LEO for the three Facilities as of October 11, 2016, and require rate discussions for the sale of clean, reliable hydroelectric power that will benefit the parties and the ratepayers.

Respectfully submitted this 17th day of May, 2021.

KILPATRICK TOWNSEND & STOCKTON LLP

By: /s_____

Benjamin L. Snowden

N.C. Bar No. 51745

Joseph S. Dowdy

N.C. Bar No. 31941

Phillip A. Harris, Jr.

N.C. Bar No. 39740

4208 Six Forks Road, Suite 1400

Raleigh, North Carolina 27609

Telephone: (919) 420-1700

Email: bsnowden@kilpatricktownsend.com

jdowdy@kilpatricktownsend.com

pharris@kilpatricktownsend.com

Attorneys for Cube Yadkin Generation, LLC

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Corrected Complainant's Post-Hearing Brief* 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 18th day of May, 2021.

/s
Benjamin L. Snowden
Kilpatrick Townsend Stockton LLP
4208 Six Forks Road, Suite 1400
Raleigh, North Carolina 27609
Telephone: (919) 420-1700
bsnowden@kilpatricktownsend.com