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FILED
APR 29 2011
Clerk's Office
N.C. Utilities Commission

April 29, 2011

Ms. Renne Vance, Chief Clerk
North Carolina Utilities Commission
430 North Salisbury Street
Raleigh, North Carolina 27603

Re: Docket No. E-100, Sub 127
Biennial Determination of Avoided Cost Rates for Electric Utility Purchases From Qualifying Facilities – 2010

Dear Ms. Vance:

Please find enclosed one original and twenty-five (25) copies of the *Proposed Order of Dominion North Carolina Power* for filing in the above-captioned proceeding.

Also enclosed is a copy on disk, as well as a copy to be file-stamped and returned with our courier. Please do not hesitate to call me if you have any questions. Thank you for your assistance in this matter.

Sincerely,

Andrea R Kells

Andrea R. Kells

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N.C. Utilities Commission

STATE OF NORTH CAROLINA
RALEIGH
UTILITIES COMMISSION

DOCKET NO. E-100, SUB 127

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Biennial Determination of Avoided Cost Rates for Electric Utility Purchases from Qualifying Facilities – 2010	))))	PROPOSED ORDER OF DOMINION NORTH CAROLINA POWER

HEARD: Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on January 25, 2011, at 9:00 a.m.

BEFORE: Commissioner William T. Culpeper, III, Presiding
Chairman Edward S. Finley, Jr.
Commissioner Lorinzo L. Joyner
Commissioner Bryan E. Beatty
Commissioner Susan Warren Rabon
Commissioner ToNola D. Brown-Bland
Commission Lucy T. Allen

APPEARANCES:

For Duke Energy Carolinas, LLC and Virginia Electric and Power Company d/b/a Dominion North Carolina Power:

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For Duke Energy Carolinas, LLC

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For the Using and Consuming Public:

Giselle Rankin, Staff Attorney
Public Staff – North Carolina Utilities Commission
430 N. Salisbury Street
Raleigh, North Carolina 27699-4236

BY THE COMMISSION: These are the current biennial proceedings held by the North Carolina Utilities Commission pursuant to the provisions of Section 210 of the public Utility Regulatory Policies Act of 1978 (PURPA) and the Federal Energy Regulatory Commission (FERC) regulations implementing those provisions, which delegated responsibilities in that regard to this Commission. These proceedings also are held pursuant to the responsibilities delegated to this Commission under G.S. 62-156(b) to establish rates for small power producers as that term is defined in G.S. 62-3(27a).

Section 210 of PURPA and the regulations promulgated pursuant thereto by FERC prescribe the responsibilities of FERC and of State regulatory authorities, such as this Commission, relating to the development of cogeneration and small power production. Section 210 of PURPA requires FERC to prescribe such rules as it determines necessary to encourage cogeneration and small power production, including rules requiring electric utilities to purchase electric power from, and to sell electric power to, cogeneration and small power production facilities. Under Section 210 of PURPA, cogeneration and small power production facilities that meet certain standards and are not owned by persons primarily engaged in the generation or sale of electric power can become "qualifying facilities" (QFs), and thus become eligible for the rates and exemptions established in accordance with Section 210 of PURPA.

Each electric utility is required under Section 210 of PURPA to offer to purchase available electric energy from cogeneration and small power production facilities that obtain QF status under Section 210 of PURPA. For such purchases, electric utilities are required to pay rates that are just and reasonable to the ratepayers of the utility, are in the public interest, and do not discriminate against cogenerators or small power producers. The FERC regulations require that the rates electric utilities pay to purchase electric energy and capacity from qualifying cogenerators and small power producers reflect the cost that the purchasing utility can avoid as a result of obtaining energy and capacity from these sources, rather than generating an equivalent amount of energy itself or purchasing the energy or capacity from other suppliers.

With respect to electric utilities subject to state regulation, FERC delegated the implementation of these rules to the State regulatory authorities. State commissions may implement these rules by the issuance of regulations, on a case-by-case basis, or by any other means reasonably designed to give effect to FERC's rules.

This Commission determined to implement Section 210 of PURPA and the related FERC regulations by holding biennial proceedings. The instant proceeding is the latest such proceeding to be held by this Commission since the enactment of PURPA. In prior biennial proceedings, the Commission has determined separate avoided cost rates to be paid by the electric utilities subject to the Commission's jurisdiction to the QFs with which they interconnect. The Commission has also reviewed and approved other related matters involving the relationship between the electric utilities and such QFs, such as terms and conditions of service, contractual arrangements, and interconnection charges.

This proceeding also is a result of the mandate of G.S. 62-156, which was enacted by the General Assembly in 1979. This statute provides that "no later than March 1, 1981, and at least every two years thereafter," the Commission shall determine the rates to be paid by electric utilities for power purchased from small power producers according to certain standards prescribed therein. Such standards generally approximate those prescribed in FERC regulations regarding factors to be considered in the determination of avoided cost rates. The definition of the term "small power producer" for purposes of G.S. 62-156 is more restrictive than the PURPA definition of that term, in that G.S. 62-3(27a) includes only hydroelectric facilities of 80 MW or less, thus excluding other types of renewable resources.

On May 5, 2010, the Commission issued its Order Establishing Biennial Proceeding, Requiring Data and Scheduling Public Hearing. That Order made Carolina Power & Light Company d/b/a Progress Energy Carolinas, Inc. (Progress), Duke Energy Carolinas, LLC (Duke), Virginia Electric and Power Company d/b/a Dominion North Carolina Power (NC Power), and Western Carolina University (WCU) parties to the proceeding in order to establish the avoided cost rates each is to pay for power purchased from QFs pursuant to Section 210 of PURPA and the associated FERC regulations and G.S. 62-156. The Order also required each electric utility to file proposed rates and proposed standard form contracts.

This procedural order also stated that the Commission would attempt to resolve all issues arising in the docket based on a record developed through public witness testimony, statements, exhibits and avoided cost schedules verified by persons who would otherwise be qualified to present expert testimony in a formal hearing, and written comments on the statements, exhibits and schedules, rather than a full evidentiary hearing for the purpose of receiving expert testimony. Progress, Duke, NC Power and WCU were required to file their statements and exhibits by November 1, 2010. Other persons desiring to become parties were allowed to intervene and file their statements and exhibits by January 10, 2011, which deadline was subsequently extended to February 22, 2011, and later extended to February 25, 2011. All parties were allowed to file reply comments by February 16, 2011, which deadline was extended to March 30, 2011, and proposed orders by March 16, 2011, which deadline was extended to April 27, 2011. The Commission scheduled a public hearing for January 25, 2011, solely for taking non-expert public witness testimony. Finally, the Commission required Progress, Duke, NC Power and WCU to provide public notice and submit Affidavits of Publication no later than the date of the hearing.

NC Power filed a comparison of calculations of avoided cost payments under its Schedule 19-LMP and Schedule 19-DRR on July 15, 2010. WCU filed its Comments and Proposed Rates on October 21, 2010. Progress, Duke and NC Power filed their initial statements and exhibits on November 1, 2010. Duke subsequently filed a revised initial statement and revised confidential exhibit on November 29, 2010. NC Power subsequently filed updated comparisons of avoided cost payments on January 12, 2011, and copies of all contracts and amendments between itself and QFs signed in 2010 on February 23, 2011.

The following parties filed timely petitions to intervene that were granted: the Public Works Commission of the City of Fayetteville (FPWC); the North Carolina Sustainable Energy Association (NCSEA); the Carolina Industrial Group for Fair Utility Rates (CIGFUR); the Carolina Utility Customers Association, Inc. (CUCA); and Charles B. Mierek.

The Commission held a hearing on January 25, 2011, for the sole purpose of taking non-expert public witness testimony. No witnesses appeared to testify at this public hearing.

On March 1, 2011, the Public Staff filed its initial statement.

On March 2, 2011, New River Light and Power Company (New River) filed its comments and proposed avoided cost rates. On March 16, 2011, WCU filed a clarification of its exhibits filed in the proceeding.

In response to a request filed by Duke on March 28, 2011, the Commission granted an extension until April 4, 2011, for the electric utilities to file reply comments to the Public Staff's initial statement. On April 4, 2011, Duke and NC Power filed reply comments, and Progress filed reply comments together with revised attachments and a revised exhibit.

Various filings made and orders issued in this proceeding are not discussed in this order but are included in the record of this proceeding.

Based on entire record in this proceeding, the Commission now makes the following:

FINDINGS OF FACT

1. The limitation of the availability of NC Power's Schedule 19-DRR to QFs able to deliver power on or before December 31, 2012, is reasonable, consistent with PURPA and Commission precedent, and should be approved.

2. NC Power's biennial reset methodology for energy payments calculated under its Schedule 19-DRR is reasonable, consistent with PURPA and FERC precedent, and should be approved.

3. NC Power's inclusion of a regulatory disallowance clause in its standard contract for purchases of energy and capacity pursuant to Schedule 19-DRR is reasonable and consistent with PURPA and should be approved.

4. NC Power's revised Schedule 19-DRR and revised Schedule 19-LMP and standard contract terms and conditions are otherwise reasonable and should be approved.

DISCUSSION AND CONCLUSIONS FOR FINDING OF FACT NO. 1

NC Power's proposed Schedule 19-DRR is available to any size-eligible QF with a Certificate of Public Convenience and Necessity (CPCN), if a CPCN is required by the Commission, that enters into a contract and begins deliveries of power on or prior to December 31, 2012 (the Availability Deadline). The Company explained that December 31, 2012, is the Availability Deadline because that is the end of the two-year period forming the basis for the estimated avoided cost rates contained in the Schedule 19 (Biennial Period). Thus, a QF that will not begin delivery of power during the Biennial Period (a Non-Period QF) is not eligible for the Schedule 19-DRR rates approved during this proceeding.

The Company's existing policy with respect to Non-Period QFs is to enter into contracts with such QFs at the rates and terms and conditions contained in the then-proposed Schedule 19-DRR that covers the applicable biennial period, subject to true-up based on the Commission's final order in such biennial proceeding. Applying this policy to the currently proposed Schedule 19-DRR, during the interval between January 1, 2011, and the Commission's order in this proceeding, the Company will enter into contracts with QFs that can meet the Availability Deadline at the rates and terms and conditions contained in its proposed Schedule 19-DRR. The rates and contract terms would be trued-up to reflect any increase in the rates approved in the Commission's final order in this proceeding. The Company will enter into contracts with Non-Period QFs that cannot meet the Availability Deadline in this proceeding at the rates and terms and conditions contained in the Schedule 19-DRR as proposed in the biennial proceeding for the future applicable period. The Company is willing to memorialize its existing policy in Schedule 19-DRR if desired by the Commission.

In its Initial Statement, the Public Staff questioned whether Schedule 19-DRR's availability limitation was consistent with PURPA in light of recent Commission orders in Docket Nos. E-2, Sub 966[1] and SP-467, Sub 1.[2] In those orders, which involved QFs that were not eligible for standard rates, the Commission interpreted Section 292.304(d) of FERC's regulations implementing PURPA and held that this regulation gives a QF two options: (a) to sell power "as available;" or (b) to sell pursuant to a legally enforceable obligation (LEO) over a specified term. If the QF chooses the LEO option, the QF has the option of choosing rates based upon avoided costs calculated at the time the LEO is incurred. Based on its interpretation of these Commission orders, the Public Staff asserts, in effect, that the application of the Availability Deadline to Non-Period QFs is inconsistent with PURPA "when that QF has its CPCN, is eligible for the standard

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[1] *In the Matter of EPCOR USA North Carolina LLC v. Carolina Power & Light Company d/b/a Progress Energy Carolinas, Inc.*, Order on Arbitration, Docket No. E-2, Sub 966 (January 26, 2011) (the EPCOR Order).

[2] *In the Matter of Economic Power & Steam Generation, LLC v. Virginia Electric and Power Company, d/b/a Dominion North Carolina Power*, Order on Arbitration, Docket No. SP-467, Sub 1 (June 18, 2010) (the EP&S Order).

rates, and has indicated that it intends to commit itself." Public Staff suggested that if the Commission concludes otherwise, then "at a minimum, the QF qualifying for the standard rates should be entitled to the proposed avoided cost rates, subject to those rates being trued up if the Commission approved higher rates."

NC Power agrees, as discussed above, that that Non-Period QFs should be entitled to the then-proposed avoided cost rates, subject to being trued-up based on the Commission's final order in a biennial proceeding. NC Power disagrees that the Availability Deadline is inconsistent with PURPA and that Section 292.304(d) should apply in a standard rate context.

NC Power notes that avoided costs determined in the Commission's biennial proceedings are necessarily based on the assumption that QFs will begin power deliveries during the Biennial Period. For example, in this proceeding, NC Power's Schedule 19-DRR rates are all based on the assumption that a QF will start delivering power to the utility in either 2011 or 2012. Accordingly, the avoided capacity rates start in 2011 or 2012, as applicable, and run for five, ten, or 15 years from 2011 or 2012, as applicable. Similarly, with respect to 100 kW or smaller QFs, for which fixed avoided cost energy rates are required, avoided cost energy rates start in 2011 or 2012, as applicable, and run for five, ten, or 15 years from 2011 or 2012, as applicable. There will be no avoided cost rate estimates developed or approved in this proceeding for QFs that begin operating in 2013, 2014 and beyond. Thus, new avoided cost estimates would need to be calculated for the Non-Period QF for years not covered by the Schedule 19-DRR approved in this proceeding, using different data and assumptions from those used in the Schedule 19-DRR approved in this proceeding.

NC Power also argues that Section 292.304(d) of the FERC's regulations does not apply in the standard rate context. The Company notes that Schedule 19-DRR is a standard rate approved by the Commission pursuant to its obligation under 18 C.F.R. § 292.204(c)(1) to put standard rates into effect for QFs with a design capacity of 100 kW or less. As permitted by 18 C.F.R. § 292.304(c)(2), the Commission has expanded standard rates to apply to QFs of five MW or less. Standard rates adopted by the Commission are required to be "consistent with paragraphs **(a) and (e)** of [18 C.F.R. § 292.304]." 18 C.F.R. § 292.304(c)(3)(i) (emphasis added). In short, according to the Company, Section 292.304(d) is not applicable to Commission-approved standard rates. Moreover, the Company asserts that even if the Commission were to find Section 292.304(d) applicable in a standard rate context, such a holding would not achieve the result advocated by the Public Staff (*i.e.*, entitling Non-Period QFs to currently-effective Schedule 19-DRR rates).

NC Power notes that Section 292.304(d) provides a QF with the right:

> (1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or

> (2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:
>
> (i) The avoided costs calculated at the time of delivery; or
>
> (ii) The avoided costs **calculated at the time the obligation is incurred.**
>
> (emphasis added).

The meaning of subsection (d)(2) was at issue in the EPCOR[3] and EP&S proceedings. In the EP&S Order, the Commission held that, under the specific facts of that case, a QF established an LEO in November 2009 because at that time the QF had (1) obtained a CPCN, and (2) made clear to the purchasing utility that it wanted to sell its output. Having established an LEO, the Commission held that the QF was entitled to avoided cost payments "based upon forecasts using data as of the time the [LEO] is incurred" (*i.e.*, November 2009).[4]

Thus, according to NC Power, under the plain language of 18 C.F.R. § 292.304(d)(2)(ii), and consistent with the Commission's rulings in the EP&S proceeding, a Non-Period QF invoking 18 C.F.R. § 292.304(d)(2) would not be entitled to the currently effective Schedule 19-DRR. Instead, that QF would be entitled to avoided costs **"calculated at the time the obligation is incurred"** and "based upon forecasts using data as of the time the [LEO] is incurred." For example, a Non-Period QF that established an LEO in October 2012 for a facility that would begin delivering power in December 2014 would not be entitled to avoided cost rates approved in this proceeding, but rather avoided cost calculated at the time of the LEO. Further, such avoided cost estimates would be based upon forecasts using data available in October 2012, not forecasts based on the data used in this proceeding. In short, there would be potentially endless rounds of calculations of avoided costs as of each QF's LEO, which would defeat the whole purpose of establishing standard rates. In sum, NC Power argues that artificially grafting 18 C.F.R. § 292.304(d) onto the standard rate context would not entitle a QF to the currently approved standard rates, and would embroil the Commission and the relevant utility into myriad individual rate setting proceedings. This result would entirely contradict the rationale for standard rate options, which is to allow small QFs, and utilities, to avoid the transactional cost of individual rate estimates and contract negotiations.

[3] NC Power's analysis focused on the EP&S proceeding because it involved an unconstructed QF. The EPCOR proceeding involved two already-constructed and operating QFs. It is entirely within the control of already-operating QFs that meet the other eligibility requirements for Schedule 19-DRR to meet the Availability Deadline.

[4] EP&S Order at 7.

Based on the record in this proceeding and the Commission's precedent regarding LEOs as cited in the record, the Commission agrees with NC Power that limiting the availability of Schedule 19-DRR rates to QFs that can deliver power during the Biennial Period is reasonable, consistent with PURPA and the Commission orders implementing PURPA, and should be approved. In addition, the Commission concludes that NC Power's policy with respect to Non-Period QFs is reasonable.

DISCUSSION AND CONCLUSIONS FOR FINDING OF FACT NO. 2

Under the Company's proposed Schedule 19-DRR, energy rates for QFs above 100 kW are fixed in two year increments over the life of NC Power's standard Agreement for the Sale of Electrical Output (PPA) through one of two methods. A QF may elect to (1) receive the energy payment approved by the Commission in each biennial proceeding, or (2) receive energy payments based on long-term levelized generation mixes with adjustable fuel prices.

NC Power notes that this biennial reset method for energy payments is not a recent development. The method was first approved by the Commission on an experimental basis in 1989 in Docket No. E-100, Sub 57.[5] The Commission granted permanent approval to the existing Schedule 19-DRR energy rate method in 1990 in Docket No. E-100, Sub 59.[6]

NC Power acknowledges that in adopting its PURPA regulations, FERC recognized that "in order to be able to evaluate the financial feasibility of a [QF], an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility."[7] NC Power argues that its Schedule 19-DRR energy pricing mechanism achieves this objective while at the same time protecting the interests of ratepayers.

NC Power contends that its energy mix approach reflects the different purposes of the capacity and energy rates in a typical project financed QF PPA. The capacity rate, which was and continues to be fixed over the term of the contract, is intended to cover the financing cost associated with a facility, while the energy rate is intended to recover the cost of fuel and O&M, which can vary over time. The Company's energy mix approach to energy rates under Schedule 19-DRR allows energy rates to reset according to fluctuations in commodity and O&M costs, which benefits both QFs and ratepayers. NC Power submits that its existing energy payment mechanism, coupled with the fixed capacity payment, has and most likely will continue to provide investors with the reasonable certainty required for financing small QFs.

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[5] *In the Matter of Biennial Determination of Avoided Cost Rates For Sale and Purchase of Electricity Between Electric Utilities and Qualifying Facilities – 1988/1989*, Order Establishing Standard Rates and Contract Terms for Qualifying Facilities, Docket No. E-100, Sub 57 (March 10, 1989).

[6] *In the Matter of Biennial Determination of Avoided Cost Rates for Sale and Purchase of Electricity Between Electric Utilities and Qualifying Facilities*, Order Establishing Standard Rates and Contract Terms for Qualifying Facilities, Docket No. E-100, Sub 59 (Sept. 10, 1991).

[7] *JD Wind I, LLC, et al.*, 129 FERC ¶ 61,148 (2009), *order denying requests for rehearing, reconsideration or clarification*, 130 FERC ¶ 61,127 at P 23 (2010) (internal citations omitted) (*JD Wind*).

In addition, NC Power argues that its method protects both the QF and ratepayers from the ill effects resulting from the inherent likelihood of error in fixed energy prices based on long-term forecasts of generation mixes and fuel prices. According to the Company, accurately predicting long-term fixed energy rates with accuracy is extremely difficult because of such factors as (1) the potential for new and more restrictive environmental regulations such as carbon legislation, (2) the increased emphasis on renewable energy at premium prices, (3) renewed interest in energy conservation and demand response programs, (4) volatile commodity market prices, and (5) the correlations between fuels. Moreover, because estimates of avoided energy costs are dependent on a number of long-term assumptions that may not play out as anticipated, the risk of forecast error escalates as the forecast period lengthens.

Under NC Power's methodology, the ratepayer or QF, as applicable, will bear the financial burden of inaccurate energy forecasts for only a relatively brief two-year period. Under a long-term fixed energy rate approach, if actual fuel and/or O&M costs decline compared to the long-term estimate of these costs, the fixed energy payments will be too high, the QF disproportionately benefits from over-recovery, and the ratepayer bears the cost of paying too much in avoided energy costs. Conversely, if actual fuel and/or O&M costs rise, then the fixed energy rates will be too low, the QF does not receive an accurate payment according to the market, and under-recovery of its variable energy costs could result in forcing the QF out of business, which would subject the ratepayers to the costs of higher market rates.

The Public Staff questions whether NC Power's decades-old method for determining energy payment is consistent with FERC's *JD Wind* decisions. Public Staff notes that in *JD Wind*, FERC stated that one of the purposes of its regulations was "to establish a fixed contract price for its energy and capacity at the outset of its obligation," and that a QF's right to long-term avoided cost contracts or LEOs with rates determined at the time the obligation is incurred is not affected by the fact that avoided costs at the time of delivery ultimately differ from those calculated at the time the obligation is originally incurred.[8]

NC Power notes that in *JD Wind,* FERC did not make any holdings requiring the use of any particular method for calculating avoided costs, or indicate what could satisfy the fixed contract price requirement. NC Power states that in another context in 1998, FERC did provide some insight on what may be permissible, when it described a "fixed price contract" as

> any legally enforceable obligation wherein the rates for purchase by a utility of the power produced by a QF are established in advance of the purchase. The fixed price may be a single, uniform rate for kilowatt or kilowatt hour for all power, including a *fixed formula rate*, or a complex

[8] *JD Wind*, 130 FERC ¶ 61,127 at P 23.

schedule of time-differentiated rates and other payments. The contracts term may range from decades to months.[9]

NC Power asserts that this discussion indicates that a formula rate is appropriate as a fixed price rate for QF avoided cost obligations. NC Power submits that the energy price determination mechanism exemplified by Section VI of its Schedule 19-DRR is such a fixed formula rate, especially considering the fixed mix option under which the price is determined by applying updated commodity prices to the fuel mix established at the onset of the contract and corresponding with the year the QF intends to deliver energy to the Company.

Finally, NC Power argues that should the Commission decide that fixed energy rates are required by PURPA, the Commission should not implement that decision in this proceeding. In support of this position, the Company notes that when it prepared filings in this proceeding, it did so with the expectation that the Commission would continue its long-standing practice of allowing biennial reset of avoided energy rates. Consequently, NC Power did not prepare any long-term energy rate estimates other than rates for projects rated at 100 kW or less. Further, NC Power has not made any determination whether the DRR method would be the appropriate method to calculate long-term fixed avoided cost energy rates for QFs larger than 100 kW. Because of the risk to ratepayers and QFs discussed above, NC Power asserts that these are not decisions that should be made in haste. Moreover, NC Power argues that there is no evidence that its current method of calculating avoided energy costs has discouraged QF development in North Carolina. Accordingly, if the Commission should decide that fixed energy rates are required by PURPA, NC Power urges the Commission to implement that decision starting with the next biennial proceeding. Such a ruling would give NC Power and all other stakeholders time to make a thoroughly thought out and deliberate decision on the appropriate method for calculating long-term fixed energy rates and related issues, including the appropriate contract term given the increased risk to ratepayers.

Based on the record in this proceeding and Commission precedent on this issue, the Commission concludes that NC Power's biennial reset of energy payments to QFs under its Schedule 19-DRR is reasonable and is consistent with PURPA and with FERC regulations and precedent and should be approved.

[9] *Administrative Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities, and Interconnection Facilities*, FERC 1988-1998 Proposed Regulation Binder ¶ 32,457 at 32,171 ("*Administrative Determination*") (emphasis added). As NC Power notes, the Administrative Determination was a notice of proposed rulemaking. Ultimately, the FERC terminated the proceeding in 1998 without adopting any rule changes on the grounds, essentially, that the rulemaking had been overtaken by events; primarily the passage of EPACT 1992, which created EWG status as an alternative to QFs and the development of competition. *Administrative Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities, and Interconnection Facilities*. 84 FERC ¶ 61,265 (1998).

DISCUSSION AND CONCLUSIONS FOR FINDING OF FACT NO. 3

The fifth paragraph of NC Power's Schedule 19-DRR PPA deals with a situation in which a regulatory body with jurisdiction, such as this Commission, the Virginia State Corporation Commission (VSCC) or FERC issues an order (a Regulatory Order) that (1) prohibits rate recovery of payments made to a QF, and/or (2) requires NC Power to refund to its ratepayers payments already made to a QF (the Regulatory Disallowance Clause). In the event of such a Regulatory Order, the Regulatory Disallowance Clause provides that rates under the PPA will be reset on a prospective basis at the levels that NC Power is allowed to recover in rates. Further, if a Regulatory Order requires NC Power to refund to ratepayers previous payments to a QF, then the QF is similarly required to refund to NC Power those amounts. The Commission has approved standard Schedule 19-DRR PPAs containing clauses similar to the Regulatory Disallowance Clause since at least 1997.[10]

The Public Staff asserts that because the PPA "is a standard agreement for renewable QFs contracting to sell five MW or less," the Regulatory Disallowance Clause "seems unwarranted and likely to discourage QF development." Further, the Public Staff argues that the Regulatory Disallowance Clause "has the effect of changing the rate paid to the QF because of subsequent regulatory action," which the Public Staff states was rejected in an April 1, 1983 order in Docket No. E-100, Sub 41.

NC Power's position is that the Regulatory Disallowance Clause is warranted and that there is no evidence that the clause has discouraged QF development. NC Power notes that its purchase of energy and capacity from QFs is not optional. Currently, pursuant to PURPA, and the rules, regulations and orders of this Commission, the VSCC and FERC, NC Power has a mandatory obligation to purchase energy and capacity from QFs of 20 MW or less at the Company's avoided cost, on the theory that the development of QFs provides a societal benefit.

Because NC Power is legally required to purchase energy and capacity from QFs, there should never be, according to NC Power, an order disallowing rate recovery of those QF payments. While the risk of such a disallowance is remote, NC Power notes that the risk is real, and offers as evidence two instances where either this Commission or the VSCC did in fact disallow rate recovery of QF payments. NC Power asserts that there is no principled reason for this remote but real risk to be borne solely by itself or to force it and its shareholders to continue to make uncompensated payments to the QF following a Regulatory Order.

With respect to the Public Staff's assertion that the Regulatory Disallowance Clause is "likely to discourage QF development," NC Power notes that nothing in the record of this proceeding supports that assertion. NC Power also notes that QFs and their

[10] *See, e.g., In the Matter of Biennial Determination of Avoided Cost Rates for Electric Utility Purchases from Qualifying Facilities – 1996*, Order Establishing Standard Rates and Contract Terms for Qualifying Facilities, Docket No. E-100, Sub 79 (June 19, 1997).

lenders know, as does NC Power, that a regulatory disallowance is a remote possibility under existing law and precedent.[11]

Finally, NC Power notes that the Commission has approved standard Schedule 19-DRR PPAs containing a clause similar to the Regulatory Disallowance Clause since at least 1997, which was well after its April 1, 1983 order in Docket No. E-100, Sub 41 raised by the Public Staff.

Based on the record in this proceeding, NC Power's inclusion of a regulatory disallowance clause in its Schedule 19-DRR continues to be reasonable and should be approved.

DISCUSSION AND CONCLUSIONS FOR FINDING OF FACT NO. 4

NC Power's initial filing in this proceeding noted that since the establishment of a dual tariff requirement for NC Power in Docket No. E-100, Sub 106, nine out of ten NC Power Schedule 19 QFs have chosen to receive rates for energy and capacity derived from Schedule 19-LMP. NC Power stated its belief that the market-based rate Schedule 19-LMP provides hourly prices from a visible market and reflects its true avoided cost more accurately than the DRR method, which uses fixed forecast data. NC Power stated that while it believes the Schedule 19-LMP could be adopted as the only Schedule 19 avoided cost tariff in North Carolina for new QFs contracting with the Company commencing January 1, 2011, it understands the Commission's concerns regarding LMP expressed in the previous two biennial avoided cost orders and therefore proposed to continue to offer both Schedule 19-DRR and Schedule 19-LMP to eligible QFs.

No party to this proceeding took issue with NC Power's proposal to continue to offer both Schedule 19-DRR and Schedule 19-LMP to eligible QFs. No party other than Public Staff, as discussed above with regard to Schedule 19-DRR, took issue with NC Power's proposed rate schedules and standard contract terms and conditions. Having concluded that NC Power's proposed Schedule 19-DRR is reasonable and consistent with PURPA and FERC regulations and precedent, the Commission concludes that NC Power's revised Schedule 19-DRR, revised Schedule 19-LMP and standard contract terms and conditions should be approved as filed. Such rate schedules and standard contract terms and conditions shall go into effect 10 days after the date of this Order.

IT IS, THEREFORE, ORDERED as follows:

1. That the availability of NC Power's Schedule 19-DRR is limited to QFs able to deliver power on or before December 31, 2012.

2. That NC Power may continue to use the biennial reset approach to calculating avoided energy cost rates pursuant to its Schedule 19-DRR.

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[11] NC Power cites, for example, *Freehold Cogeneration Associates v. Bd. Of Regulatory Commissioners of New Jersey*, 44 F.3d 1178 (3d. Cir. 1995).

3. That NC Power may continue to include in its standard PPA for purchases of energy and capacity pursuant to Schedule 19-DRR a regulatory disallowance clause.

4. That NC Power's revised Schedule 19-LMP and revised Schedule 19-DRR and standard contract terms and conditions are approved. Such rate schedules and standard contract terms and conditions shall go into effect 10 days after this Order.

ISSUED BY ORDER OF THE COMMISSION.

This the ____ day of ____________, 2011.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount, Deputy Clerk

CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Proposed Order of Dominion North Carolina Power* submitted in Docket No. E-100, Sub 127 has been served this day by mail, first class, postage prepaid, or electronically upon all parties of record in the above-captioned docket.

This the 29th day of April, 2011.

By: Andrea R Kells

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