

**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.	)	
	)	ORDER SERVING JOINT ANSWER
Duke Energy Progress, LLC,	)	AND MOTION TO DISMISS
Respondent	)	
	)	
DOCKET NO. E-7, SUB 1172	)	
	)	
In the Matter of	)	
Cube Yadkin Generation, LLC,	)	
Complainant	)	
	)	
v.	)	
	)	
Duke Energy Carolinas, LLC,	)	
Respondent	)	

BY THE COMMISSION: Notice is hereby given that on May 7, 2018, Duke Energy Progress, LLC, and Duke Energy Carolinas, LLC, filed with the Commission the attached Joint Answer and Motion to Dismiss setting forth its admissions or denials as well as any affirmative defenses and offers to satisfy the Complainant.

Rule R1-9 of the Commission's Rules provides that if this Answer of the Respondent is satisfactory to the Complainant then no further proceedings will be held in this docket.

The Commission requests that the Complainant review the attached Joint Answer and Motion to Dismiss and advise the Commission whether the Answer is acceptable and, if not, whether the Complainant requests a hearing to present evidence or to provide

oral argument. The Commission advises that the Complainant may file a reply to the Answer and Motion to Dismiss.

If the Complainant does not file a reply or request a hearing by May 23, 2018, the Commission will assume the complaint is satisfied and this docket will be closed.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 8<sup>th</sup> day of May, 2018.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in black ink, appearing to read "Janice H. Fulmore". The signature is written in a cursive style with a large initial "J" and "F".

Janice H. Fulmore, Deputy Clerk



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May 7, 2018

**VIA ELECTRONIC FILING**

M. Lynn Jarvis, Chief Clerk  
North Carolina Utilities Commission  
4325 Mail Service Center  
Raleigh, North Carolina 27699-4300

**RE: Duke Energy Progress, LLC and Duke Energy Carolinas, LLC's  
Joint Answer and Motion to Dismiss  
Docket Nos. E-2, Sub 1177 and E-7, Sub 1172**

Dear Ms. Jarvis:

Please find enclosed for filing Duke Energy Progress, LLC and Duke Energy Carolinas, LLC's Joint Answer and Motion to Dismiss Complaint of Cube Yadkin Generation, LLC in the above-referenced docket.

If you have any questions, please let me know.

Sincerely,

A handwritten signature in black ink that reads 'Kendrick C. Fentress'.

Kendrick C. Fentress

Enclosure

cc: Parties of Record

OFFICIAL COPY

May 07 2018

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-2, SUB 1177

DOCKET NO. E-7, SUB 1172

DOCKET NO. E-2, SUB 1177 )

In the Matter of )  
Cube Yadkin Generation, LLC, )  
Complainant )

v. )

Duke Energy Progress, LLC, )  
Respondent )

**RESPONDENTS' JOINT ANSWER  
AND MOTION TO DISMISS  
COMPLAINT OF CUBE YADKIN  
GENERATION, LLC**

DOCKET NO. E-7, SUB 1172 )

In the Matter of )  
Cube Yadkin Generation, LLC, )  
Complainant )

v. )

Duke Energy Carolinas, LLC, )  
Respondent )

NOW COME Duke Energy Progress, LLC (“DEP”) and Duke Energy Carolinas, LLC (“DEC”) (collectively “the Companies” or “Respondents”) by and through counsel and pursuant to Rule R1-9 of the North Carolina Utilities Commission (“Commission”) Rules and Regulations, and respond to the Complaint, Request for Declaratory Judgement, and Request for Arbitration filed by Cube Yadkin Generation, LLC (“Complainant” or “Cube Yadkin”) on March 29, 2018. Respondents have reviewed the Complaint and reply to the allegations as set forth below. Any allegation not specifically admitted shall be deemed denied.

## **MOTION TO DISMISS**

The Respondents move the Commission to dismiss the Complaint with prejudice because, for the reasons set forth herein, Cube Yadkin has failed to state a claim upon which relief can be granted.

### **SUMMARY OF ANSWER AND DEFENSES**

The Respondents have acted in good faith and consistently with the requirements of the Public Utility Regulatory Policies Act of 1978 (“PURPA”), the rules and regulations of the Federal Energy Regulatory Commission (“FERC”), N.C. Gen. Stat. § 62-156, and this Commission’s previous orders implementing PURPA in their interactions, communications, and meetings with Cube Hydro Partners, LLC and its subsidiary, Cube Yadkin Generation, LLC (“Complainant” or “Cube Yadkin”).

On February 1, 2017, Cube Yadkin completed its purchase of four hydroelectric facilities - High Rock, Tuckertown, Falls, and Narrows – from Alcoa Power Generating, Inc. (“Alcoa”). Cube alleges that it is entitled to sell to Respondents the output of three of those hydroelectric units along the Yadkin River - High Rock, Tuckertown, and Falls (“Yadkin facilities”)<sup>1</sup> - under a PURPA power purchase agreement (“PPA”), incorporating fixed, levelized avoided cost rates for energy and capacity, for a period of not less than ten years at avoided cost rates established in accordance with the Commission’s March 10, 2016 *Order Establishing Avoided Cost Rates* in Docket No. E-100, Sub 140. (Complaint at p. 24) Cube Yadkin’s request is unavailing. First, this order does not apply to QFs, such as Cube Yadkin, that are not eligible for the Companies’ standard offer. Second, and more significantly, this Order does not reflect

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<sup>1</sup> As noted in the Complaint, fn. 5, the Narrows facility is not eligible to be a qualifying facility due to its size.

the Companies' current forecast of their respective avoided costs and is not the Commission's most up-to-date determination of the Companies' avoided costs or avoided cost rates. Put simply, the Respondents' position in this matter is that our customers should not be forced to pay Cube Yadkin stale, outdated avoided cost rates in excess of the Respondents' current forecasts of their respective avoided costs; nor should our customers be forced to bear the increased risk of overpayments of avoided cost rates due to a PPA extending for ten years or more. Such a result is inconsistent with PURPA, this Commission's recent avoided cost decisions in Docket Nos. E-100, Sub 140 and Sub 148, and House Bill 589.

Cube Yadkin's demand for a ten-year PURPA PPA at stale, out-of-date avoided cost rates comes against the backdrop of this Commission's and the North Carolina General Assembly's recent actions regarding PURPA implementation and the integration of renewable energy in North Carolina. On November 15, 2016, the Respondents filed their Joint Initial Statements in the 2016 Avoided Cost Proceeding, Docket No. E-100, Sub 148 ("2016 Avoided Cost Proceeding"). The Companies' proposed avoided cost rates and standard contract terms and conditions in that proceeding reflected the economic and regulatory circumstances facing the utilities and qualifying facilities ("QFs"), including the decline in fuel prices since the previous avoided cost proceeding as an input to the calculation of avoided energy rates. Based on those circumstances, the Companies had proposed several changes to the Commission's policies for implementing PURPA. One of the drivers of the Companies' proposed changes was the growing risk to customers of overpayment for power from QFs based on the mandated fifteen-year maximum lengths of standard offer contracts, when, among other things, fuel commodity

prices had been declining significantly over the last several years. *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities*, Docket No. E-100, Sub 148 (Oct. 11, 2017) (“*Sub 148 Order*”) at 63, 71.

Approximately eight months after the commencement of the 2016 Avoided Cost Proceeding, on July 27, 2017, House Bill 589 was signed into law by Governor Cooper. Among other things, House Bill 589 revised N.C. Gen. Stat. § 62-156, which governs power sales by small power producers to public utilities. Significantly, N.C. Gen. Stat. § 62-156(c) now provides that:

Rates to be paid by electric public utilities to small power producers not eligible for the utility’s standard contract . . . shall be established through good-faith negotiations between the utility and small power producer, subject to the Commission’s oversight as required by law. In establishing rates for purchases from such small power producers, the utility shall design rates consistent with the most recent Commission-approved avoided cost methodology *for a fixed five-year term*. Rates for such purchases shall take into account factors related to the individual characteristics of the small power producer . . . . Notwithstanding this subsection, small power producers that produce electric energy primarily by the use of any of the following renewable energy resources may negotiate for a fixed-term contract that exceeds five years: (i) swine or poultry waste; (ii) hydropower, if the hydroelectric power facility total capacity is equal to or less than five megawatts (MW); or (iii) landfill gas, manure digester gas, agricultural waste digester gas, sewage digester gas, or sludge digester gas.

(Emphasis added). Notably Complainant’s Yadkin facilities are in excess of five MW and so are not subject to exemption to the five-year contract requirement.

Cube Yadkin acknowledges that the Commission’s *Sub 148 Order* and House Bill 589 changed the methodology by which avoided costs are calculated and the terms and conditions for negotiated PPAs for QFs not eligible for the standard offer. (Complaint at ¶¶ 18, 33) Nevertheless, Cube Yadkin seeks to evade their application to its proposed

negotiated PPA with Respondents by alleging that it is entitled to avoided cost rates and PPA terms that have been superseded by the Commission's *Sub 148 Order* and House Bill 589. To make this argument, Complainant claims that it established a LEO prior to November 15, 2016, when the Companies filed their Joint Initial Statement at the Commission and when the revisions to PURPA implementation in North Carolina began. As shown by this Motion and Answer, however, Cube Yadkin has not followed the Commission's requirements for establishing a LEO (as it concedes) prior to November 16, 2016. Consequently, its argument in support of its requested relief must fail.

Under this Commission's implementation of PURPA, establishment of a LEO is a threshold issue, and QFs are entitled to PPAs with avoided cost rates calculated as of the date of their respective LEOs using data at the time the LEO was established. As discussed in more detail in this Response and Answer, the Commission's requirements for establishing a LEO prior to October 11, 2017 were simple and straightforward: (i) the QF has self-certified with FERC as a QF; (ii) the QF has made a commitment to sell the QF's output to a utility under PURPA using the approved Notice of Commitment form ("NoC form"); (iii) the QF has filed a report of proposed construction or been issued a certificate of public convenience and necessity ("CPCN"). *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities*, Docket No. E-100, Sub 140, issued December 17, 2015 ("*Sub 140 Order*") at 52.

As shown by the Complaint and this Motion and Answer, the following relevant facts not in dispute: (i) Cube Yadkin did not own the Yadkin facilities until February 1, 2017; (ii) Cube Yadkin did not self-certify as a QF with respect to the Yadkin facilities until March 9, 2017; (iii) Cube Yadkin has not submitted the required NoC form; and (iv)



Cube Yadkin does not have a certificate of public convenience and necessity (“CPCN”). Under these undisputed facts, Cube Yadkin has failed to meet the Commission’s requirements for establishing a LEO prior to November 15, 2016, in particular, and has failed to establish a LEO in general. Cube Yadkin’s Complaint should be dismissed, and its request for declaratory judgment should be denied.

Additionally, because Cube Yadkin has failed to establish a LEO to determine the avoided cost rates and terms and conditions that should be applied to it, there are no issues ripe for arbitration and its Complaint and petition for arbitration should be dismissed.

### **ANSWER**

#### **FIRST DEFENSE: RESPONSE TO THE COMPLAINT’S ALLEGATION**

The Respondents deny each allegation of the Complaint not hereinafter specifically admitted and respond as follows to the allegations in the Complaint:

#### **(Parties, Jurisdiction, and Venue)**

1. The allegations contained in Paragraph 1 either require no response from the Respondents or are admitted upon information and belief.

2. With respect to allegations contained in footnote 4 to Paragraph 2 of the Complaint, Respondents admit that the Yadkin facilities are interconnected with DEC and DEP through Cube Yadkin’s affiliate, Cube Yadkin Transmission, LLC. Respondents admit the remaining allegations contained in Paragraph 2 of the Complaint.

3. Respondents admit the allegations contained in Paragraph 3.

#### **(Background on Cube Yadkin and Cube Yadkin QFs)**

4. Respondents admit the allegations contained in Paragraph 4 upon information and belief.

5. With respect to the allegations contained in Paragraph 5, Respondents are without sufficient information to admit or deny when Cube Yadkin signed a contract to acquire the Yadkin facilities. Respondents admit the remaining allegations contained in Paragraph 5, including that Cube Yadkin completed its purchase of the Yadkin facilities on February 1, 2017.

6. Respondents admit that the Yadkin facilities are interconnected with DEC and DEP but deny that they are directly interconnected with DEC and DEP. Respondents admit the remaining allegations contained in Paragraph 6 upon information and belief.

7. With respect to the allegations contained in Paragraph 7, Respondents admit, upon information and belief, that the Yadkin facilities were placed into operation on the dates provided. Respondents admit that the Yadkin facilities were in operation prior to the enactment of the Electricity Act of 1965, but deny that they are not subject to certification by Cube Yadkin under N.C. Gen. Stat. ¶ 62-110.1 and Commission Rule R8-64. Respondents admit that the *Order Withdrawing Application* speaks for itself but deny it supports Cube Yadkin's allegations in Paragraph 7.

8. With respect to the allegations contained in Paragraph 8, Respondents respond as follows:

a. Respondents lack sufficient information to admit or deny whether the Yadkin facilities have undergone or will undergo further "substantial" modifications.

b. Respondents admit that the License speaks for itself.

c. Respondents deny that the Cube Yadkin facilities are “new capacity” under PURPA because they were constructed prior to November 9, 1978 and do not meet FERC’s standard for determining whether such capacity that is refurbished may qualify as “new.” *Brunswick Pulp and Paper Co., Small Power Prod. & Cogeneration Facilities-Qualifying Status*, 38 FERC ¶ 62,223 (1987).

d. Respondents deny the allegation that modifications required by the License to the existing Yadkin facilities pertaining to turbine/generator efficiency, water quality, protection of aquatic habitat, fish populations, wetlands, recreational opportunities, and aesthetics result in “new capacity” under PURPA. *Id.*

e. Respondents lack sufficient information to admit or deny the allegation about Cube Yadkin’s current scope of work and budget for the modifications, but deny the scope of work and budget for these modifications establish “new capacity” under PURPA.

f. Respondents deny that any modification to the Narrows facility results in “new capacity” under PURPA because it is not a QF.

g. Respondents deny that this question has any relevance to whether Cube Yadkin has established a LEO.

9. Respondents deny they “suggested” that Cube Yadkin file for registration as new renewable energy facilities, but they admit they had discussions with Cube Yadkin about entering into a non-PURPA, market-based PPA. Respondents lack sufficient information to admit or deny Cube Yadkin’s substantial investment in the modernization and renewal of the Yadkin facilities as the basis for its filing for the registration of the Yadkin facilities and the Narrows facility as new renewable energy

facilities under N.C. Gen. Stat. § 62-133.8(a)(5). Respondents admit that the registrations were filed on March 16, 2017 and remain pending.

10. With respect to the allegations contained in Paragraph 10, the Respondents deny that the Narrows facility is a QF; accordingly, the allegations pertaining to a PPA with all four hydroelectric facilities would not refer to a PURPA PPA; therefore, those allegations are not relevant to the issues before the Commission in this Complaint. Respondents admit that the Yadkin QF facilities are available 24 hours a day, but deny they are available 24 hours a day at full capacity on an annual basis. Respondents admit that the Cube Yadkin facilities can be scheduled during peak periods, subject to limitations associated with license obligations and drought conditions. Respondents deny that a PPA with all four facilities would provide significant incremental value to DEC's increased dispatched coordination with the Yadkin facilities; to the extent the Cube Yadkin assets were bid into a competitive RFP process, any incremental value that was created would then be considered relative to another asset that did not provide that value.

**(Count One: Complaint and Declaratory Ruling)**

11. Respondents admit the allegations contained in Paragraph 11.

12. Respondents admit the allegation of Paragraph 12 that Section 210 of PURPA obligates electric utilities to purchase the energy and capacity of cogeneration facilities and small power production facilities that meet the requirements of PURPA Section 201. Respondents deny, however, that this obligation is absolute. A public utility may petition the FERC pursuant to Section 292.309 of the FERC's regulations to terminate its obligation to purchase electric energy and capacity from QFs that have non-

discriminatory access to wholesale markets. *See e.g. City of Burlington, Vt*, Order Granting Application to Terminate Mandatory Purchase Obligation, 145 FERC ¶ 61,121 (Nov. 13, 2013) at ¶ 61,633.

13. Respondents admit the allegations contained in Paragraph 13.

14. In response to the allegations contained in Paragraph 14 of the Complaint, Respondents admit that FERC regulations speak for themselves.

15. With respect to Paragraph 15 of the Complaint, Respondents admit that the Commission's orders, including the January 26, 2011 *Order on Arbitration*, Docket No. E-2, Sub 966 (*EPCOR Order*), and FERC's decision in *J.D. Wind*, 129 FERC ¶ 61,148 (2009), *recon. denied* 130 FERC ¶ 61, 127 (2010) speak for themselves. Respondents deny that the *EPCOR Order* has any binding adjudicative effect on this proceeding. *See Order Establishing Date of Legally Enforceable Obligations*, Docket No. E-22, Sub 522, issued Sept. 22, 2015, at 7.

16. With respect to the allegations contained in Paragraph 16 of the Complaint, Respondents admit that FERC's 2010 *JD Wind Order* and the Commission's December 31, 2014, *Order Setting Avoided Cost Input Parameters*, Docket No. E-100, Sub 140 ("*Order Setting Parameters*") speak for themselves, but deny that either defines "long-term fixed rates" for purposes of this Complaint.

17. With respect to the allegations contained in Paragraph 17, Respondents admit that FERC has not specified maximum or minimum terms that must be offered to all QFs, but note that the State of North Carolina has specified that five years is the maximum term for a PURPA PPA for a QF such as Cube Yadkin that is not eligible for the standard offer. N.C. Gen. Stat. § 62-156(c) (negotiated PURPA PPAs are limited to

five years). Respondents note that FERC's "established policy" has been to "leave to state regulatory authorities . . . issues relating to the specific application of PURPA requirements to the circumstances of individual QFs." See *Cuero Hydroelectric Inc.*, 85 FERC ¶ 61, 124, at 61, 467 (1998) (internal citations omitted); see also *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61, 304, at 61, 645 (1983) ("The Commission's regulations allow the States . . . a wide degree of latitude in establishing an implementation plan"). The Respondents admit that FERC has held that QFs are entitled to contracts "long enough to allow QFs reasonable opportunities to attract capital from potential investors." The Respondents are without sufficient information to admit or deny the allegation that a long-term PPA at fixed rates is the only practical way to provide sufficient certainty for QFs such as Cube Yadkin. Based on the history of the Yadkin facilities, Respondents deny any implication that Cube Yadkin cannot access wholesale or organized markets for the Yadkin facility's output. Respondents further deny the implication that their customers should pay Cube Yadkin avoided cost rates in excess of their current avoided costs or should bear the risk of overpayments that come with a PPA in excess of five years in order to justify Cube Yadkin's investment in the Yadkin facilities.

18. With respect to the allegations contained in Paragraph 18, Respondents admit that the Companies filed their Joint Initial Statement and Proposed Standard Avoided Cost Rate Tariffs with the Commission in Docket No. E-100, Sub 148 on November 15, 2016. The Respondents deny the characterization of their proposed changes as "sweeping," and further deny the characterization that proposed changes to

the methodology would have the impact of “dramatically” reducing the utilities’ avoided costs and the rates offered to QFs. The Respondents note that since the first biennial avoided cost proceeding in 1981, the Commission has exercised its authority under PURPA to establish avoided cost rates based upon the then-existing economic and regulatory circumstances and did the same in the Sub 148 proceeding. *Sub 148 Order* at 16-18 (concluding that the current economic and regulatory circumstances with respect to QF development demonstrate that “moderating the financial impact on electric ratepayers” requires “refinements to the Commission’s implementation of PURPA and adjustments in the Commission-approved avoided cost rates”). The Respondents admit that their proposal in the 2016 Avoided Cost Proceeding included reduced avoided cost rates, but further admit that declining fuel commodity prices, in addition to the proposed changes in the Commission’s methodology, were drivers for that decline. *Sub 148 Order* at 63 (Testimony describing declining gas prices and coal prices).

19. With respect to the allegations contained in Paragraph 19, Respondents admit that their Joint Initial Statement speaks for itself. Respondents admit that the transcript from the evidentiary hearing in Docket No. E-100, Sub 148 speaks for itself. Respondents deny that five-year PPAs are short and not “long-term” under PURPA. Respondents deny the implication that there is a potential for “a rash” of complaints concerning the appropriate length of a non-standard PPA because N.C. Gen. Stat. § 62-156(c) made that issue moot by mandating five-year PPAs with QFs such as Cube Yadkin.

20. Respondents admit the allegations contained in Paragraph 20 of the Complaint. Respondents further admit that Alcoa, not Cube Yadkin, self-certified the

Yadkin facilities through the Form 556 filing at the FERC on September 28, 2016, and that Cube Yadkin consummated its purchase of the Yadkin facilities on February 1, 2017. Respondents admit that after the purchase of the Yadkin facilities, Cube Yadkin self-certified as QFs on March 9, 2017 by filing Form 566s at the FERC, as required by FERC's regulations to reflect the transfer of ownership of the facilities from Alcoa to Cube Yadkin.

21. As for the allegations contained in Paragraph 21 of the Complaint, Respondents admit that each of the Cube Yadkin QFs has a nameplate capacity in excess of the maximum size for which the Commission has approved standard contracts terms and conditions and that QFs must negotiate the terms and conditions of their respective PPAs, but deny that eligibility was determined by the Commission in its December 2015 *Sub 140 Order*. Instead, the *Sub 148 Order* and N.C. Gen. Stat. § 62-156, as amended by House Bill 589, require the Commission to approve a standard offer PPA for small power producers with a design capacity up to and including 1000 kilowatts.<sup>2</sup>

22. With respect to the allegations contained in Paragraph 22 of the Complaint, Respondents have insufficient information to admit or deny that Cube Yadkin reached out to them in March 2016, but generally admit that Cube Yadkin had reached out to them involving its purchase of Cube Yadkin. Respondents lack sufficient information to admit or deny the components of Cube Yadkin's due diligence efforts and whether a long-term PPA was a critical component of Cube Yadkin's business plan. Respondents lack sufficient information to admit or deny Alcoa's commitment to support

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<sup>2</sup> N.C. Gen. Stat. § 62-156 actually limits eligibility further by additionally providing that when an electric public utility has entered into PPAs with small power producers from facilities (i) in the aggregate capacity of 100 MW or more and (ii) which established a LEO after November 15, 2016, the eligibility threshold for that utility's standard offer shall be reduced to 100 kW.



Cube Yadkin's efforts to enter into a long-term PPA with Respondents to sell energy and capacity or any agreement or understanding between Alcoa and Cube Yadkin.

23. With respect to the allegations contained in Paragraph 23, Respondents lack sufficient information to admit or deny whether Cube Yadkin contacted them *immediately* upon executing the purchase agreement with Alcoa, but they admit that they met with Cube Yadkin representatives in early August 2016, and they admit that the August 23, 2016 email attached to Cube Yadkin's complaint as Exhibit 1 speaks for itself. Respondents further admit that the August 23, 2016 email attached to Cube Yadkin's complaint as Exhibit 1 provides *in full* that in addition to discussing registering the Yadkin facilities as QFs, Cube and Respondents had discussed the possibility of a non-PURPA PPA with all four facilities, including the Narrows facility, which is not a QF. (Complaint, Exhibit 1) Respondents deny, however, that this communication and Cube Yadkin's plan to register the Yadkin facilities as QFs are relevant to meeting the Commission's LEO requirements because the Yadkin facilities would not become QFs until September 28, 2016; Cube Yadkin did not own them until February 1, 2017; and Cube Yadkin did not self-certify with respect to the Yadkin facilities until March 9, 2017.

24. With respect to the allegations contained in Paragraph 24, Respondents admit that Cube Yadkin contacted them to discuss the Companies purchasing the output of the Yadkin facilities on or about September 16, 2016. Respondents admit that they confirmed the conversation in a letter dated September 21, 2016 and that this letter is attached as Exhibit 2 to the Complaint. Respondents admit that the September 21, 2016 letter speaks for itself and, *in full*, confirms that the Yadkin facilities had not been self-certified as QFs and that Cube Yadkin did not own or operate the facilities as of

September 21, 2016. Respondents deny that this letter meets in part or in whole any of the Commission's LEO requirements.

25. With respect to the allegations contained in Paragraph 25, Respondents admit that Cube Yadkin transmitted an undated letter informing DEC and DEP that the Yadkin facilities had been self-certified as QFs. (Complaint, Exhibit 3) Respondents admit that the letter speaks for itself. Respondents further admit that the letter shows that Cube Yadkin did not own the Yadkin facilities at that time. Respondents deny that this letter meets in part or in whole any of the Commission's LEO requirements.

26. With respect to the allegations contained in Paragraph 26, Respondents admit that their October 14, 2016 letter speaks for itself and is attached to the Complaint as Exhibit 4. Respondents further admit that the letter provides *in full* that Cube Yadkin did not own or operate the Yadkin facilities and that Cube Yadkin had not self-certified as a QF as of October 14, 2016. Respondents deny that this letter meets in part or in whole any of the Commission's LEO requirements.

27. As for the allegations contained in Paragraph 27 of the Complaint, the Respondents respond as follows:

a. Respondents deny that an exchange of communications between the parties demonstrates that the LEO to purchase the output of each of the QFs was established as of September 16, 2016. Respondents did not own the Yadkin facilities and had not self-certified as QFs at that time. Respondents further deny that Cube Yadkin has established a LEO because Cube Yadkin has failed to submit the mandatory NoC form or to obtain the CPCN. *See Sub 140 Order* at 51-53 (Outlining the requirements for establishing a LEO).

b. Respondents deny that Complainant has established LEOs as of September 28, 2016, upon the filing of the FERC 556s, because Alcoa, and not Cube Yadkin, filed the self-certifications and because Cube Yadkin did not own the Yadkin facilities at that time. Respondents further deny that Cube Yadkin has established a LEO because it has failed to submit the mandatory NoC form or obtain a CPCN. *Id.*

c. Respondents deny that Complainant established a LEO by no later than October 11, 2016, because it did not own the Yadkin facilities at that time and had not self-certified as a QF. Additionally, Cube Yadkin has not submitted the required NoC form or obtained a CPCN. *Id.*

d. Respondents deny that the Companies' October 14, 2016 letter to Cube Yadkin supports Complainant's purported LEO; the October 14, 2016 letter attached as Exhibit 4 to the Complaint speaks for itself and does not support the allegations contained in Paragraph 27 of the Complaint.

e. With respect to the allegation that Cube Yadkin had signed a binding contract to purchase the facilities with only limited regulatory out clauses, Respondents do not have sufficient information on the legal enforceability of Cube Yadkin's contract to purchase to admit or deny. Respondents deny Cube Yadkin's conclusory allegation regarding its contract to purchase the Yadkin facilities is relevant to, or demonstrates compliance with, the Commission's clear and well-established requirements for establishing a LEO.

f. Respondents admit that Cube Yadkin had submitted an application to transfer the FERC license as early as July 26, 2016, but deny that this application to

transfer is related to or meets any of the Commission's requirements for establishing a LEO.

g. With respect to the allegation that in any event the obligation established under PURPA attaches to the facility, and not to the owner of the QFs, Respondents deny that a developer that has not self-certified as a QF may establish a LEO in North Carolina for that facility. *See Sub 140 Order* at 52 (Commission requires developers to have self-certified with FERC as a QF to establish a LEO). Additionally, self-certification is not the only requirement in North Carolina to establish a LEO. The Commission's LEO requirements additionally require the QF to submit a NoC form to the electric public utility and to obtain a CPCN, which the Complainant has not done.

h. With respect to the predicate for Complainant's acquisition of the facilities, the Respondents lack sufficient information to admit or deny the Complainant's reasons for, or due diligence efforts associated with, the purchase of the Yadkin facilities or the Narrows facility, which is not a QF.

28. With respect to the Complainant's allegations contained in Paragraph 28, Respondents respond as follows:

a. Respondents admit that they have not provided proposed contract terms, including pricing, for a long-term PURPA PPA or to otherwise enter into negotiations for such an agreement; but they have discussed entering into a non-PURPA PPA with Cube Yadkin. Respondents note that until March 9, 2017, Cube Yadkin was not self-certified as a QF and therefore not entitled to enforce PURPA rights. Respondents additionally note that they declined to enter into negotiations for a PURPA agreement throughout this process, in order to preserve, and not waive, their right to

petition FERC for authorization to terminate their obligation to purchase the output of the Yadkin facilities as QFs under 18 C.F.R. 292.309 and also because Cube did not own the Yadkin facilities until February 1, 2017. (Complaint, Exhibit 4) Respondents further admit that on March 22, 2017, Respondents sent a letter agreement to Cube Yadkin indicating their willingness to discuss the purchase of the output of the Yadkin facilities on a non-PURPA basis and further admit that they made reasonable non-PURPA offers to Cube Yadkin during discussions that took place between March 22, 2017, and February 23, 2018. Cube Yadkin declined these offers.

b. Respondents lack sufficient information to admit or deny Cube Yadkin's motivations for entering these non-PURPA discussions, but admit that Cube Yadkin entered into the finalized letter agreement with Respondents dated April 25, 2017, which stated that any such discussions would not be deemed to establish any LEO under or pursuant to PURPA.

29. With respect to the allegations contained in Paragraph 29, Respondents admit that they pursued an alternative path to a non-PURPA PPA with respect to all four facilities and that Cube Yadkin filed the currently pending registration statements for the Yadkin facilities and the Narrows facility in mid-March of 2017. With respect to Complainant's allegation that it delayed its enforcement of its rights as a QF because it was waiting, in good faith, on Respondents to engage in the alternative approach, Respondents lack sufficient information to admit or deny Complainant's motivations for its delay of enforcement of its rights as a QF. Respondents note they sent a letter agreement to Cube Yadkin on March 22, 2017 to indicate that they were willing to discuss non-PURPA PPAs. On April 25, 2017, the letter agreement was executed. A

confidentiality agreement between the parties was signed May 8, 2017. Respondents admit that, after seeking necessary responses from Cube Yadkin to perform their internal analysis and preparation of the offer, Respondents sent an offer to Cube Yadkin on August 10, 2017. Respondents deny the remaining allegations contained in Paragraph 29. Finally, Respondents note that Cube Yadkin has failed to pursue its right to establish a LEO under PURPA consistent with the Commission's LEO requirements.

30. With respect to the allegations contained in Paragraph 30, Respondents deny that there is no legal basis to support their claim that because Cube Yadkin has sought market-based rate authority, they are exempted from any purchase obligation under PURPA. Respondents admit that QFs may have market-based rate authority. Respondents further admit that Cube Yadkin is required to have market based rate authority under federal law because the three QFs are over the 30 MW threshold for the QF exemption from federal rate regulation. Respondents further admit that Alcoa and the Yadkin facilities have had competitive access to organized and wholesale markets and the Yadkin facilities have historically sold into these markets. Respondents admit that they have not sought from FERC, nor have been granted, an exemption from their obligations under PURPA. However, Respondents have properly reserved, and not waived, their entitlement to petition the FERC for authority to grant this exemption under 18 C.F.R. 292.309. After Cube Yadkin became the owner of the Yadkin facilities, Respondents and Cube Yadkin entered into negotiations with respect to a non-PURPA PPA. Respondents admit that without FERC authorization for the exemption, they are legally required to purchase the output of the Cube Yadkin facilities under PURPA, but not at a PPA term

and avoided cost rates that are inconsistent with PURPA, the Commission's recent avoided cost orders, and House Bill 589.

31. With respect to the allegations contained in Paragraph 31 of the Complaint, Respondents respond as follows:

a. Respondents deny that Complainant's Yadkin facilities had established a LEO prior to the Respondents filing their Joint Initial Statement in the 2016 Avoided Cost proceeding.

b. Respondents deny that in 2018 Cube Yadkin is entitled to enter into long-term PPAs with DEC or DEP for the purchase of the output of the Yadkin QFs at DEC's or DEP's avoided cost rates calculated in accordance with the Commission's *Order Setting Parameters*. Even *assuming arguendo* that Cube Yadkin had established a LEO prior to November 15, 2016, which the Respondents do not concede, Respondents deny that the 2014 *Order Setting Parameters* applies to Cube. The Commission's *Order Setting Parameters* primarily applies to QFs that are eligible for the standard offer; Cube's Yadkin facilities are not eligible for the standard offer. In its subsequent *Order on Clarification*, the Commission clarified that the *Order Setting Parameters* does not make the rates and terms of the standard contract available to all QFs up to 80 MW in size. *Order on Clarification*, Docket No. E-100, Sub 140, issued March 6, 2015, at 2.

c. With respect to the allegations contained in footnote 17 to Paragraph 31 of the Complaint, the Respondents deny that the "formal" LEO process established by the Commission in prior cases is not applicable to the facts and circumstances here. The Respondents deny that the Commission's LEO requirements have no applicability to QFs that "predate" the statutory certification process – the

requirement that a developer must self-certify as a QF and the requirement that a QF must submit the NoC form are separate and distinct prongs of the Commission's LEO test, regardless of whether the Complainant is required to obtain a CPCN.

d. Respondents deny that the Commission's LEO requirements should be waived under the circumstances, because Cube Yadkin has not justified a waiver, and a waiver of the LEO requirements would be discriminatory to other QFs that have complied with the Commission's mandatory requirements in establishing a LEO. Respondents have insufficient information to admit or deny whether the Complainant actually knew the LEO requirements in advance.

e. Finally, Respondents deny that Cube Yadkin has substantially complied with the substance of the LEO requirement in its communications with appropriate personnel at DEC and DEP because throughout the communications occurring before February 1, 2017, Complainant did not own the Yadkin facilities and had not self-certified as QFs. Moreover, Complainant has not submitted an NoC form or obtained a CPCN, which are requirements to establish a LEO.

32. With respect to the allegations contained in Paragraph 32, Respondents admit that N.C. Gen. Stat. § 62-156 speaks for itself.

33. With respect to the allegations contained in Paragraph 33, Respondents admit that House Bill 589 was signed into law on July 27, 2017. The Respondents admit that the North Carolina General Statutes speak for themselves. Respondents deny that the statutory revisions in House Bill 589 do not apply to Complainant's Yadkin's facilities and that Cube Yadkin's LEO predates House Bill 589 because Cube Yadkin has not yet



established a LEO. The Respondents admit that 18 C.F.R. § 292.304(d)(ii) and the *Order Setting Parameters* speak for themselves.

34. With respect to the allegations contained in Paragraph 34 of the Complaint, Respondents admit that N.C. Gen. Stat. § 62-73 speaks for itself.

35. With respect to the allegations contained in Paragraph 35, Respondents admit that the North Carolina Declaratory Judgment Act and N.C. Gen. Stat. § 62-60 speak for themselves.

**(Count Two: Request for Arbitration)**

36. The Respondents' responses to the allegations contained in paragraphs 1-35 of the Complaint are incorporated by reference.

37. Respondents deny that Cube Yadkin has established a LEO for any of the Yadkin facilities. Respondents deny that the rates, terms and conditions proposed by Cube Yadkin for a PURPA PPA reflect their respective avoided costs or the current terms and conditions of their negotiated PPAs. Respondents admit that they have declined to negotiate a PURPA PPA with Cube Yadkin, because Cube Yadkin did not own the facilities until February 1, 2017 and had not self-certified until March 9, 2017, and because the Yadkin facilities have access to sell their power in the wholesale markets and the Respondents believed that they should be able to seek FERC authorization to terminate their obligation to purchase from Cube Yadkin. Respondents further admit that they entered into negotiations with Cube Yadkin for a non-PURPA PPA after Cube Yadkin completed its purchase of the Yadkin facilities.

38. Respondents deny that there are any issues to be resolved by arbitration. Respondents deny that PURPA requires a long-term PPA to have a term of not less than 10 years.

39. Respondents do not agree or consent to arbitration because there are no issues ripe for arbitration. N.C. Gen. Stat. § 62-40 requires “all parties” to a controversy to agree in writing to submit the controversy to the Commission as arbitrator. *See e.g., Order Serving Complaints and Requiring Responses*, Docket No. E-2, Sub 1050, Docket No. E-7, Sub 1060, Docket No. E-22, Sub 511, issued July 16, 2014 at 2 (“General Statute 62-40 requires that in order for the Commission to serve as arbitrator all parties to a controversy must agree in writing to submit the controversy to the Commission as arbitrator.”); *Order Serving Petition for Arbitration and Requiring a Response*, Docket No. E-22, Sub 530, issued Feb. 5, 2016 at 2 (explaining that if both parties did not agree in writing to the arbitration as required by N.C. Gen. Stat. § 62-40, “the Commission will treat the filing as a complaint pursuant to [G.S. 62-73](#) and proceed accordingly”).

40. The allegations contained in Paragraph 40 require no response.

**SECOND DEFENSE: COMPLAINANT HAS FAILED TO ESTABLISH A LEO  
AS REQUIRED BY THE COMMISSION**

41. Cube Yadkin contends that DEC and DEP are legally obligated to purchase the output of the Yadkin facilities under a PPA with a term of not less than ten years pursuant to Cube Yadkin establishing a LEO on either September 16, 2016, September 28, 2016 or October 11, 2016. Cube Yadkin acknowledges that it has not complied with the Commission’s “formal” LEO “process,” but that failure notwithstanding, Cube Yadkin proffers these particular dates to support its argument that it is entitled to a ten-year PPA at outdated avoided cost rates that are in excess of the

Companies' current avoided costs. Cube Yadkin's assertions ignore both N. C. Gen. Stat. § 62-156 and the Commission's LEO requirements.

42. Establishing a LEO is a matter of state law, and the states determine: (i) whether and when a LEO is created and (ii) the procedures for obtaining approval of such an obligation. Order No. 588-A, 119 FERC ¶ 61,305 at p. 139 (2007); *see also, Power Res. Grp., Inc. v. Pub. Util. Comm'n*, 422 F.3d 231, 239 (5<sup>th</sup> Cir. 2005). The Commission's requirements to establish a LEO are simple and straightforward: prior to October 11, 2017, establishment of a LEO required a QF to meet a three-prong test: (i) the developer has self-certified with FERC as a QF; (ii) the QF has made a commitment to sell the QF's output to a utility under PURPA using the approved NoC form; and (iii) the QF has filed a report of proposed construction or been issued a CPCN pursuant to N.C. Gen. Stat. § 62-110.1. *Sub 140 Order* at 52.<sup>3</sup>

43. Prior to 2015, however, the Commission's LEO standard included less specificity. A QF established a LEO when it had: (i) obtained a CPCN or filed a report of proposed construction and (ii) indicated to the utility that it seeks to commit itself to sell its output to that utility. *Sub 140 Order* at 48. However, in the years leading up to the Sub 140 avoided cost proceeding, the Commission experienced "an increasing number of disputes over the date of an LEO," which resulted in the Commission clarifying and adding to its LEO requirements in order "to provide a standardized and clearly stated method to establish a LEO." *Sub 140 Order* at 52. To foster clarity and consistency with PURPA, the Commission concluded that "a developer must obtain QF status in order to

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<sup>3</sup> In the Commission's *Sub 148 Order*, the Commission reaffirmed those requirements, but added a fourth prong - the QF has submitted a completed interconnection request pursuant to NCIP. *Sub 148 Order* at 106. Although Cube is not exempt from the LEO requirements, this prong of the LEO requirements is not at issue here.

establish a LEO.” *Id.* The Commission also mandated the use of the NoC form to demonstrate that the QF has given notice of its commitment to sell its output to the utility. In requiring the use of the NoC form, the Commission expressly rejected recommendations by the North Carolina Sustainable Energy Association that use of the form to establish a LEO be “permissive.” *Sub 140 Order* at 49. Instead the Commission determined that:

the use of a simple form clearly establishing a QF’s commitment to sell its electric output to a utility to establish the notice of commitment to sell prong for creation of a LEO would provide clarity to both the QFs and the Utilities and would, therefore, reduce the number of disputes between the parties and the number of complaints brought before the Commission for adjudication as to when an LEO was established. The revised form submitted by [Dominion North Carolina Power] . . . contains the information necessary to satisfy the second prong of the LEO test and should not be unduly burdensome for a QF to complete. As such, the Commission finds that use of the form should be mandatory.

*Sub 140 Order* at 51. These requirements have, without exception, applied to all QFs seeking to negotiate a PURPA PPA since they were outlined in the Commission’s 2015 *Sub 140 Order*.

- (i) Cube Yadkin did not own the Yadkin facilities until February 1, 2017 and did not have QF status prior to March 2017.

44. As an initial matter, Cube Yadkin could not assert its rights as a QF prior to February 1, 2017, when it completed its purchase of the Yadkin facilities. Additionally, and as noted above, the Commission has held that a developer must have QF status to satisfy the Commission’s LEO test. *Sub 140 Order* at 52. Cube Yadkin, however, did not actually own the Yadkin facilities at any of the times it claims it established a LEO – September 16, 2016, September 28, 2016, and October 28, 2016.

Additionally, it had not self-certified as a QF on any of those dates. Cube Yadkin cannot enforce its LEO rights under PURPA prior to its March 9, 2017 self-certification. *Vote Solar Initiative and Montana Environmental Information Center v. Montana Public Serv. Comm'n.* 157 F.E.R.C. P 61,080 (Nov. 1, 2016). Cube Yadkin argues that because Alcoa had self-certified the facilities as QFs on September 28, 2016, it has complied with this first prong of the Commission's requirements for establishing LEOs. Cube Yadkin's argument is without merit.

45. The Commission's requirement that a developer self-certify as a QF, by its own terms, requires that the developer self-certify as a QF according to the FERC's rules for self-certification. FERC regulations require new owners of facilities that had previously been certified as QFs to re-certify those facilities to maintain their QF status. *See Order No. 732* (Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility), 130 FERC ¶ 61, 214 at P 58 (2010) (under FERC's QF ownership reporting requirement, a change in ownership triggers a recertification requirement). Therefore, Alcoa's self-certification of the Yadkin facilities as QFs in September 2016 does not meet even one prong of the Commission LEO test. Cube Yadkin cannot meet the Commission's QF requirement of the LEO test at any time prior to March 9, 2017, when it self-certified as a QF, reflecting the change in ownership of the Yadkin facilities. Therefore, Cube Yadkin cannot attempt to enforce PURPA obligations prior to this self-certification date. Additionally, Cube Yadkin has failed to meet the NoC requirement of the LEO test.

- (ii) Cube Yadkin has failed to submit the mandatory NoC form.

46. Cube Yadkin also has failed to comply with the Commission's requirement that it submit a NoC form to establish a LEO. The Commission has expressly required the use of the NoC form to provide clarity to public utilities and QFs and to reduce the number of disputes on the establishment of LEOs before the Commission. *Sub 140 Order* at 51. Since its approval, the NoC form has had its desired effect in clarifying and standardizing the QF's notification of its commitment to sell its output to the utility. The number of disputes surrounding the establishment of the QF's notice of commitment prong of the Commission's LEO requirements appears to have declined since the 2013-2015 timeframe. Moreover, it has prevented the "gaming" of the LEO date through its required usage.

47. Notably, this Complaint presents the very circumstances that the Commission intended the NoC form to remedy – a QF alleges that it provided notice of its commitment to sell to the utility when it can maximize the avoided cost rates to be paid to it. This allegation then leaves the utility and, potentially, the Commission itself to later sift through various emails, letters, or meetings between the QF and the utility to determine whether or when the QF had actually provided such notice. Cube Yadkin has asked nothing less of the Commission in this Complaint, proposing a selection of self-serving LEO dates for the Commission to review, based on various actions by Alcoa, the previous owner of the Yadkin facilities, or letters and emails between Cube Yadkin (prior to its purchase of the Yadkin facilities and its self-certification as a QF at FERC) and Respondents.

48. In contrast, the Commission's mandatory NoC form provides a clear, non-discriminatory method for all QFs to unequivocally provide the required notice of

commitment to sell its output to the utility in a manner that reduces disputes between the parties and before the Commission. Cube Yadkin has presented no compelling argument why the Commission should abandon its well-considered and effective determination that an NoC form is mandatory.

49. Cube Yadkin argues, however, that because the Yadkin facilities were constructed prior to the enactment of the statutory obligation, and because the facilities have “long-standing” relationships with the Respondents, the Commission’s LEO requirements are “simply not applicable to the facts and circumstances here.” (Complaint at ¶ 31, fn. 17) These arguments have no merit. Even assuming that Cube Yadkin is not required to obtain a CPCN to operate the existing Yadkin facilities (which the Respondents do not concede as explained below), this does not relieve Cube Yadkin from meeting the other LEO requirements. The Commission has previously determined that the CPCN requirement and the notice of commitment to sell requirement are separate and distinct. *See Order Establishing Date of Legally Enforceable Obligation*, Docket No. E-22, Sub 522, issued Sept. 22, 2015, at 9-10 (Explaining that even though a CPCN application indicated the QF’s “general plan” to sell power to a utility, the QF still had to provide a distinct notice of commitment to sell to the utility). The fact that the Yadkin facilities existed prior to the CPCN requirement is not a substitute for meeting the Commission’s requirement that Cube Yadkin provide notice of its commitment to sell the output of the Yadkin facilities by submitting the required NoC to establish a LEO.

50. Additionally, the Commission has likewise previously concluded that a request to interconnect was not a notice of a QF’s commitment to sell the output of a facility to the utility. *Id.*; *Sub 140 Order* at 49, 52. Although the Commission added a

new requirement to the LEO test that pertained to those QFs in the interconnection queue in the *Sub 148 Order*, the Commission has never concluded that existing interconnections or relationships exempted QFs from complying with the LEO requirements.

(iii.) Cube Yadkin has failed to obtain a CPCN.

51. Cube Yadkin also claims that it is not required to obtain a CPCN because the Yadkin facilities were constructed and began operation prior to the Electricity Act of 1965. Cube Yadkin's assertion is inconsistent with Commission precedent.

52. In October of 1996, Duke Power Company ("Duke Power") and Northbrook Carolina Hydro, LLC ("Northbrook") filed a joint petition for the transfer of CPCNs for four hydroelectric facilities from Duke Power to Northbrook. The hydroelectric facilities had been in existence since the early 1900s. Northbrook was not a public utility, but was instead a small power producer seeking to operate the facilities as QFs under N.C. Gen. Stat. § 62-156. Therefore, Northbrook sought the transfer of the CPCNs from Duke Power. The Commission then transferred to Northbrook the CPCNs that were "issued or *deemed to have been issued* to Duke Power Company." *Order Approving Transfer of Certificates*, Docket No. SP-122, issued Dec. 3, 1996, at 2-3 (emphasis added).

53. Additionally, Commission Rule R8-64 establishes filing requirements for obtaining a CPCN for persons other than public utilities, who: (1) own a renewable energy facility that is participating in the Competitive Procurement of Renewable Energy Program; (2) are QFs seeking the benefits under N.C. Gen. Stat. § 62-156 or 16 U.S.C. 824a-3, or (3) own or operate a small power production facility under 16 U.S.C. 769. Cube Yadkin is a QF that seeks the benefits of N.C. Gen. Stat. § 62-156. (Complaint at ¶



32) Accordingly, Cube Yadkin is not exempt from the Commission's requirement that it obtain a CPCN for the Yadkin facilities in order to establish a LEO.

(iv.) Cube Yadkin has failed to justify a waiver of the Commission's LEO Requirements

54. Finally, Cube Yadkin argues that, if the Commission finds that the LEO requirements do apply to it, the Commission should waive the requirements because Cube Yadkin "could not have known that in advance." (Complaint, at ¶ 31, fn. 17) This alleged ignorance of the Commission's LEO requirements does not justify a waiver. First, Cube Yadkin is not a small, unsophisticated QF, but instead is a sophisticated market participant, "in the business of owning, developing and modernizing hydroelectric facilities." (Complaint at ¶ 1) Second, Cube Yadkin's communications with Respondents evince its familiarity with PURPA's requirements as early as August 2016. Notably, the Commission's *Sub 140 Order* implementing PURPA and including the mandatory requirement of the NoC form was publicly issued at the end of 2015. The NoC form has been widely used by even small, unsophisticated QFs to establish a LEO. Finally, submission of the NoC form is hardly burdensome, as the Commission itself noted in the *Sub 140 Order*. *Sub 140 Order* at 51. Cube Yadkin's claim of ignorance of the LEO requirements fails to justify any waiver of the Commission's requirements.

55. Moreover, the Commission's grant of a waiver under these circumstances would likely result in opening the floodgates of disputes and complaints before the Commission from QFs that would, like Cube Yadkin, seek to establish backdated LEOs prior to the commencement of the 2016 Avoided Cost Proceeding and passage of House Bill 589. Such a result would lead to regulatory uncertainty and completely negate the recognized benefits of the standard NoC form in: (i) providing an administratively

simple, fair, and nondiscriminatory process for QFs to establish LEOs and (ii) reducing the number of complaints and disputes surrounding establishment of LEO dates brought before the Commission. For the foregoing reasons, Cube Yadkin has failed to justify any waiver of the LEO requirements.

**THIRD DEFENSE: CUBE YADKIN IS NOT ENTITLED TO A PURPA PPA WITH A TERM OF NOT LESS THAN TEN YEARS AT AVOIDED COST RATES ESTABLISHED IN ACCORDANCE WITH THE OUTDATED AVOIDED COST ORDERS**

56. Even if assuming *arguendo* that Cube Yadkin established a LEO prior to November 2016 or the passage of House Bill 589, which the Respondents do not concede, this would still not require DEC or DEP to purchase the output of the Yadkin facilities pursuant to a PURPA PPA with a term of not less than ten years.

57. The Companies have the obligation to negotiate avoided cost rates that are non-discriminatory to QFs, consistent with the public interest and, most importantly, just and reasonable for our customers. Neither PURPA nor the FERC's regulations implementing PURPA specify maximum or minimum terms for PURPA contracts. Further, prior to the passage of House Bill 589, the Commission had not specified a maximum or minimum term for negotiated PURPA contracts. See *Order on Clarification*, Docket No. E-100, Sub 140, issued March 6, 2015 (Commission declines to require standard offer contract durations to negotiated PPAs).

58. Second, as the *Order on Clarification* provides, only limited portions of the Commission's *Order Setting Parameters* applied to negotiated PPAs. *Order on Clarification* at 3. Additionally, the Commission mandated that the Companies use "up-to-date data" in determining inputs for negotiated avoided cost rates. *Id.* Therefore, the


determination of inputs, such as fuel prices, for calculating avoided cost rates for negotiated PPAs would include data that was up-to-date in the September–October 2016 timeframe. Those avoided cost rates would not, therefore, be the same as those approved in the Commission’s Sub 140 docket for the standard offer.

59. Based on the foregoing, therefore, even assuming *arguendo* that Cube Yadkin were able to establish a LEO in September or October of 2016, it has failed to show that it is entitled to a ten-year PPA or to the outdated avoided cost rates approved for standard offer QFs in Sub 140.

WHEREFORE, the Respondents respectfully pray as follows:

1. That the Commission dismiss the Complaint with prejudice.
2. That the Commission deny Cube Yadkin’s request for declaratory judgment that DEC and DEP are legally obligated to purchase the output of Cube Yadkin’s Yadkin facilities.
3. That the Commission deny Cube Yadkin’s request to direct DEC and/or DEP to enter into a PPA with each of Cube Yadkin’s Yadkin facilities.
4. That the Commission deny Cube Yadkin’s request for arbitration under N.C. Gen. Stat. § 62-40.
5. That the Commission deny Cube Yadkin’s request for an expedited procedural schedule; and
6. That the Commission grant such other relief as the Commission deems just, equitable, and proper.

Respectfully submitted, this the 7<sup>th</sup> day of May, 2018.



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BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

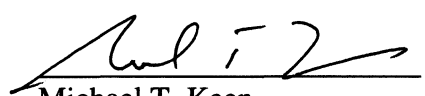
DOCKET NO. E-2, SUB 1177  
DOCKET NO. E-7, SUB 1172

In the Matter of )  
Cube Yadkin Generation, LLC, )  
Complainant )  
v. )  
Duke Energy Carolinas, LLC and Duke )  
Energy Progress, LLC, )  
Respondents )

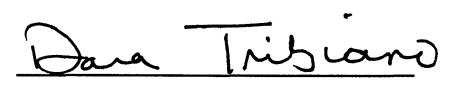
VERIFICATION

Michael T. Keen, having been first duly sworn, deposes and says that he is a Business Development Manager with Duke Energy Business Services, LLC; that he has read the foregoing Answer and Motion to Dismiss Complaint of Cube Yadkin Generation LLC and knows its contents; that the same is true of his own personal knowledge, except for those matters alleged on information and belief, and as to those matters, he is informed and believes them to be true.

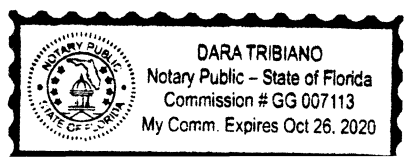
This is the 1<sup>st</sup> day of May, 2018.

  
Michael T. Keen

Sworn to and subscribed before me  
this the 1<sup>st</sup> day of May, 2018.

  
Notary Public

My Commission Expires:  
October 26, 2020



CERTIFICATE OF SERVICE

I certify that a copy of Duke Energy Progress, LLC and Duke Energy Carolinas, LLC's Joint Answer and Motion to Dismiss Complaint of Cube Yadkin Generation, LLC, in Docket Nos. E-2, Sub 1177 and E-7, Sub 1172 has been served by electronic mail, hand delivery, or by depositing a copy in the United States Mail, 1<sup>st</sup> Class Postage Prepaid, properly addressed to parties of record.

This the 7<sup>th</sup> day of May, 2018.



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