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September 4, 2019

Ms. Janice Fulmore  
Interim Chief Clerk  
North Carolina Utilities Commission  
430 N. Salisbury Street  
Raleigh, NC 27603

**RE: *In the Matter of Biennial Determination of Avoided Cost Rates for Electric Utility Purchases from Qualifying Facilities—2018***  
**DOCKET NO. E-100, SUB 158**

Dear Ms. Fulmore:

On behalf of NC Small Hydro Group (“Hydro Group”), we hereby submit **Hydro Group’s Partial Proposed Order** in the above-referenced docket.

If you have any questions or comments regarding this filing, please do not hesitate to call me. Thank you in advance for your assistance.

Very truly yours,

Deborah Ross

DR:sb

Enclosures

A Pennsylvania Limited Liability Partnership

California Colorado Delaware District of Columbia Florida Georgia Illinois Minnesota  
Nevada New Jersey New York North Carolina Pennsylvania South Carolina Texas Washington

STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH

DOCKET NO. E-100, SUB 158

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of:

Biennial Determination of Avoided Cost  
Rates for Electric Utility Purchases from  
Qualifying Facilities—2018

HYDRO GROUP'S  
PARTIAL PROPOSED ORDER

Pursuant to the North Carolina Utilities Commission's ("Commission") *Order Granting Extension of Time* dated August 28, 2019, the NC Small Hydro Group ("Hydro Group"), through its counsel, respectfully submits its Partial Proposed Order in the Biennial Determination of Avoided Cost Rates for Electric Utility Purchases from Qualifying Facilities ("Avoided Cost Proceeding") - 2018 to the Commission.

FINDINGS OF FACT

1. It is appropriate to require Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP") (collectively "Duke") to utilize a PAF of 2.0 in their respective avoided cost calculations for hydroelectric QFs with no storage capability and no other type of generation that contract to sell 5 megawatts ("MW") and less until discontinued by further order of the Commission.
2. It is appropriate for existing QFs to continue to be paid for capacity when they renew or extend their contracts.
3. It is appropriate for the utilities to file a Statement of Need in the IRP process that recognizes the fundamental link between each utility's planned generation and

the calculation of avoided capacity payments in the contemporaneous avoided cost proceeding.

#### EVIDENCE AND CONCLUSIONS SUPPORTING FINDING OF FACT NO. 1

The evidence supporting this finding of fact is found in the public hearing testimony of small hydroelectric QF operators; the Initial Statement and Reply Comments of the Hydro Group; the Initial Statement of the Public Staff; Duke's Joint Initial Statement and Reply Comments; and, Duke's Joint Letter to NC Small Hydro Group filed on July 12, 2019 ("Joint Letter").

In its Initial Statement, the Hydro Group agreed with Duke's position in its Joint Initial Statement that a 2.0 PAF for run-of-river hydro QFs without storage as set forth in the Hydro Stipulation entered among DEC, DEP and the NC Hydro Group in Docket No. E-100, Sub 140 ("Small Hydro Stipulation") should continue, and further supported the inclusion of the 2.0 PAF in DEC's and DEP's standard offer capacity calculation for run-of-river hydro QFs without storage that are 1 MW and below. The Hydro Group also requested that the 2.0 PAF for run-of-river hydro QFs without storage that contract to sell 5 MW and less remain in effect.

The Public Staff in its Initial Statement limited its support for retaining the 2.0 PAF for run-of-river hydro QFs without storage to those QFs that are 1 MW and below.

The Hydro Group maintained that because the Small Hydro Stipulation covered run-of-river hydro QFs without storage up to 5 MW, the 2.0 PAF should remain unchanged for these facilities. Currently, there are only ten small hydroelectric facilities in the state between 1 MW and 5 MW. Only three of them are larger than 2 MW. They are limited in number. They all benefit from the current 2.0 PAF for capacity. The Hydro Group also

maintains that a reduction of almost 50% in the PAF coupled with the lower avoided cost rates proposed in this proceeding would be financially devastating to these facilities.

Duke filed its Joint Letter indicating that it will honor the 2.0 PAF for purposes of calculating avoided cost rates for all hydro QFs covered by the Small Hydro Stipulation until its December 31, 2020 expiration date, subject to any future adverse regulatory decisions by the Commission that Duke should not offer a 2.0 PAF.

#### Discussion and Conclusions

No party introduced any evidence indicating that the Commission should reconsider its prior approval of the Small Hydro Stipulation. The Commission's historic reliance on state policy supporting the encouragement of the development and economic feasibility of small hydroelectric generating facilities is furthered by allowing the Small Hydro Stipulation to remain in effect. Considerations of regulatory certainty lend further support to allowing the 2.0 PAF for all hydro QFs covered by the Small Hydro Stipulation to continue, at least through the end of the two-year period that is covered by this biennial proceeding. The Commission concludes that the 2.0 PAF for run-of-river hydro QFs without storage that are up to 5 MW shall remain in effect through the two-year period that is covered by this biennial proceeding.

#### EVIDENCE AND CONCLUSIONS SUPPORTING FINDING OF FACT NO. 2

The evidence for this finding of fact is found in the public hearing testimony of small hydroelectric QF operators; testimony of Duke witnesses Snider, Wheeler and Johnson; testimony of Public Staff witness Hinton; and testimony of NCSEA witness Johnson.

The evidence for this finding involves Duke's IRP assumptions regarding expiring QF contracts and whether they should be treated the same as other wholesale contracts or whether QFs by virtue of their rights under PURPA should be assumed to continue to be part of the utility's resource stack, and thus be paid for their capacity when they renew or extend their contracts. Consideration of this evidence depends on the Commission's interpretation of G.S. 62-156(b)(3), as amended by House Bill 589 (S.L. 2017-192 or HB 589) and House Bill 329 (S.L. 2019-132 or HB 329).

The statute, G.S. 62-156(b)(3) as amended in HB 589 provided that, "[a] future capacity need shall only be avoided in a year where the utility's most recent biennial integrated resource plan filed with the Commission pursuant to G.S. 62-110(c) has identified a need can be met by the type of small power producer resource based upon its availability or reliability of power, other than swine or poultry waste for which a need is established consistent with G.S. 62-133.8(e) and (f)." This legislative session, G.S. 62-156(b)(3) was further amended by House Bill 329 (S.L. 2019-132 or HB 329) on July 19, 2019, to add "hydropower small power producers with power purchase agreements with an electric public utility in effect as of July 27, 2017, and the renewal of such a power purchase agreement, if the hydroelectric small power producer's facility total capacity is equal to or less than five megawatts (MW)" to those power producers for which a need is established. Clearly, these hydro QFs are entitled to capacity payments when they renew their contracts.

HB 329 also included in Section 3.(b) language explaining that "[t]he exception for hydropower small power producers from limitations on capacity payments established in

G.S. 62-156(b)(3)...shall not be construed in any manner to affect the applicability of G.S. 62-156(b)(3) as it relates to any other small power producer.”

The Hydro Group and NCSEA took the position that existing QFs that are already in the utilities’ generation stack reduce future capacity needs, and as such, when they renew their PPAs or enter into a new PPA, existing QFs should continue to be paid for the capacity that they provide.

In its Initial Comments, the Hydro Group provided information to the Commission about the difference between displacing existing capacity with new capacity and renewing or extending a contract with an existing QF that has been providing capacity. The Hydro Group cited orders from the Idaho Utilities Commission holding that renewals/extensions of QF contracts in that state include the immediate payment of capacity.

NCSEA provided the Commission with supporting information from Dr. Ben Johnson that established the basis for the benefits of existing QF capacity. Dr. Johnson also testified that the Commission needs to address the meaning a “future” capacity needs in G.S. 62-156(b)(3) when evaluating capacity payments to existing QFs that renew their contracts.

SACE agreed with the positions of the Hydro Group and NCSEA.

Duke took the position that QF contracts should be treated the same way that merchant contracts are treated with the assumption that they will not be renewed when they expire. Duke further asserted that QFs have alternatives other than selling to the utilities and referenced potential RFPs, the CPRE program, or selling to another buyer. Duke asserted that FERC’s implementing regulations provide QFs the right to establish a legally

enforceable commitment to provide energy and capacity only for the duration of their PPAs or “over a specified term...” 18 C.F.R. 292.304(d)(2).

At the evidentiary hearing, the Hydro Group pointed out that hydro QFs are not eligible for Duke’s RFPs and that QFs renewing or extending their contracts are not eligible for the CPRE program.

The Public Staff testified that for the purpose of determining a need for capacity the utilities should not assume that existing QFs will renew their contracts. The Public Staff also requested that the utilities file a Utility Statement of Need addressing QF contract renewals among other things in future IRP proceedings.

Commissioner Clodfelter asked questions of Duke’s witnesses during the evidentiary hearing that revealed that Duke’s existing contracts with QFs do not automatically terminate unless the QF takes action.

#### Discussion and Conclusions

The interpretation of G.S. 62-156(b)(3), as amended by House Bill 589 and House Bill 329, is central to resolving whether a QF is entitled to immediate payment for capacity in a PPA renewal or extension. For QFs other than eligible small power producers using swine or poultry waste or renewing a hydroelectric power purchase agreement, the fundamental question is whether a QF contract renewal is for the continuation of existing capacity or the addition of future capacity. The statute limits payments for “future” capacity. Moreover, if the utility is planning to add capacity in the future, there is an issue as to whether the continuation of a QF’s capacity allows for the deferral of other capacity additions.

Federal law also has an impact on the correct interpretation of the statute. In its explanation of 18 C.F.R. 292.304(e)(3) “*Factors affecting rates for purchases,*” FERC stated,

Subparagraph (3) concerns the relationship of energy or capacity from a qualifying facility to the purchasing electric utility’s need for such energy or capacity. If an electric utility has sufficient capacity to meet its demand and is not planning to add any new capacity to its system, then the availability of capacity from qualifying facilities will not immediately enable the utility to avoid any capacity costs. However, an electric utility system with excess capacity may nevertheless plan to add new, more efficient capacity to its system. *If purchases from qualifying facilities enable a utility to defer or avoid these new planned capacity additions, the rate for such purchases should reflect the avoided costs of these additions.*

*Small Power Production and Cogeneration Facilities: Regulations Implementing Section 210 of the Public Utility Regulatory Policy Act of 1978*, 45 Fed. Reg. at 12,227 (emphasis added). The Idaho Commission appeared to recognize the ongoing value of existing QF capacity when it determined that a QF is entitled to immediate payment for capacity in a PPA renewal or extension based on the first capacity deficit date at the time of its original PPA. This result recognized the difference between existing and future capacity.

Taking into account the evidence presented regarding the process for contract renewals, federal law, and the language of the G.S. 62-156(b)(3), Commission concludes that a QF is entitled to immediate payment for capacity in a PPA renewal or extension based on the first capacity deficit date at the time of its original PPA.

### EVIDENCE AND CONCLUSIONS SUPPORTING FINDING OF FACT NO. 3

The evidence for this finding of fact is found in the Public Staff’s Initial Comments and Duke’s Reply Comments in in the IRP proceeding, Docket No. E-100, Sub 157; the Initial Statement and Reply Comments of the Hydro Group in this proceeding; Duke’s Reply Comments in this proceeding; and the testimony of Duke witness Snider.



The Public Staff commented in the IRP proceeding that the IRP process should be adjusted to complement the Avoided Cost Proceeding and recommended that the Commission require a Utility Statement of Need in the IRP process that recognizes the fundamental link between each utility's planned generation and the calculation of avoided capacity payments in the contemporaneous Avoided Cost Proceeding. The Public Staff's comments included suggestions for the specific items that should be addressed in the Utility Statement of Need, including the treatment of QF capacity.

The Hydro Group recommended subjecting IRPs to additional scrutiny, particularly with respect to existing QF capacity and contract renewals. The Hydro Group agreed that a Utility Statement of Need in the IRP process would complement the Avoided Cost Proceeding, however, this should be done before the 2019 IRP update in order to ensure that the current Avoided Cost Proceeding benefits from all of the information necessary to determine appropriate capacity rates.

Duke agreed that it would file a Statement of Need as recommended by the Public Staff in DEC's and DEP's 2019 IRP updates and future IRP proceedings.

#### Discussion and Conclusions

No party disagrees with the Public Staff's suggestion in the IRP proceeding that the utilities file a Statement of Need in the 2019 IRP updates and future IRP proceedings. The issue for the Commission is whether such a Statement of Need would assist the Commission in the Avoided Cost Proceeding sooner. Because the IRP and avoided cost proceedings do not always proceed in a complementary fashion and the initial filing of Statements of Need could be the subject of further scrutiny that might need to be resolved before the next biennial avoided cost proceeding, the Commission concludes that any

Statement of Need filed along with the utilities' 2019 IRP updates shall also be filed in this proceeding.

IT IS THEREFORE ORDERED AS FOLLOWS:

1. That DEC and DEP are required to utilize a PAF of 2.0 in their respective avoided cost calculations for hydroelectric QFs with no storage capability and no other type of generation that contract to sell 5 MW and less until discontinued by further order of the Commission.
2. That existing QFs are to be paid for capacity when they renew or extend their PPAs based on the first capacity deficit date at the time of its original PPA.
3. That the utilities shall file Statements of Need along with their 2019 IRP updates and in this proceeding that recognize the fundamental link between their planned generation and the calculation of avoided capacity payments.

Respectfully submitted this the 4th day of September, 2019.

FOX ROTHSCHILD LLP

BY: 


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**CERTIFICATE OF SERVICE**

I, Deborah K. Ross, hereby certify that a true and exact copy of the foregoing Proposed Order has been duly served upon all persons on the docket service list by either depositing a true and exact copy of same in a depository of the United States Postal Service, first-class postage prepaid, and/or by electronic delivery of same with the party's consent.

This the 4<sup>th</sup> day of September, 2019.

FOX ROTHSCHILD LLP

BY:  \_\_\_\_\_  
Deborah K. Ross  
Attorney for NC Small Hydro Group