STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-100, SUB 148

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Biennial Determination of Avoided Cost Rates for Electric Utility Purchases from Qualifying Facilities – 2016	)))	ORDER ON CLARIFICATION

BY THE COMMISSION: On October 11, 2017, the Commission issued an Order Establishing Standard Rates and Contract Terms for Qualifying Facilities (Avoided Cost Order). The Avoided Cost Order sets out the procedural background of this proceeding, the 2016 biennial proceeding held by the Commission pursuant to the provisions of Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), 18 U.S.C. 824a-3, and the Federal Energy Regulatory Commission (FERC) regulations implementing those provisions, which delegated to this Commission certain responsibilities for determining each utility's avoided costs with respect to rates for purchases from qualifying cogenerators and small power production facilities (qualifying facilities, or QFs). This proceeding is also held pursuant to G.S. 62-156, which requires this Commission to determine the rates to be paid by electric utilities for power purchased from small power producers as defined in G.S. 62-3(27a).

In the Avoided Cost Order, the Commission made 23 findings of fact supported by an extensive record of evidence and a lengthy discussion of the conclusions reached therein. As a result of these findings and conclusions, Ordering Paragraph 12 of the Avoided Cost Order required Duke Energy Carolinas, LLC (DEC), and Duke Energy Progress, LLC (DEP) (together, Duke), to make a compliance filing on or before November 13, 2017, consisting of revised schedules, supporting calculations, and revised purchase power agreements (PPAs), and terms and conditions, among other required content.

On November 13, 2017, Duke made the required compliance filings. Pursuant to Ordering Paragraph 13 of the Avoided Cost Order, the revised rate schedules, PPAs, and terms and conditions were to become effective and be implemented 15 days after being filed unless a party filed with the Commission specific objections to the accuracy of the revisions or supporting calculations.

Also on November 13, 2017, the Southern Alliance for Clean Energy (SACE) and the North Carolina Sustainable Energy Association (NCSEA) jointly filed a motion for clarification and modification (Joint Motion). The Joint Motion seeks clarification and modification of portions of the Avoided Cost Order that address the seasonal allocation weightings, which are an input used in calculating the utilities' avoided capacity rates. In addition, the Joint Motion seeks clarification and modification of aspects of the

Commission's Order Accepting Integrated Resource Plans and Accepting REPS Compliance Plans, issued in Docket No. E-100, Sub 147 on June 27, 2017 (2016 IRP Order).

On November 28, 2017, NCSEA filed an objection to Duke's November 13 compliance filing and a motion for clarification (NCSEA's Motion). NCSEA's Motion seeks modification of the Avoided Cost Order as related to a sentence that Duke proposed to add to paragraph 1(e) of the terms and conditions that are a part of the Commission-approved standard offer PPAs. Paragraph 1(e) contains contract provisions that restrict the ability of the Seller (the QF) under the contract to "transfer and assign" the PPA. The additional sentence proposed by Duke, and the subject of NCSEA's Motion, provides that the PPA shall not be assigned to "any person, firm, or corporation that is party to any other purchase agreement under which a party sells or seeks to sell power to the Company from another Qualifying Facility that is located within one-half mile."

On December 11, 2017, Duke filed separate responses to the Joint Motion and NCSEA's Motion.

On January 12, 2018, NCSEA filed a reply.

No other party has made a filing addressing either the Joint Motion or NCSEA's Motion.

Standard of Review

Pursuant to G.S. 62-80:

> The Commission may at any time upon notice to the public utility and to the other parties of record affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it. Any order rescinding, altering or amending a prior order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original orders or decisions.

The Commission's decision to rescind, alter, or amend an order upon reconsideration under G.S. 62-80 is within the Commission's discretion. State ex rel. Utilities Comm'n v. MCI Telecommunications Corp., 132 N.C. App. 625, 630, 514 S.E.2d 276, 280 (1999). However, the Commission cannot arbitrarily or capriciously rescind, alter, or amend a prior order. Rather, there must be some change in circumstances or a misapprehension or disregard of a fact that provides a basis for the Commission to rescind, alter, or amend a prior order. State ex rel. Utilities Comm'n v. North Carolina Gas Service, 128 N.C. App. 288, 293-294, 494 S.E.2d 621, 626, rev. denied, 348 N.C. 78, 505 S.E.2d 886 (1998).

The Joint Motion

Through the Joint Motion, SACE and NCSEA request that the Commission issue an order 1) clarifying that there is a link between "IRP determinations and avoided cost seasonal allocation weighting as they relate to seasonal planning, seasonal peaking, solar power's contribution to peak, and reserve margin planning;" 2) directing Duke and the Public Staff, with assistance or input from other parties, to "consider the following avoided cost issues and related intervenor concerns in the IRP Joint Report,[1] to help inform future biennial avoided cost proceedings: seasonal allocation weighting for the calculation of avoided costs and solar power's contribution to peak;" 3) directing that "the IRP Joint Report be filed within 150 days of the filing of Duke's 2017 IRP updates, unless the Commission deems it appropriate to grant additional time to address the IRP and avoided cost overlap;" 4) directing Duke to "revise and update its resource adequacy studies to incorporate changes described in the IRP Joint Report, its updated load forecasts, and any other improvements that Duke may identify based on comments and testimony raised in the avoided cost proceeding and related to IRP;" and 5) directing Duke "to use the results of the updated resource adequacy study to revise its recommendations regarding seasonal allocation weighting in its next biennial avoided cost filing, and to apply changes to its valuation of aggregate solar generation coincidence at peak in its IRP forecast and utilize those results for purposes of identifying capacity need and other related applications of its IRP in its next avoided cost filing."

In support of the Joint Motion, SACE and NCSEA argue that the additional clarification and directive from the Commission would not impact this proceeding or require recalculation of avoided cost rates, but it would better inform subsequent avoided cost proceedings by addressing some of the intervenors' concerns prior to the start of those proceedings. In addition, they argue that this clarification may inform avoided capacity calculation changes related to House Bill 589, particularly if consensus can be reached prior to the next biennial avoided cost proceeding. With regard to the "valuation of aggregate solar generation coincidence at peak," SACE and NCSEA argue that valuing solar capacity is directly relevant to the determination of which years the IRP forecast demonstrates a capacity need and that this demonstration of capacity need will be "an essential and impactful input into the calculation of avoided capacity rates going forward."

By its response, Duke initially raises two procedural issues. First, Duke argues that the Joint Motion should be treated as a motion to "rescind, alter, or amend" the Avoided Cost Order pursuant to G.S. 62-80. SACE and NCSEA cite no statutory authority in their Joint Motion, and did not respond to this argument by filing a reply. Although SACE and NCSEA do not specifically cite G.S. 62-80, nor specifically use the terms "rescind, alter, or amend," the Joint Motion plainly seeks alteration or amendment to the Commission's prior orders or decisions. The Commission, therefore, determines that the Joint Motion is,

[1] The 2016 IRP Order required Duke to work with the Public Staff to address concerns expressed by the Public Staff and others regarding Duke's reserve margin targets, and to file a joint report in Docket No. E-100, Sub 147, within 150 days of the filing of Duke's 2017 IRP Update. Duke filed its 2017 IRP Update in that docket on September 1, 2017; however, the deadline for filing of the IRP Joint Report was extended to February 16, 2018, by Commission order issued on February 1, 2018 in Docket No. E-100, Sub 147.

in substance, a motion requesting that the Commission exercise its authority under G.S. 62-80 to rescind, alter, or amend its prior orders or decisions. Second, Duke argues that the Joint Motion is "beyond the scope of this docket" because the Joint Motion seeks modification of the required content of the IRP Joint Report, which would require alteration or amendment to the 2016 IRP Order. The Commission agrees that it would be inappropriate to alter or amend the 2016 IRP Order in response to the Joint Motion. The proceeding established to review IRP filings and this proceeding are separate and distinct. This difference is more than a technicality: different parties are before the Commission in the two proceedings; an evidentiary hearing was held in this proceeding, but not in the IRP proceeding; a different combination of members of the Commission is participating in the two proceedings; and, as discussed further below, the two proceedings have substantively different purposes. Therefore, the Commission will consider the Joint Motion on the merits, but only to the extent that the Joint Motion seeks rescission, alteration, or amendment to the Avoided Cost Order.

Turning to the substance of the Joint Motion, Duke argues that the Joint Motion presents no compelling reason to revisit the Avoided Cost Order. Duke notes that work is underway to complete the IRP Joint Report, which is due to be filed on or before February 16, 2018. Further, Duke states that it will incorporate changes resulting from that report and any other improvements as directed by the Commission or as necessary after Commission review of that report. In addition, Duke states that it will revise its seasonal allocations as necessary after review and preparation of the next avoided cost filings. Finally, in response to SACE and NCSEA's concern about "valuing solar capacity," Duke states that it is working to develop a rate design that considers factors relevant to the characteristics of QF-supplied power that is intermittent and non-dispatchable, as directed by the Commission in Ordering Paragraph 16 of the Avoided Cost Order, and argues that changes to that requirement would be premature given that these filings are due within the next nine to twelve months.

The Commission is not persuaded that the Joint Motion provides new or changed circumstances as a basis for the Commission to amend, alter, or rescind its Avoided Cost Order. The Commission acknowledges, as SACE and NCSEA have observed, that both Duke's IRPs and the Commission's biennial avoided cost proceedings rely on resource adequacy studies and reserve margin studies (among other data and reports). This observation is not new evidence or changed circumstances, nor did the Commission misapprehend or disregard this fact in its Avoided Cost Order. For example, as noted in the Joint Motion, in the Avoided Cost Order the Commission's cited to the 2016 IRP Order in specifically reserving judgment on "arguments regarding winter peaking versus winter planning and whether the reserve margins referenced herein are appropriate for the Duke utilities' integrated resource planning." Rather than creating a linkage between the IRP proceeding and the avoided cost proceeding, as SACE and NCSEA argue, this citation strengthens the separation between the two proceedings. The purpose of an annual investigation into the electric utilities' IRPs is to meet the requirements of G.S. 62-110.1 and G.S. 62-2(a)(3a). 2016 IRP Order at 2-3. The purpose of the biennial avoided cost proceedings is to meet the requirements of Section 210 of PURPA, FERC's regulations implementing these provisions, and G.S. 62-156. Avoided Cost Order at 3-4.

Finally, the Commission acknowledges that the 2016 IRP Order and the Avoided Cost Order (and all the Commission's past orders issued in IRP proceedings and in avoided cost proceedings) reflect a shared characteristic: both represent a snapshot along a continuum. For example, in the 2016 IRP Order the Commission recognized "that the IRP process continues to evolve," 2016 IRP Order at 70-71, and stated that "the comments, findings, conclusions, and Commission directives included in this Order are intended to inform and guide the electric utilities and parties in their ongoing IRP processes and participation." Id. (emphasis added). Similarly, in the Avoided Cost Order, the Commission directed Duke to address various issues in the next biennial avoided cost proceeding as part of the Commission's effort to identify and respond to emerging issues or changing dynamics that might alter the Commission's determination of utilities' avoided costs or implementation of PURPA. These efforts are aimed at refining the Commission's regulation of the IRP process, on the one hand, and avoided cost rates and PURPA implementation, on the other, as distinct and separate regulatory tools.

The Commission carefully considered the arguments in the Joint Motion with an openness to the possibility that the Commission misunderstood or misapprehended facts, but, based upon the foregoing and the entire record herein, the Commission is not persuaded that any new or changed circumstances exist, nor that the Commission misapprehended or disregarded facts as argued in the Joint Motion. Therefore, SACE and NCSEA's request for reconsideration and modification of the Avoided Cost Order should be denied.

NCSEA's Motion

Through NCSEA's Motion and its reply in support thereof, NCSEA objects to Duke's attempt to amend the terms and conditions of the standard offer PPAs by adding an additional sentence to paragraph 1(e), which restricts the transfer or assignment of a contract based on the standard offer PPA, on the grounds that it is inconsistent with the Avoided Cost Order. While NCSEA does not cite Ordering Paragraph 13 of the Avoided Cost Order, it appears that its "objection" was made pursuant to that paragraph, based on NCSEA's initial view that the Commission did not approve Duke's proposed addition to paragraph 1(e). In its reply, NCSEA agrees with Duke that the Commission approved this proposed change pursuant to Ordering Paragraph No. 18 of the Avoided Cost Order.[2]

The Commission agrees with Duke and NCSEA that the incorporation of the additional sentence in paragraph 1(e) of DEC and DEP's standard offer PPAs was approved pursuant to Ordering Paragraph 18 of the Avoided Cost Order. An objection pursuant to Ordering Paragraph No. 13 of the Avoided Cost Order is an opportunity for the parties to alert the Commission that Duke's compliance filings are inconsistent with the conclusions reached in the Avoided Cost Order. Given that the inclusion of the additional sentence in paragraph 1(e) was consistent with the Avoided Cost Order,

[2] Ordering Paragraph 18 provides that the "purchase power agreements and terms and conditions, except as specifically addressed in this order, are approved and shall be implemented."

NCSEA's objection should be overruled and its arguments supporting the objection are abandoned.

Although NCSEA's "objection" was procedurally deficient inasmuch as it raises a substantive objection to the Commission's approval of the revision to paragraph 1(e) of the terms and conditions, the Commission will proceed to consider NCSEA's Motion as a motion pursuant to G.S. 62-80[3] for clarification and modification of the Avoided Cost Order as related to the additional sentence that the Commission approved for incorporation into paragraph 1(e) of Duke's standard offer PPAs. Paragraph 1(e) contains contract provisions that restrict the ability of the Seller under the contract to "transfer and assign" the PPA. The additional sentence proposed by Duke provides that the PPA shall not be assigned to "any person, firm, or corporation that is party to any other purchase agreement under which a party sells or seeks to sell power to the Company from another Qualifying Facility that is located within one-half mile."

NCSEA argues that the Commission "appears to have misapprehended, misunderstood, or disregarded the scope and implications" of Duke's proposal to add this sentence to paragraph 1(e). Specifically, NCSEA states that the approved addition to paragraph 1(e) would apply to both new and existing standard offer contracts through the Commission-approved update to the terms and conditions.[4] NCSEA argues that paragraph 1(b) of the terms and conditions "provides that any changes to the terms and conditions apply to standard offer PPAs previously signed by QFs under previous tariffs no matter when those PPAs were executed." This "critical fact," NCSEA states, "was not well understood by the Commission when it gave blanket approval to Duke's proposed terms and conditions." Further, NCSEA argues that the Commission's approval of this additional sentence "disregards the total lack of evidence or supporting legal or policy justification provided by Duke." Finally, NCSEA argues that there was "substantial evidence that the proposed change is grossly overbroad and will inhibit the sale of projects," and violates North Carolina law prohibiting contracts in restraint of trade.

Through its response, Duke argues that NCSEA has identified no change in circumstance nor any misapprehension or disregard of fact that compels the Commission to alter its Avoided Cost Order. Duke recites a history of this proceeding in arguing that NCSEA's objection is not new, but untimely, and that NCSEA should not be allowed to sit on its rights to counter this issue at the evidentiary proceeding and through its proposed

[3] In its reply, responding to Duke's argument that NCSEA's Motion is a motion made pursuant to G.S. 62-80, NCSEA agreed that NCSEA's Motion "meets the standard for a motion" pursuant to G.S. 62-80, "should the Commission decide to treat it as such."

[4] As used in NCSEA's Motion, the term "new" refers to contracts entered into between Duke and a QF that established or will establish a legally enforceable obligation after November 15, 2016, and "existing" refers to contracts entered into between Duke and a QF that established a legally enforceable obligation prior to November 15, 2016.

order, and then raise the issue in NCSEA's Motion.[5] In Duke's recitation of the history of this proceeding, Duke cites its initial comments, which included the proposed additional sentence in paragraph 1(e) in Duke's proposed terms and conditions, testimony of Duke witnesses Bowman and Freeman addressing this issue, and Duke's proposed order, which included a specific finding of fact and discussion and conclusions related to this additional sentence. Finally, Duke argues that the Commission's approval of these changes is consistent with its finding that the current economic and regulatory circumstances made it appropriate to establish avoided cost rates and to alter the contract terms for QFs in light of these changed circumstances.

The Commission rejects NCSEA's argument that it was inappropriate to approve Duke's proposed revision because there was no evidentiary support for this change. As Duke states, the proposed revision to paragraph 1(e) was included in the proposed terms and conditions filed with Duke's Joint Initial Statement filed on November 15, 2016, discussed in the Duke's Joint Initial Statement and in the testimony of Duke witnesses Bowman and Freeman under cross-examination, and supported in Duke's proposed order filed on June 22, 2017. This included evidence that, through collusive conduct, there is a potential that QFs could evade the restricted availability of the standard offer PPA. No other witnesses discussed Duke's proposed revision to paragraph 1(e) and no other party addressed this issue in its proposed order or brief. The Commission concludes there is competent, substantial, and material evidence in support of its proposed revision to paragraph 1(e), and that this evidence is uncontroverted. NCSEA's Motion brings no new or changed circumstances to the Commission's attention. Therefore, the Commission concludes that it would be inappropriate to reconsider its approval of Duke's proposed revision to paragraph 1(e) based upon a lack of evidence in the record.

The Commission also declines to interpret on this record the scope and implications of revised paragraph 1(e) as applied to a specific situation in the guise of whether the Commission should reconsider its approval of the revision to paragraph 1(e) based upon a misapprehension or disregard of facts. NCSEA's concern is that operation of paragraph 2 of the PPA and paragraph 1(b) of the terms and conditions incorporates the additional sentence in paragraph 1(e) into new and existing contracts, and that this application would result in the termination of existing contracts between Duke and QFs. The Commission concludes that NCSEA's argument based on the Commission's misapprehension or disregard of facts is, in substance, a request that the Commission enter a ruling on whether the application of revised paragraph 1(e) of the standard offer PPA in a specific situation (consolidated ownership of two QFs located within one half mile of each other that both sell electric power to Duke under valid contracts based on the standard offer PPA) violates PURPA, State law, or the contract rights of one or more QFs. NCSEA has not identified a QF who has been, or with some reasonable certainty

[5] As this issue was addressed in only Duke's proposed order, it appeared that the parties were satisfied with the answers from Duke witnesses Bowman and Freeman, and that this issue was no longer contested. Parties to a proceeding before the Commission have an obligation to timely alert the Commission to the contested issues and to support their positions with testimony, legal arguments, and/or policy justifications. Nonetheless, there is no statutory time limit on a motion made pursuant to G.S. 62-80, and the Commission does not reach the question of timeliness, or the lack thereof, in this order.

will be, injured by such an eventuality, and, NCSEA is not itself a QF owner, so far as the Commission is aware. The Commission declines NCSEA's invitation to issue an advisory opinion and reserves judgment on the question of interpretation of the terms and conditions of a contract based upon the standard offer PPA until such time that an aggrieved party brings an actual case or controversy before the Commission.

Therefore, based upon the foregoing and the entire record in this proceeding, NCSEA's request for reconsideration and modification of the Avoided Cost Order should be denied.

IT IS, THEREFORE, ORDERED as follows:

1. That the Joint Motion for Clarification and Modification filed by SACE and NCSEA on November 13, 2017 pursuant to G.S. 62-80, shall be, and is hereby, denied;

2. That the objection to Duke's compliance filing filed by NCSEA on November 28, 2017, shall be, and is hereby, overruled;

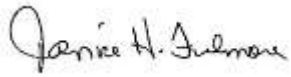
3. That the Motion for Clarification and Modification filed by NCSEA on November 28, 2017 pursuant to G.S. 62-80, shall be, and is hereby, denied; and

4. That, pursuant to Ordering Paragraphs 13 and 18 of the Avoided Cost Order, the standard contracts and terms and conditions filed by Duke on November 13, 2017, are approved and shall be implemented.

ISSUED BY ORDER OF THE COMMISSION.

This the 15th of February, 2018.

NORTH CAROLINA UTILITIES COMMISSION



Janice H. Fulmore, Deputy Clerk

Commissioners Daniel G. Clodfelter and Charlotte A. Mitchell did not participate in this decision.