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BEFORE THE NORTH CAROLINA UTILITIES COMMISSION
DOCKET NO. E-22, SUB 518

FILED
FEB 16 2015

Clerk's Office
N.C. Utilities Commission

In the Matter of:)	
Tarboro Solar LLC, Aulander Solar LLC,)	
Woodland Solar LLC, Winton Solar LLC,)	
Garysburg Solar LLC, Gaston Solar LLC,)	MOTION TO INTERVENE
Seaboard Solar LLC, Jamesville Solar LLC,)	IN A LIMITED
Weldon Solar LLC, and Community Energy)	CAPACITY
Solar, LLC)	
)	[WITH PROPOSED
Complainants)	COMMENTS
)	ATTACHED]
v.)	
)	
Virginia Electric and Power Company,)	
d/b/a Dominion North Carolina Power)	
)	
Respondent)	

NCSEA'S MOTION TO INTERVENE
IN A LIMITED CAPACITY

Pursuant to North Carolina Utilities Commission ("Commission") Rules R1-5, R1-7, and R1-19, the North Carolina Sustainable Energy Association ("NCSEA") hereby moves that it be permitted to intervene in the above-referenced docket in a limited capacity. In support of this motion, NCSEA states as follows:

STATEMENT OF CASE

1. On 31 October 2014, pursuant to Section 210(m) of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), Virginia Electric and Power Company¹ ("Dominion") filed an *Application to Terminate Purchase Obligation* ("Application") at the Federal Energy Regulatory Commission ("FERC"). *Application of Virginia Electric and Power Company to Terminate Purchase Obligation*, FERC Docket No. QM15-1-000 (Oct. 31, 2014). In the Application, Dominion requested a FERC

¹ Virginia Electric and Power Company does business in Virginia as Dominion Virginia Power and in North Carolina as Dominion North Carolina Power.

determination that Dominion is not required under 18 C.F.R. § 292.303(a) to enter into a new contract or obligation to purchase electric energy and capacity from nine North Carolina qualifying facilities (“QFs” or, singularly, “QF”) owned by Community Energy Solar, LLC (“Community Energy QFs”). Application at p. 1. Community Energy Solar, LLC, and the Community Energy QFs oppose FERC approval of the Application. *Community Energy Solar, LLC’s, Community Energy Renewables, LLC’s and Nine Affiliated Entities’ Answer to Virginia Electric and Power Company’s Application to Terminate Mandatory Purchase Obligation*, FERC Docket No. QM15-1-000 (Jan. 14, 2015). NCSEA similarly filed comments opposing FERC approval of the Application. *Comments of North Carolina Sustainable Energy Association in Opposition to the Application of Virginia Electric Power Company to Terminate Utility Mandatory Purchase Obligation for Small Qualifying Facilities*, FERC Docket No. QM15-1-000 (Jan. 16, 2015). FERC has not ruled on the Application.

2. On 30 December 2014, Community Energy Solar, LLC and the Community Energy QFs (collectively “Complainants”) initiated this related proceeding by filing a *Complaint and Request for Declaratory Ruling* (“Complaint”). In the Complaint, Complainants essentially asserted that (1) Dominion incurred a legally enforceable obligation (“LEO”) to purchase the energy and capacity from each of the Community Energy QFs at the fixed, long-term avoided costs rates approved in the Commission’s last biennial proceeding and (2) each LEO arose *prior* to Dominion’s filing of the Application at FERC. *See, e.g.*, Complaint at ¶ 18. Based on their assertions, Complainants sought (1) a Commission declaration that “each of the [Community

Energy] QFs has a LEO with regard to sale of electric power to [Dominion]” and (2) an order directing Dominion “to enter into a standard long-term Power Purchase Agreement in the form of the . . . standard offer PPA . . . with each of the [Community Energy] QFs . . .” Complaint at pp. 9-10.

3. On 23 January 2015, Dominion filed its *Response to Complaint and Request for Declaratory Judgment* (“Response”).
4. Having received the Complaint and Response, the Commission issued an order on 27 January 2015 requiring the filing of briefs by the parties and scheduling an oral argument. *Order Requiring Filing of Briefs and Scheduling Oral Argument*, Commission Docket No. E-22, Sub 518 (27 January 2015).
5. In response to the Commission’s 27 January 2015 order, Complainants and Dominion conferred and agreed, subject to Commission approval, to narrow the scope of the issues before the Commission. Pursuant to their agreement, Complainants and Dominion filed a joint motion on 4 February 2015 in which they proposed that the Commission address only the question of whether Complainants had established LEOs prior to Dominion’s filing of the Application at FERC on 31 October 2014. *Joint Motion to Stay Claim for Relief and to Modify Order Requiring Filing of Briefs and Scheduling Oral Argument*, Commission Docket No. E-22, Sub 518 (4 February 2015).
6. On 9 February 2015, the Commission issued an order approving the joint motion and directing the parties to address in their briefs and arguments whether each Complainant has established an LEO and, if so, what the date of the LEO is. *Order*

Refining Issues for Briefing and Oral Argument, Commission Docket No. E-22, Sub 518 (9 February 2015).

LEGAL/POLICY ISSUE

7. This proceeding presents an important legal/policy question that has significant implications for North Carolina's QFs and for the implementation of PURPA by this Commission, namely: Does an LEO arise when a QF commits to sell its output or when a particular department within the relevant utility actually receives notice of the QF's commitment to sell its output?

NCSEA'S INTEREST

8. NCSEA is a non-profit corporation formed under the laws of North Carolina, with individual, business, and government members located across the State. NCSEA promotes a sustainable future through the use of renewable energy and energy efficiency programs. NCSEA seeks to achieve its objectives by advocating for public policies that encourage the responsible technological and market development of renewable energy and energy efficiency, including all aspects of demand side management, a smart grid, energy storage, and vehicle electrification.
9. NCSEA has participated as an intervenor in the Commission's 2012 and 2014 biennial avoided cost proceedings – *see, generally*, Commission Docket Nos. E-100, Subs 136 & 140 – in which the Commission considered LEOs and eligibility for the utilities' standard offer PPAs.
10. Any Commission order addressing the legal/policy question set out above will have implications for NCSEA and its members, particularly its QF-developer business members. More particularly, any Commission determination in this proceeding could

have implications for NCSEA's and other parties' ongoing participation in Commission Docket No. E-100, Sub 140.²

11. NCSEA seeks to intervene for the limited purpose of filing comments designed to aid the Commission in its consideration of the legal/policy question set out above. NCSEA's proposed comments are attached as **Exhibit A**.
12. For the foregoing reasons, NCSEA's participation in this docket in a limited capacity will bring critical insight, knowledge, and understanding to the proceeding.

DISTINGUISHABLE COMMISSION PRECEDENT

13. On at least one other occasion, NCSEA has sought leave of the Commission to, in essence, intervene for the limited purpose of filing comments. Commission Docket No. E-2, Sub 966 was opened as an avoided cost arbitration proceeding involving EPCOR USA North Carolina, LLC ("EPCOR") and Progress Energy Carolinas, Inc. ("PEC"). On 13 May 2010, NCSEA filed a motion asking to be allowed to submit an *amicus curiae* brief in the proceeding. Both EPCOR and PEC opposed NCSEA's motion. In a 25 May 2010 order, the Commission denied NCSEA's motion on the basis that it was "an arbitration proceeding involving two parties and both of these

² The Commission's Phase 1 order contained the following language in Ordering Paragraph 17:

That [Dominion's] proposal for a simple form to be used to determine the date of the commitment of a QF, along with how it should be implemented shall be approved with the details and implementation to be considered in the next phase of this proceeding and the parties are directed to address it in their filings.

Order Setting Avoided Cost Input Parameters, p. 67, Commission Docket No. E-100, Sub 140 (31 December 2014).

parties object to NCSEA's motion." *Order Denying Motions*, p. 1, Commission Docket No. E-2, Sub 966 (25 May 2010).

14. NCSEA believes the 25 May 2010 Commission *Order Denying Motions* is distinguishable in at least two ways and therefore does not necessitate a denial of the instant motion.

- First, in 2010, while recognizing that "NCSEA appears to be aligned in interest," EPCOR nonetheless asserted that it was "able to adequately advocate its position and the involvement of others [wa]s neither necessary nor helpful." *Id.* In this proceeding, the undersigned has conferred with counsel for Complainants and Complainants do *not* oppose NCSEA's intervention for the limited purpose of filing comments on the legal/policy question set out above.
- Second, the 2010 proceeding was an avoided cost arbitration proceeding. This proceeding involves a request for a declaratory ruling. The Commission has permitted NCSEA and other parties to intervene in declaratory ruling proceedings. *See, e.g., Order Granting Petition to Intervene*, Commission Docket No. SP-100, Sub 26 (8 September 2010) (permitting NCSEA to intervene); *Order Granting Petition to Intervene*, Commission Docket No. SP-100, Sub 12 (19 February 1997); *Order Granting Petition to Intervene*, Commission Docket No. SP-100, Sub 10 (21 October 1996); *Order Granting Petition to Intervene*, Commission Docket No. SP-100, Sub 9 (12 July 1996).

SERVICE INFORMATION

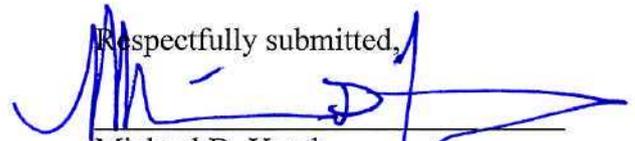
15. NCSEA's address is 4800 Six Forks Rd., Suite 300, Raleigh, NC 27609. All correspondence related to this proceeding should, however, be addressed to:

Michael D. Youth
Counsel for NCSEA
4800 Six Forks Rd., Suite 300
Raleigh, NC 27609
(919) 832-7601 Ext. 118
michael@energync.org

16. Pursuant to Commission Rule R1-39, NCSEA agrees to electronic service of all pleadings and other filings in this matter.

WHEREFORE, for the reasons set forth above, NCSEA prays that it be allowed to intervene in a limited capacity in this matter and that, in accordance with the order approving intervention in a limited capacity, the attached comments be accepted as having been filed on 16 February 2015. Alternatively, in the event NCSEA's motion is denied, NCSEA prays the Commission acknowledge receipt of the attached comments as a consumer statement of position.

Respectfully submitted,

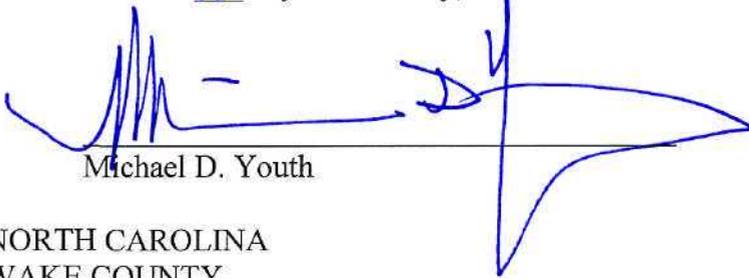


Michael D. Youth
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N.C. State Bar No. 29563
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VERIFICATION

Michael D. Youth, first being duly sworn, deposes and says that he is the attorney for NCSEA; that he has read the foregoing Motion to Intervene and that the same is true of his personal knowledge, except as to any matters and things therein stated on information and belief, and as to those, he believes them to be true; and that he is authorized to sign this verification on behalf of NCSEA.

This the 16th day of February, 2015.

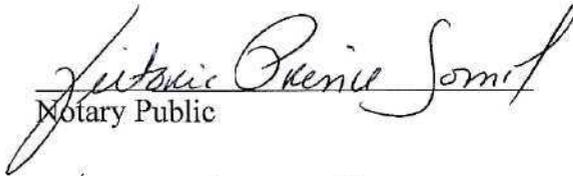

Michael D. Youth

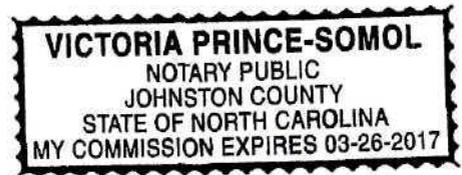
NORTH CAROLINA
WAKE COUNTY

Sworn to and subscribed before me,

this the 16 day of February, 2015.

[AFFIX SEAL OF NOTARY]


Notary Public



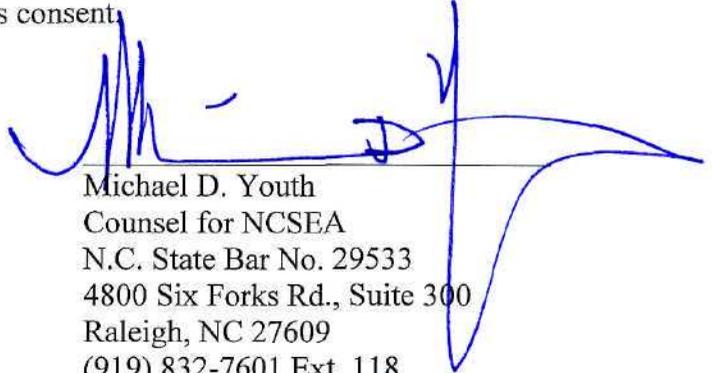
Victoria Prince Somol
Printed Name of Notary Public

My Commission Expires: 3-26-2017

CERTIFICATE OF SERVICE

I hereby certify that all persons on the docket service list have been served true and accurate copies of the foregoing Motion to Intervene, together with any exhibits attached thereto, by hand delivery, first class mail deposited in the U.S. mail, postage pre-paid, or by email transmission with the party's consent.

This the 16th day of February, 2015.



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EXHIBIT A

**BEFORE THE NORTH CAROLINA UTILITIES COMMISSION
DOCKET NO. E-22, SUB 518**

In the Matter of:)	
Tarboro Solar LLC, Aulander Solar LLC,)	
Woodland Solar LLC, Winton Solar LLC,)	
Garysburg Solar LLC, Gaston Solar LLC,)	
Seaboard Solar LLC, Jamesville Solar LLC,)	
Weldon Solar LLC, and Community Energy)	COMMENTS
Solar, LLC)	
)	
Complainants)	
)	
v.)	
)	
Virginia Electric and Power Company,)	
d/b/a Dominion North Carolina Power)	
)	
Respondent)	

NCSEA'S COMMENTS

This proceeding presents an important legal/policy question that has significant implications for North Carolina's qualifying facilities ("QFs" or, singular, "QF") under the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3, ("PURPA") and for the implementation of PURPA by the North Carolina Utilities Commission ("Commission"), namely: Does a legally enforceable obligation ("LEO") arise when a QF commits to sell its output to the relevant utility or when a particular department within the relevant utility actually receives notice of the QF's commitment to sell its output?

The North Carolina Sustainable Energy Association ("NCSEA") submits these comments in an effort to assist the Commission as it considers the legal/policy question.

STATEMENT OF CASE

NCSEA incorporates by reference the Statement of Case set forth in its Motion to Intervene in a Limited Capacity. *Motion to Intervene in a Limited Capacity*, ¶¶ 1-6, Commission Docket No. E-22, Sub 518 (16 February 2015).

STATEMENT OF FACTS

A. THE COMMISSION'S MOST RECENT LEO RULINGS

In February 2014 (and, again, in December 2014), the Commission articulated its position on establishment of an LEO:

[I]n the [E-100,] Sub 136 proceeding[, the Commission] concluded that each QF that (a) has obtained a [certificate of public convenience and necessity ("CPCN")] . . . no later than November 1 of the year in which a biennial proceeding has been initiated, or the actual filing date of proposed rates if later, and (b) has indicated to the relevant North Carolina utility that it is seeking to commit itself to sell its output should be entitled to the fixed, long-term avoided costs rates approved in the immediately preceding biennial proceeding.

Order Setting Avoided Cost Input Parameters, p. 64, Commission Docket No. E-100, Sub 140 (31 December 2014) (referring to *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities*, p. 37, Commission Docket No. E-100, Sub 136 (21 February 2014)).

B. DOMINION'S POSITION ON LEOS LEADING UP TO 28 OCTOBER 2014

During a July 2014 evidentiary hearing, Dominion witness Roger Williams testified that Dominion "believes the phrase 'commit to sell' needs to be more clearly defined." *Transcript of Testimony Heard 7-9-14, Raleigh Vol. 5 pp. 197-447*, pp. 351-352, Commission Docket No. E-100, Sub 140 (30 July 2014). Dominion witness Roger Williams went on to recommend how to bring clarity to the "commit to sell" question:

The best means to achieve this would be a simple document that states clearly the date both parties agree constitutes the LEO, prior to providing applicable rates to the QF. . . . The form that [Dominion] is proposing for this purpose is attached to my testimony as Appendix B.

Transcript of Testimony Heard 7-9-14, Raleigh Vol. 5 pp. 197-447, p. 352, Commission Docket No. E-100, Sub 140 (30 July 2014). For the Commission's convenience, Dominion's proposed "Offer and Request" form is attached hereto as **Exhibit A**. Of particular relevance here, paragraph 5.c. of Dominion's proposed Offer and Request form provides:

If on the date of an Offer and Request Seller has a CPCN from or has filed a Report of Proposed Construction with NCUC for the Facility, *the LEO Date will be the date of the Offer and Request.*

Exhibit A at ¶ 5.c. (emphasis added). Furthermore, in connection with the proposed form, Witness Williams engaged in the following clarifying exchange during cross examination:

- Q: I know that Dominion has made a proposal on the form that the developer would complete and provide to the Utility with respect to LEO date. Is it Dominion's proposal that Dominion would have some say or right to negotiate when that LEO date occurs?
- A: Absolutely not. All we're seeking is to have some sort of clarity between the developer and the Utility as to what the LEO date is. And the [form] is a means to do that, but you know, we're open to other ideas.

Transcript of Testimony Heard 7-10-14, Raleigh Vol. 6, p. 125, Commission Docket No. E-100, Sub 140 (30 July 2014).

As recently as 9 September 2014 – less than two months before 28 October 2014 – Dominion re-affirmed the position expressed through witness Williams' testimony, including the company's support for its proposed Offer and Request form, in Dominion's proposed order filed in the 2014 biennial avoided cost proceeding. *See Proposed Order of*

Dominion North Carolina Power, pp. 124-125, Commission Docket No. E-100, Sub 140 (9 September 2014).

C. COMPLAINANTS' ACTIONS ON 28 OCTOBER 2014

On 28 October 2014, Complainants – having already secured their CPCNs – executed, in substance if not exact form, the Offer and Request Dominion said it wanted QFs to submit. There was no delay between Complainants' articulation of a commitment to sell and the mailing of the articulation. In fact, in Dominion's Response, Dominion concedes that each of the Complainants in this proceeding (1) articulated in a form letter that the Complainant "hereby commits itself to selling its output from the QF to [Dominion,]" (2) clearly dated the form letter "October 28, 2014[,]" and then (3) promptly mailed the letter on the same day. *See* Response at ¶ 18 and Exhibit 1 to the Response (consisting of one of multiple substantively identical commitment letters sent by Complainants to Dominion).

In other words – it is worth reiterating – Dominion concedes that Complainants, in substance, followed the very procedure that Dominion proposed mere months earlier, a proposed procedure that gives rise to an LEO as of the date of the QF's Offer and Request.

D. DOMINION'S NEW POSITION ON LEOs AFTER 28 OCTOBER 2014

Despite Dominion's proposed Offer and Request form and Dominion's representation to this Commission that the issuance by a QF of an Offer and Request would create an LEO, and without notifying the Commission or the QF community that its position had changed, Dominion now seeks to disavow the very process that it proposed would bring the utility clarity with respect to creation of an LEO.

Dominion's Response *in this proceeding* indicates Dominion now believes the phrase "commit to sell" should be construed by the Commission such that, where a QF's CPCN has already been secured, an LEO arises only after a QF has committed itself to sell its output *and* a particular department within the relevant utility has actually received the commitment in writing. *See, e.g.*, Response at ¶¶ 10, 19.¹ In short, Dominion seeks to append an "actual receipt" requirement to the test already articulated by the Commission and to further require that such receipt be by a specific department within the company. Dominion's "actual receipt" position in this proceeding is remarkable in that it is a marked departure from the position it took in the 2014 biennial avoided cost proceeding less than six months ago.

ARGUMENT

GIVEN THE UNDISPUTED FACTS, THE COMMISSION SHOULD DECLARE COMPLAINANTS' LEOS AROSE NO LATER THAN 28 OCTOBER 2014.

A. THE COMMISSION IS EMPOWERED TO ESTABLISH WHEN AN LEO ARISES.

The Public Utility Regulatory Policies Act of 1978 ("PURPA"), together with Federal Energy Regulatory Commission ("FERC") regulations promulgated thereunder, makes clear that a utility can "incur" an LEO to purchase energy and capacity from a QF. Specifically, 18 C.F.R. § 292.304(d), entitled "Purchases 'as available' or pursuant to a legally enforceable obligation," provides as follows:

¹ Dominion specifically "denies that . . . the Solar QF Letters placed in the mail to Mr. Tomzak on October 28, 2014 established an LEO for the Solar QFs on October 28, 2014." Response at ¶ 19e.

Each qualifying facility shall have the option either:

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

(2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:

(i) The avoided costs calculated at the time of delivery; or

(ii) The avoided costs calculated at the time the obligation is incurred.

(Emphasis added). It is important to note that, while the FERC regulation establishes the operative importance of the time at which the LEO arises or “is incurred,” the FERC regulation does not provide guidance as to when an LEO actually arises.

It has generally fallen to commissions like this one to establish when an LEO arises. As the Public Staff has explained, “it has been the FERC’s long-standing practice to leave to state commissions the issue of when and how an LEO is created” *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities*, p. 33, Commission Docket No. E-100, Sub 136 (21 February 2014).² Of course, as the Public Staff went on to assert, “this does not mean that a state commission is free to ignore the requirements of PURPA or the FERC’s regulations” in establishing when an LEO arises under State law. *Id.*

In interpreting PURPA and the FERC’s regulations, the Commission has determined that an LEO arises under State law when a QF has a CPCN *and* commits itself to sell its output to a utility (which concomitantly commits the utility to purchase

² On this point, there appears to be consensus among the parties to this proceeding. *See* Response at ¶ 13 (“In Order No. 688-A, FERC held that under PURPA, it is the state regulatory authorities that determine whether and when a legally enforceable obligation is created.”)

the output from the QF). *See Order Setting Avoided Cost Input Parameters*, p. 64, Commission Docket No. E-100, Sub 140 (31 December 2014); *see also Order Establishing Standard Rates and Contract Terms for Qualifying Facilities*, p. 37, Commission Docket No. E-100, Sub 136 (21 February 2014).

B. A DECLARATION THAT COMPLAINANTS' LEOs AROSE NO LATER THAN 28 OCTOBER 2014 WOULD NOT (1) THWART DOMINION'S EFFORTS TO COMBAT "CHERRY-PICKING" OF RATES BY QFs, BUT WOULD (2) ADVANCE REGULATORY CONTINUITY AND CERTAINTY, AND (3) PRESERVE THE RIGHTS OF PARTIES TO COMMISSION DOCKET NO. E-100, SUB 140 TO ADDRESS THE DETAILS AND PROSPECTIVE IMPLEMENTATION OF DOMINION'S OFFER AND REQUEST FORM IN THAT PROCEEDING IN ACCORDANCE WITH THE COMMISSION'S 31 DECEMBER 2014 ORDER.

1. An Order Declaring Complainants' LEOs Arose No Later Than 28 October 2014 Would Not Thwart Dominion's Efforts to Combat "Cherry-Picking" of Rates by QFs.

Dominion has indicated that the lack of a clearly defined "commit to sell" test can give rise to the possibility that QFs will seek to game the system. Dominion proposed the *Offer and Request* form in an effort to combat an "evil:" the perceived ability of a QF to "cherry pick[]" rates between biennial periods." *Transcript of Testimony Heard 7-9-14, Raleigh Vol. 5 pp. 197-447*, p. 349, Commission Docket No. E-100, Sub 140 (30 July 2014) (Roger Williams testimony). Specifically, as to its proposed form, Dominion witness Roger Williams testified as follows in the 2014 biennial avoided cost proceeding:

[I]t is reasonable to require a level of commitment to the then-current rates if a QF wants to remain eligible for them. Requiring a QF to establish an LEO, and to promptly execute a PPA, would preclude eligibility for subsequent biennial rates, removing any ability for "cherry picking" rates between biennial periods.

Id.

The Complainants' actions on 28 October 2014 hewed closely, in substance if not exact form, to the procedure Dominion itself proposed for clearly establishing an LEO. Perhaps more importantly, Complainants' actions on 28 October 2014 evidence a clear level of commitment to the "then-current rates." As such, Complainants' undisputed actions on that day served to preclude their eligibility for subsequent biennial rates and thus dispelled the possibility of gamesmanship/"cherry-picking" that Dominion seeks to combat.

In sum, a Commission declaration on the equities that Complainants' LEOs arose no later than 28 October 2014 would not thwart Dominion's efforts to combat "cherry-picking;" to the contrary, such a declaration would actually incentivize all QFs to clearly articulate and promptly transmit a commitment to sell to the relevant utility.

2. *An Order Declaring Complainants' LEOs Arose No Later Than 28 October 2014 Would Advance Regulatory Continuity and Certainty.*

This Commission has recognized the need for regulatory continuity and certainty in the avoided cost context. In December 2014, the Commission stated,

[i]n balancing the costs, benefits and risks to all parties and customers, the Commission recognizes that regulatory continuity and certainty play a role in the development and implementation of sound utility regulatory policy.

Order Setting Avoided Cost Input Parameters, p. 21, Commission Docket No. E-100, Sub 140 (31 December 2014). It should not be news to the Commission that just as utilities and their shareholders value regulatory continuity and certainty, so too do QFs and their investors, especially when it comes to avoided cost rates.³

³ With regard to QFs, FERC made the following observation almost three decades ago in its notice of proposed rulemaking for Order No. 69:

From a QF's perspective, as of 28 October 2014, the clearest, most current guidance on committing to sell in Dominion territory would have been gleaned from (a) Dominion's own proposed Offer and Request procedure and (b) the Commission's *Order on Arbitration* in Commission Docket No. E-2, Sub 966. Neither of these pieces of guidance would have put a QF on notice that its commitment to sell would not establish an LEO until it had been actually received by Dominion; to the contrary, both of these pieces of guidance would have led a QF to believe its LEO would be established at the time it committed to sell.

- a. The Offer and Request form Dominion proposed in the 2014 biennial avoided cost proceeding provides in relevant part:

If on the date of an Offer and Request Seller has a CPCN from or has filed a Report of Proposed Construction with NCUC for the Facility, *the LEO Date will be the date of the Offer and Request.*

Exhibit A at ¶ 5.c. (emphasis added). As of 28 October 2014, this form would have served to lead QFs, like Complainants, to believe that an LEO is established as of the date a QF puts its commitment to sell in writing and not

[I]n order to be able to evaluate the financial feasibility of a cogeneration or small power production facility, an investor needs to be able to estimate with reasonable certainty, the expected return on a potential investment before construction of a facility. This return will be determined in part by the price at which the qualifying facility can sell its electric output.

Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, Order No. 69, FERC Stats. & Regs. ¶ 30,128, ¶ 31,171 (1980), *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part and vacated in part*, *Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part*, *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983).

on the date on which the writing, if promptly mailed or otherwise delivered, is actually received by Dominion.

- b. Beyond Dominion's Offer and Request, the Commission's most substantive treatment of the "commit to sell" prong of the LEO "test" likewise would have suggested to a QF, on 28 October 2014, that an LEO is established as of the date a QF puts its commitment to sell in writing and not on the date on which the writing, if promptly mailed or otherwise delivered, is actually received by Dominion. In a 2011 *Order on Arbitration*, the Commission explained how, in July 2008, a QF's "board [of directors] made a new level of commitment by releasing funds to modify the [QF] facilities." *Order on Arbitration*, p. 9, Commission Docket No. E-2, Sub 966 (26 January 2011). Given the board action (of which the relevant utility was presumably unaware at the time), the Commission concluded that "the acts of [the QF's] board in July 2008 in the context of the status of the [QF-utility] negotiations at that time establish an appropriate commitment by [QF] so as to give rise to an LEO" *Id.* This Commission order articulates no actual receipt requirement of the sort that Dominion now advocates for.

The advancement of regulatory continuity and certainty necessitates that the Commission consider, in a case like this, what a reasonable QF and a reasonable utility would have had reason to believe was the state of the law as of 28 October 2014. Here, based on Dominion's own proposed procedure – with which Complainants complied in spirit – and the Commission's 2011 ruling in Docket No. E-2, Sub 966, Complainants and Dominion had every reason to believe an LEO is established as of the date a QF puts

its commitment to sell in writing and not on the date on which the writing, if promptly mailed or otherwise delivered, is actually received by the relevant utility. For this reason, a Commission declaration on the equities that Complainants' LEOs arose no later than 28 October 2014 will advance regulatory continuity and certainty, resulting in sound utility regulatory policy.

3. An Order Declaring Complainants' LEOs Arose No Later Than 28 October 2014 Would Preserve the Rights of Parties to Commission Docket No. E-100, Sub 140 to Address the Details and Prospective Implementation of Dominion's Offer and Request Form in that Proceeding in Accordance with the Commission's 31 December 2014 Order.

On 31 December 2014, the Commission issued an order in the 2014 biennial avoided cost proceeding that contained the following language in Ordering Paragraph 17:

That [Dominion's] proposal for a simple form to be used to determine the date of the commitment of a QF, along with how it should be implemented shall be approved with the details and implementation to be considered in the next phase of this proceeding and the parties are directed to address it in their filings.

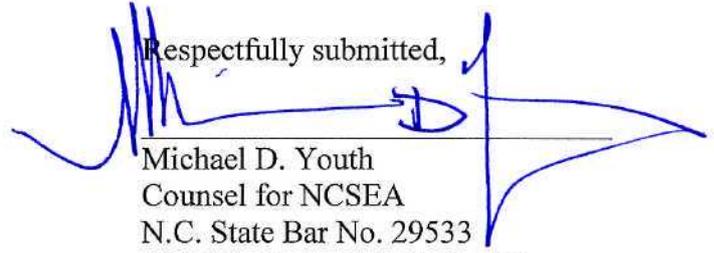
Order Setting Avoided Cost Input Parameters, p. 67, Commission Docket No. E-100, Sub 140 (31 December 2014). While the Commission suggested that it will approve Dominion's use of the Offer and Request form, the Commission indicated that the details and implementation will be considered by it in the coming months in Phase 2 of the 2014 biennial avoided cost proceeding. The Commission's ruling in this proceeding should not preempt or otherwise curtail the rights of the parties to Commission Docket No. E-100, Sub 140 to fully address the details and prospective implementation of Dominion's form. NCSEA believes any ruling in this proceeding that requires "actual receipt by a particular department" within the relevant utility or "actual receipt" by the relevant utility would likely preempt or otherwise curtail the rights of the parties to Commission Docket No. E-

100, Sub 140 to present argument against such a legal/policy ruling and, thus, to fully address the details and prospective implementation of Dominion's Offer and Request form in accordance with the Commission's 31 December 2014 order. For this additional reason, the Commission should issue a declaratory ruling that Complainants' LEOs arose no later than 28 October 2014.

CONCLUSION

Given the undisputed facts, the Commission should declare Complainants' LEOs arose no later than 28 October 2014 for the reasons set out herein.

Respectfully submitted,

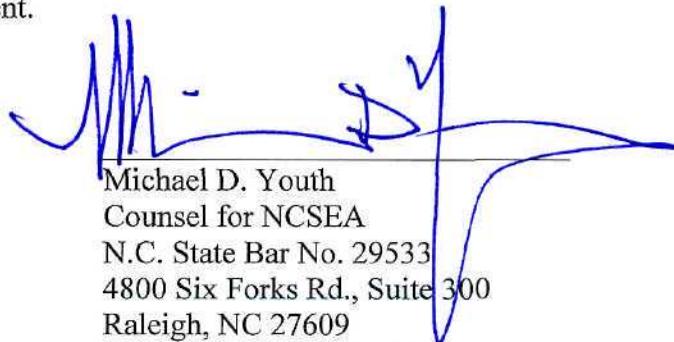


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CERTIFICATE OF SERVICE

I hereby certify that all persons on the docket service list have been served true and accurate copies of the foregoing Comments, together with any exhibits attached thereto, by hand delivery, first class mail deposited in the U.S. mail, postage pre-paid, or by email transmission with the party's consent.

This the 16th day of February, 2015.



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EXHIBIT A

OFFER TO SELL TO AND REQUEST FOR POWER PURCHASE AGREEMENT WITH DOMINION NORTH CAROLINA POWER BY A QUALIFYING FACILITY

OFFICIAL COPY
Apr 25 2014

1. [] ("Seller") hereby requests that Virginia Electric and Power Company d/b/a Dominion North Carolina Power (the "Company") enter into a power purchase agreement ("PPA") and purchase the electricity supplied to Company's system by Seller's "Qualifying Cogeneration/Small Power Production Facility" located at _____, North Carolina (the "Facility").

2. The name, address, and contact information for Seller is:

Telephone:
Facsimile:
Email:

3. By execution and submittal of this offer to sell and request for a PPA ("Offer and Request"), Seller certifies as follows:

- a. Seller desires to and hereby offers to sell the output of its Facility to the Company.
- b. Seller is a qualifying facility ("QF") of the type and size described in the self-certification of QF status filed with the Federal Energy Regulatory Commission attached as Exhibit I hereto.
- c. (Select the applicable certification below)
 - i. ___ Seller has received a certificate of public convenience and necessity ("CPCN") for the construction of the Facility from the North Carolina Utilities Commission ("NCUC") pursuant to North Carolina General Statute § 62-110.1 and NCUC Rule 8-64, which CPCN was approved on _____ in Docket No. _____, and is attached as Exhibit 2, hereto;
 - ii. ___ Seller is exempt from the CPCN requirements pursuant to North Carolina General Statute § 62-110.1(g) and has filed a report of proposed construction with the NCUC pursuant to NCUC Rule 8-65 ("Report of Proposed Construction"). A copy of that Report Of Proposed Construction is attached as Exhibit 3, hereto;
 - iii. ___ Seller has applied for a CPCN for the construction of its Facility

and will provide the Company with a copy of its CPCN upon issuance by the NCUC; or

- iv. ___ Seller is exempt from the CPCN requirements pursuant to North Carolina General Statute § 62-110.1(g) and will file a Report of Proposed Construction with the NCUC pursuant to NCUC Rule 8-65 and will provide the Company with a copy of the same upon filing.
4. Seller desires to enter into a PPA with the Company pursuant to: (Select one):
- a. ___ Schedule 19-LMP (available only to QFs with a net capacity of 100 kW or less)
 - b. ___ Schedule 19-FP (available only to QFs with a net capacity of 100 kW or less)
 - c. ___ Negotiated terms and conditions (for QFs with a net capacity in excess of 100 kW)
5. By execution and submittal of this Offer and Request Seller acknowledges that:
- a. Company cannot enter into a PPA with a QF that has not received a CPCN from the NCUC or filed a Report of Proposed Construction with the NCUC, as applicable.
 - b. The legally enforceable obligation date (“LEO Date”) for an Offer and Request will be determined in accordance with subsections (c) or (d) below. If Seller is seeking a Schedule 19 PPA, the LEO Date will be used to determine Seller’s eligibility for a PPA under the currently effective Schedule 19. If the Seller’s Facility is too large to qualify for Schedule 19, the Company will develop avoided cost rates for the PPA using data available as of the LEO Date.
 - c. If on the date of an Offer and Request Seller has a CPCN from or has filed a Report of Proposed Construction with NCUC for the Facility, the LEO Date will be the date of the Offer and Request.
 - d. If on the date of the Offer and Request Seller does not have CPCN for the Facility or has not filed a Report of Proposed Construction with NCUC for the Facility, the LEO Date will be the date on which the NCUC issues a CPCN for the Facility or the filing date of the Report of Proposed Construction for the Facility, as applicable.
 - e. If, prior to execution of a PPA, Seller desires to withdraw its Offer and Request, Seller shall provide written notice of such withdrawal to the Company. If Seller thereafter desires to sell the output of its Facility to the Company, Seller must submit a new Offer and Request for the

Facility. A new LEO Date will be established in connection with each new Offer and Request, which will be the later of: (i) the date of the new Offer and Request or (ii) the date on which the NCUC issues a CPCN for the Facility or the filing date of the Report of Proposed Construction for the Facility, as applicable.

6. Except as provided in Section 7, this Offer and Request shall automatically terminate and be of no further force and effect in the following circumstances:
 - a. Upon withdrawal of the Offer and Request by Seller pursuant to Section 5(e), above;
 - b. Upon execution of a PPA between Seller and Company;
 - c. For a Seller eligible for Schedule 19, if such Seller does not execute a PPA prior to the date set by the NCUC for the filing of updated Schedule 19 rates and contracts; and
 - d. For a Seller that is not eligible for Schedule 19, if such Seller does not execute a PPA within six months after the Company's submittal of the PPA to the QF; provided, however, if the PPA proposed by the Company is the subject of an arbitration proceeding before the NCUC, such six month deadline may be extended as directed by the NCUC.

7. The acknowledgements of Seller pursuant to Section 5, above, shall survive termination of this Offer and Request.

[NAME OF QF OWNER]

[Name]

[Title]

Date