

**BEFORE THE NORTH CAROLINA UTILITIES COMMISSION  
DOCKET NO. E-100, SUB 148**

<b>In the Matter of:</b>	)	
<b>Biennial Determination of Avoided</b>	)	<b>NORTH CAROLINA SUSTAINABLE</b>
<b>Cost Rates for Electric Utility</b>	)	<b>ENERGY ASSOCIATION'S</b>
<b>Purchases from Qualifying Facilities</b>	)	<b>OBJECTION TO DUKE</b>
<b>– 2016</b>	)	<b>COMPLIANCE FILING AND</b>
	)	<b>MOTION FOR CLARIFICATION</b>

NOW COMES the North Carolina Sustainable Energy Association (“NCSEA”), pursuant to Commission Rule R1-7 and the Commission’s October 11, 2017 *Order Establishing Standard Rates And Contract Terms For Qualifying Facilities* (“Avoided Cost Order”) in the above-referenced proceeding, and: (1) objects to the proposed Terms and Conditions for the Purchase of Electric Power (“Terms and Conditions”) submitted by Duke Energy Carolinas (“DEC”) and Duke Energy Progress (“DEP”) (collectively, “the Companies”) in Attachments E and F of their November 13, 2017 Compliance Filing (“Compliance Filing”), on the ground that certain revisions proposed by Duke are inconsistent with the Avoided Cost Order; and (2) respectfully moves the Commission to clarify and modify the holding related to Ordering Paragraph No. 12 in the Avoided Cost Order.

Specifically, NCSEA objects to DEC/DEP’s attempt to amend their Terms and Conditions to prohibit the transfer or assignment of a standard-offer power purchase agreement (“PPA”) by a seller to any entity that owns another Qualifying Facility (“QF”) located within a half-mile that sells or seeks to sell power to DEC/DEP.<sup>1</sup> The proposed

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<sup>1</sup> As an initial matter, it should be noted that the intent of DEC/DEP’s language is not entirely clear. It is highly unusual in the QF world for a PPA to be transferred or assigned from one entity to another. It is common, however, for the membership

revision is not authorized by the Avoided Cost Order, is unsupported by any evidence, and is inconsistent with North Carolina law barring contracts in restraint of trade.

### BACKGROUND

1. In their *Joint Initial Statement and Proposed Standard Avoided Cost Rate Tariffs* filed in this Docket on November 15, 2016 (“Joint Initial Statement”), the Companies proposed to amend Paragraph 1(e) of their standard Terms and Conditions to provide that standard-offer PPAs “shall not be transferred and assigned by a Seller QF to any person, firm, or corporation that is party to any other PPA under which it sells or seeks to sell power to the Companies as a QF, if that party is located within one-half mile of the original Seller QF.” Joint Initial Statement at 30-31. The Companies’ current standard offer rate schedules are not available to a QF “owned by a Seller or affiliate or partner of a Seller, who sells power to the Company from another Qualifying Facility of the same energy resource located within one-half mile, as measured from the electrical generating equipment, unless the combined capacity is equal to or less than five (5) megawatts.”<sup>2</sup> As noted by the Commission, the purpose of the so-called “half-mile rule” is to prevent QF developers from circumventing the eligibility limits for

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interests in the corporate entity that owns and operates the QF to be transferred from one upstream owner to another. Based on Ms. Bowman’s testimony, NCSEA understands that the intent of the Companies’ proposed language is to prevent such transfers where the transferee is the owner of another QF within one-half mile of the QF that is the subject of the transfer. *Direct Testimony of Kendal C. Bowman* at 55:9-11 (“These amendments are intended to prevent evasion of this geographic restriction through subsequent consolidation of *ownership* to QFs after their PPAs under the standard offer have been executed.”) (emph. added); *Hearing Tr. (Vol. 4)* (Apr. 19, 2017) at 11:7-16.

<sup>2</sup> As required by H.B. 589, the Commission has approved changing the five megawatt capacity threshold to one megawatt.

standard offer rates and contracts “by breaking up larger facilities into multiple, closely-located five MW or less facilities.” *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities*, Docket No. E-100, Sub 140 (Dec. 17, 2015) at 42. The Companies’ Joint Initial Filing stated that the proposed amendments were “intended to prevent evasion of this geographic restriction through subsequent consolidation of ownership of QFs after their PPAs under the standard offer have been executed.” *Id.*

2. In their *Proposed Order Establishing Standard Rates and Contract Terms for Qualifying Facilities* (June 22, 2017) (“Proposed Order”), the Companies requested that the Commission approve the proposed change. Proposed Order at 16, 163-164.
3. In the Avoided Cost Order, the Commission did *not* approve the Companies’ proposed changes and did not include any finding as to their reasonableness.
4. With respect to changes in the Companies’ Terms and Conditions, the Commission directed DEC/DEP to make a compliance filing including revised purchase power agreements and terms and conditions, “that comply with the contract terms and conditions *approved in this order* for the standard offer contract for purchase of power from QFs.” October 11 Order at 109-110 (Ordering Paragraph 12(c)) (emph. added). The Commission did *not* authorize the Companies to make changes to the standard Terms and Conditions in addition to those specifically approved in the Avoided Cost Order.
5. Even though the Avoided Cost Order did not approve any change to the geographic limitation in the standard Terms and Conditions, the Companies’ Compliance

Filing seeks to add the following language to Section 1(e) of the standard Terms and Conditions:

A Purchase Power Agreement shall not be transferred and assigned by Seller 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, as measured from the electrical generating equipment.

**OBJECTION TO THE COMPANIES'  
PROPOSED TERMS AND CONDITIONS**

6. As noted, the requested change to the Companies' standard Terms and Conditions was not approved by the Commission and therefore should be deleted.

**REQUEST FOR CLARIFICATION AND MODIFICATION**

7. To the extent that the Commission's silence on the requested change may have created ambiguity about the Commission's intent, NCSEA requests that the Commission clarify and modify the holding in the Avoided Cost Order related to Finding of Fact No. 14 (which currently discusses changes to the standard offer contract related to NERC BAL Standard violations) and Ordering Paragraph No. 12(c). Specifically, NCSEA requests that the Commission modify Finding of Fact No. 14 to add the following clarifying language:

DEC/DEP's request to modify the standard Terms and Conditions for the Purchase of Electric Power from QFs to prohibit the transfer or assignment of a standard-offer power PPA by a seller to any entity that owns another QF located within a half-mile that sells or seeks to sell power to DEC/DEP (as applicable) is unwarranted and unreasonable.

8. NCSEA requests that the Evidence and Conclusion for this Finding of Fact be modified to include the following language.

The Commission finds that this proposed change to DEC/DEP's respective Schedule PP terms and conditions is unnecessary and unreasonable. As acknowledged by Witness Freeman, the proposed change would impose additional restrictions on the sale or assignment of QFs in North Carolina. The concern underlying the existing "half-mile rule" is "to ensure that larger QF developers could not avoid negotiating with the utility by breaking up larger facilities into multiple, closely-located five MW or less facilities." *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities*, Docket No. E-100, Sub 140 (Dec. 17, 2015) at 42. DEC/DEP have introduced no evidence that the current rule does not adequately address this concern. Although DEC/DEP raise concerns that QFs might seek to evade the limits by post-development acquisition of projects, Witness Freeman acknowledged that there is no evidence to substantiate these concerns. Even if there were such evidence, the DEC/DEP's proposed restrictions are unreasonably broad and would block the assignment or transfer of QF PPAs even where there is no evidence of gaming, or (as in the case of projects developed at different times, or projects whose aggregate capacities are less than the standard-offer capacity limit) no possibility of it. Such a restriction would be manifestly unreasonable and also violate North Carolina's general prohibition on contracts in restraint of trade. See N.C. Gen. Stat. Ch. 75.

9. The requested change is neither reasonable nor appropriate, for several reasons. First, unlike the application of the one-half mile rule to initial standard offer PPA eligibility, which prevents a developer from artificially subdividing projects to avoid the eligibility threshold, applying the rule to post-PPA transfers serves no public policy purpose. If two standard offer projects have been legitimately developed by separate, unrelated parties, there is no reason for the Commission or the state to concern itself with the long-term ownership of the facilities.
10. The one exception to that statement would be if two developers colluded to develop and obtain standard offer PPAs for separate eligible projects with the intent of then consolidating those projects under common ownership. There is no evidence

whatsoever in the record to suggest such collusive activity is occurring in the Companies' service territories.

11. In the only Direct Testimony provided by the Companies in support of the requested change, Duke's witness Ms. Bowman simply parroted the request made in DEC/DEP's Joint Initial Statement, without providing any explanation as to why such a change is necessary or appropriate. *Direct Testimony of Kendal C. Bowman* at 54:21-55:11. And Ms. Bowman and DEC/DEP witness Gary Freeman conceded on cross-examination that there is no evidence that QFs are attempting to circumvent the "half-mile" rule via post-development consolidation:

Mr. Culley: [I]n the context of the conversation we've been having about subsequent consolidation of those projects, do you have any evidence that developers are evading the geographic restrictions by gaming it in that way?

Mr. Freeman: No. I don't have any evidence that that I'm aware of at this point.

*Hearing Tr. (Vol. 4)* (Apr. 19, 2017) at 14:15-21; *see also id.* at 15:8-11 ("Q: But as – as you say, there's no evidence that developers have deliberately tried to evade this restriction by subsequent consolidation? A: No. I'm not aware of any evidence.").

12. Even if there were some evidence of occasional collusive activity, which there is not, it would be unreasonable to address that concern by prohibiting all acquisitions of standard offer projects (or PPAs) by a party that happens to own another nearby project. Such an overbroad restriction would unreasonably restrict the ability of companies to purchase and sell QF's in North Carolina.
13. Mr. Freeman acknowledged on cross-examination that the proposed Terms and Conditions would be more restrictive than the status quo. *Hearing Tr. (Vol. 4)* at

17:11-14. Ms. Bowman testified that as intended by the Companies, a violation of the proposed restriction would authorize termination of a PPA by DEC/DEP. *Id.* at 13:18-14:2, 16:17-21. And the restriction on sale of assignment would apply even in the absence of any evidence that the QFs in question are trying to circumvent the “half-mile” rule by collusive development or sale of projects. *Id.* at 16:1-11.

14. Ms. Bowman also confirmed that the Companies intended the proposed restriction to bar a company from ever purchasing a QF within a half-mile of an existing QF owned by the same company, even if the projects were developed by entirely separate companies, years apart. *Id.* 18:8-11. Moreover, the Companies’ proposed revision would prevent a company that owns a QF from buying another standard-offer QF located within a half-mile of the first project, *even if the combined size of the projects did not exceed the standard offer threshold*. Indeed, the proposed language could be interpreted to apply the restriction even where one of the QF projects at issue is not even a standard offer project.
15. This is not just a concern for new QFs. Section 1(b) of the companies’ terms and conditions states that “All Purchase Agreements in effect at the effective date of this tariff or that may be entered into in the future, are made expressly subject to these Terms and Conditions[.]” (emph. added). Conceivably, every existing standard-offer QF in North Carolina with a DEC/DEP PPA could be impacted by this change.
16. The proposed changes would unreasonably and unnecessarily restrict the purchase and sale of QF projects in North Carolina. This restriction, as embodied in the

standard contract terms that would apply to all new and existing standard-offer QFs, violates North Carolina's general prohibition on contracts in restraint of trade. See G.S. §§ 75-1 *et seq.* (declaring contracts in restraint of trade in the state of North Carolina illegal); *Rose v. Vulcan Materials Co.*, 194 S.E.2d 521, 282 N.C. 643 (1973).

WHEREFORE, movants respectfully request the Commission issue an order:

- (1) Directing the Companies to make a compliance filing including revised Terms and Conditions that omits the revision discussed herein; and
- (2) Clarifying and modifying its October 11, 2017 Avoided Cost Order to include a Finding of Fact that the Companies' proposed revision to their Terms and Conditions for the Purchase of Electric Power from Qualifying Facilities to restrict of transfer or assignment of QFs based on proximity is unwarranted and unreasonable.

Respectfully submitted, this the 28<sup>th</sup> day of November, 2017.

/s/ Peter H. Ledford  
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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 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 28th day of November, 2017.

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