BEFORE THE NORTH CAROLINA UTILITIES COMMISSION
DOCKET NO. E-100, SUB 137

In the Matter of:	)	
2012 Biennial Integrated Resource Plans	)	**MOTION FOR DISCLOSURE**
and Related 2012 REPS Compliance	)	
Plans	)	

NCSEA'S MOTION FOR DISCLOSURE

Pursuant to North Carolina Utilities Commission ("Commission") Rules R1-5(c) and R1-7, the North Carolina Sustainable Energy Association ("NCSEA") hereby moves the Commission to:

(A) require disclosure of redacted information in Progress Energy Carolinas, Inc's ("PEC") publicly-filed 2012 REPS Compliance Plan[1] – particularly

(i) the information redacted from Tables 3 through 6 on pages D-4 through D-6 of PEC's publicly filed 2012 REPS Compliance Plan; and

(ii) the information redacted from Exhibit A (with the exception of the name of the contracting party) on pages D-9 through D-12 of PEC's publicly filed 2012 REPS Compliance Plan;

(B) require disclosure of the redacted information in Duke Energy Carolinas, LLC's ("DEC") publicly filed 2008 REPS Compliance Plan filed in Commission Docket No. E-100, Sub 118; and

[1] While NCSEA is privy, via executed confidentiality agreements, to some of the confidential information targeted in this motion, NCSEA brings this motion because it believes public availability of the targeted information is important to insuring that the ongoing public discourse about the REPS law is undergirded by fact rather than speculation.

(C) order PEC, DEC, and Dominion North Carolina Power ("DNCP") to review on an annual basis, as part of their IRP proceeding preparations, their publicly filed REPS compliance plans from four years earlier (*e.g.*, the 2009 REPS compliance plans would be reviewed in 2013, the 2010 plans in 2014, etc.) and unseal any redacted information or provide specific explanation as to why a particular piece of information should not be unsealed.

In support of this motion, NCSEA states as follows:

GENERALLY APPLICABLE LEGAL PRINCIPALS

1. In proceedings such as the instant one, the Commission exercises functions judicial in nature and has all of the powers and jurisdiction of a court of general jurisdiction pursuant to N.C. Gen. Stat. § 62-60.

2. With this power and jurisdiction comes responsibility. As the North Carolina Supreme Court explained in Virmani v. Presbyterian Health Services Corp.:

> The public's right of access to court records is provided by N.C.G.S. § 7A-109(a), which specifically grants the public the right to inspect court records in criminal and civil proceedings. N.C.G.S. § 7A-109(a) (1995). . . . [Nevertheless,] a trial court may, in the proper circumstances, shield portions of court proceedings and records from the public; the power to do so is a necessary power rightfully pertaining to the judiciary as a separate branch of the government, and the General Assembly has "no power" to diminish it in any manner. N.C. Const. art. IV, § 1; see State v. Britt, 285 N.C. 256, 271-72, 204 S.E.2d 817, 828 (1974); Miller v. Greenwood, 218 N.C. 146, 150, 10 S.E.2d 708, 711 (1940). *This necessary and inherent power of the judiciary should only be exercised, however, when its use is required in the interest of the proper and fair administration of justice or where, for reasons of public policy, the openness ordinarily required of our government will be more harmful than beneficial.*

350 N.C. 449, 463, 515 S.E.2d 675, 685 (1999) (emphasis added).

3. The Commission has recognized its responsibility: "[A] court's power to shield documents or evidence from the public is an extraordinary power that should be used only when necessary to avoid unfairness or a miscarriage of justice." *Final Order on Public Records Act Request*, p. 10, Commission Docket Nos. E-2, Sub 998 & E-7, Sub 986 (14 August 2012).

4. Nevertheless, "[a]s a general rule, the Commission does not examine documents filed under seal to determine whether they do, in fact, contain confidential information . . . . Rather, it is for the parties to challenge such confidentiality claims, either at the time the documents are filed under seal or at an evidentiary hearing." *Order on Public Records Act Request*, p. 2, Commission Docket No. E-7, Sub 1017 (19 October 2012).

5. With regard to challenges to information filed under seal, "the Commission [has] note[d] that NCSEA and other parties can by appropriate motion in any Commission proceeding identify and request public disclosure of specific information that they believe was inappropriately filed under seal or should no longer be maintained under seal." *Order Approving 2011 Annual Updates to 2010 Biennial Integrated Resource Plans and 2011 REPS Compliance Plans*, p. 21, Commission Docket No. E-100, Sub 128 (30 May 2012).

6. Where challenges have been brought, the burden has generally been placed on the party seeking to keep information confidential to, if possible, "identify the actual or potential commercial value of the information to the party objecting to public

release together with any other pertinent consideration."[2] *Order Concerning Motion for Disclosure*, p.3, Commission Docket Nos. P-55, Sub 1013, P-7, Sub 825, P-10, Sub 479, P-19, Sub 277, and P-100, Sub 133 (4 December 2002); *see Order on Public Records Act Requests*, p. 8, Commission Docket No. E-7, Sub 1017 (19 October 2012) (upon consideration of a public records request for disclosure of documents filed under seal, the Commission indicated that the DEC and PEC bore the "burden" and either "carried their burden of showing that portions of the information . . . do meet the definition of a trade secret" or did not carry their burden); *Final Order on Public Records Act Request,* p. 12, Commission Docket Nos. E-2, Sub 998, E-&, Sub 986 (14 August 2012) (same).

7. The Commission has admonished both PEC and DEC to be more careful in their redaction of information from their public filings: "In the Applicants' future filings in this and all dockets, the Commission expects the Applicants to be more forthright in their assertions as to what documents in fact contain confidential information." *Order on Public Records Act Requests*, p. 8, Commission Docket No. E-7, Sub 1017 (19 October 2012).

TABLES 3 – 6 AND EXHIBIT A IN PEC'S 2012 REPS COMPLIANCE PLAN

8. Beyond the general admonition cited in ¶ 7, the Commission has "conclude[d] that the IOUs should continue to review and appropriately reduce the confidential portions of their future REPS filings." *Order Approving 2011 Annual Updates to*

[2] In the face of a challenge, the *post hoc* placement of the burden on the party claiming a right to secrecy is entirely appropriate given that, under the Commission's general course of practice, a party filing a document under seal is not required to make any up-front showing. *See* ¶ 4 *supra*.

2010 Biennial Integrated Resource Plans and 2011 REPS Compliance Plans, pp. 20, 24, Commission Docket No. E-100, Sub 128 (30 May 2012).

9. The basis for the Commission's particular interest in transparency in REPS filings appears to be rooted in the Commission's "recogni[tion of] the value of making more . . . information public so as to improve customer confidence in the expenditures that are being made, as well as to potentially prompt further innovations and reductions in the cost of REPS compliance." *Order Approving REPS and REPS EMF Riders and 2010 REPS Compliance*, p. 12, Commission Docket No. E-7, Sub 984 (23 August 2011); *see Order Seeking Responses to CompSouth/NCCTA Motion*, p. 2, Commission Docket No. P-100, Sub 167 (22 September 2011) ("There is a strong public interest that this information should be made available to the public. Put simply, the public is entitled to know what they are paying for. The Commission has ample authority to remove the confidential designation of [sealed] materials . . . and has acted to do so in the past [in *Order Granting Motion to Disclose Attachment*, p.2, Commission Docket No. E-100, Sub 56 (25 August 2003)], saying it generally 'believes that documents filed with the Commission for use in connection with Commission proceedings should be available to the public unless specific grounds for maintaining confidentiality apply.").

10. Tables 3 through 6[3] on pages D-4 through D-6 of PEC's 2012 REPS Compliance Plan have been redacted of information of the ilk routinely disclosed by PEC in its

[3] Tables 3 through 6 cover only the years 2012 through 2014. The filing technically complies with Commission Rule R8-67(b)(1) which directs that REPS compliance plans "shall cover the calendar year in which the plan is filed and the immediately subsequent

past publicly filed REPS Compliance Plans. Comparing these tables to, for example, Exhibits 7 & 8 of PEC's 2008 and 2010 REPS Compliance Plans – found, respectively, on pages D-12 and D-13 of PEC's 2008 IRP and on the last two un-numbered pages of Appendix D to PEC's 2010 IRP – makes this evident.

11. Similarly, Exhibit A on pages D-9 through D-12 of PEC's 2012 REPS Compliance Plan contains the redaction of information of the ilk disclosed by PEC in a past REPS Compliance Plan. Exhibit A appears to contain a list of executed contracts and, presumably, related information such as expected annual RECs. In Exhibit 1 to PEC's 2008 REPS Compliance Plan – found on page D-6 of PEC's 2008 IRP – PEC publicly disclosed all of this information except for the name of the party with which it had contracted.

12. As the Commission has noted, one of the "factors for determining whether information is a trade secret" is "the extent of measures taken to guard the secrecy of the information; . . . [and] the value of the information to the business and its competitors." *Order on Public Records Act Requests*, p. 8, Commission Docket No. E-7, Sub 1017 (19 October 2012). The fact that PEC has in the past disclosed without harm the type of information it now seeks to shield from public view should lead the Commission to conclude that the 2012 REPS Compliance Plan information is not commercially sensitive, will not result in any commercial disadvantage to PEC or advantage to its competitors, and must be unsealed.

---

two calendar years." In the past, however, PEC routinely provided data covering a 15-year outlook. *See* Exhibits 7 & 8 to PEC's 2008 and 2010 REPS Compliance Plans. This 15-year projection reflected (and, if perpetuated, will continue to reflect) an admirable level of transparency.

13. At a minimum, the prior disclosure by PEC of information of this ilk should give rise to a presumption that the information does not constitute "terms [that] would impair the IOUs' ability to negotiate and transact business on favorable terms." *Order Approving Annual Updates to 2011 Annual Updates to 2010 Biennial Integrated Resource Plans and 2011 REPS Compliance Plans*, pp. 20-21, Commission Docket No. E-100, Sub 128 (30 May 2012).

DEC'S 2008 REPS COMPLIANCE PLAN AND ONGOING REVIEW BY THE IOUS OF THEIR PAST CONFIDENTIAL REPS COMPLIANCE PLAN FILINGS

14. The Commission has indicated on at least one occasion that information filed under seal can, with the passage of time, go stale and lose its sensitive status, in which case it is in the public interest for it to be unsealed. Specifically, in response to a motion for disclosure of cost estimates that had been filed under seal, the Commission held that "Duke's current cost estimates for the Lee Nuclear Station are, at this time, entitled to protection as confidential information pursuant to G.S. 132-1.2(1). . . . However, the Commission believes that it is in the public interest for such estimates to be disclosed at the earliest possible time that disclosure will no longer prejudice Duke's negotiations." *Order Approving Decision to Incur Project Development Costs*, p.6, Commission Docket No. E-7, Sub 819 (11 June 2008).

15. In connection with future REPS filings by the IOUs, the Commission has "recognized the value of making more of t[he REPS compliance] information public so as to improve consumer confidence in the expenditures that are being made[,]" leading it to conclude that "the IOUs should continue to review and

appropriately reduce the confidential portions of their future REPS filings." *Id.* at p. 21.

16. An identical rationale should be applied to the IOUs' past REPS filings. These, too, should be systematically reviewed and the confidential portions therein appropriately reduced.

17. The REC market in North Carolina can change and has changed rapidly. For example, DEC's 2012 IRP and 2012 REPS Compliance Plan indicate that solar will begin to play a significant role in not only DEC's set-aside compliance but also its general requirement compliance due to "increased industry scale, standardization, and technological innovation." *See, e.g., Duke Energy Carolinas, LLC's Integrated Resource Plan*, p. 61, Commission Docket No. E-100, Sub 137 (4 September 2012). This was almost unthinkable just one year ago.

18. Given that the fundamentals of the market and the IOUs' overall compliance strategies can change so quickly, it follows that "trade secrets" will go stale more quickly and the need to keep market information – except, perhaps, for the names of parties to individual contracts – from previous years' plans under seal is diminished.

19. In order to ensure a systematic review of past REPS filings, NCSEA recommends that PEC, DEC, and Dominion North Carolina Power ("DNCP") be ordered to review, on an annual basis as part of their IRP proceeding preparations, their respective publicly filed REPS compliance plans from four years earlier (*e.g.*, the 2009 REPS compliance plans would be reviewed in 2013, the 2010 plans in 2014,

etc.) and unseal any redacted information or provide specific explanation as to why a particular piece of information should not be unsealed.

20. As for the IOUs' 2008 REPS compliance plans, NCSEA has reviewed each of the IOUs' plans and has found that DNCP's plan, embedded in its 2008 IRP, does not appear to have any redactions, while PEC's plan, embedded in its 2008 IRP, appears to redact only the names of parties to executed contracts. *See* Exhibit 1 on page D-6 of PEC's 2008 IRP. DEC's 2008 plan, however, contains multiple redactions, all of which appear to cover information/estimates related to 2008 through 2011 which might have been commercially sensitive in 2008 but are no longer sensitive in 2012. The redacted information in DEC's 2008 REPS Compliance Plan should, therefore, be unsealed.

CONCLUSION

The REPS law has been an incredibly successful clean energy policy tool. Nonetheless, it seems perennially to come under scrutiny by various interests including select legislators. NCSEA anticipates that this trend will continue in 2013. The IOUs' REPS filings contain an incredible amount of information that can inform the public discourse regarding the REPS law and clean energy development. When this information is filed under seal, it cannot inform the public discourse. By unsealing the information targeted by this motion and instituting an annual review requirement, the Commission can ensure that the public interest in a robust, well-informed public discourse about the REPS law is systematically advanced without harming the IOUs' competitive positions.

WHEREFORE, for the reasons set forth above, NCSEA prays that its motion for disclosure be granted in all respects or, alternatively, in such manner as best advances the proper and fair administration of justice.

Respectfully submitted,

Michael D. Youth
Counsel for NCSEA
N.C. State Bar No. 29533
P.O. Box 6465
Raleigh, NC 27628
(919) 832-7601 Ext. 118
michael@energync.org

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 for Disclosure 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 5th day of February, 2013.

Michael D. Youth
Counsel for NCSEA
N.C. State Bar No. 29533
P.O. Box 6465
Raleigh, NC 27628
(919) 832-7601 Ext. 118
michael@energync.org