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

In the Matter of: Biennial Determination of Avoided Cost Rates for Electric Utility Purchases from Qualifying Facilities – 2016	)	**North Carolina Sustainable Energy Association's Reply in Support of Objection to Duke Compliance Filing and Motion for Clarification**

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 files this Reply in support of its Objection to Duke's Compliance Filing and Motion for Clarification, filed with this Commission on November 28, 2017 ("Objection and Motion"). The Objection and Motion argued that the so-called "half-mile rule," which is intended to prevent qualifying facility developers from artificially dividing their projects so as to avoid the size limitation on projects eligible for the Commission's standard offer, should not be extended to prevent a developer from acquiring a qualifying facility constructed by another developer that happens to be located near a facility owned by the acquiring developer.[1]

DEC and DEP's Joint Response in Opposition ("Joint Response"): (i) does little more than rehash evidence and arguments made in the Companies' Initial Filings (which

[1] Duke argues that the extension of the rule doesn't technically prohibit the buying and selling of an affected qualifying facility. But by abrogating the affected facility's existing power purchase agreement and eligibility for the applicable standard offer tariff, the extension would absolutely and unequivocally have that effect.

were acknowledged in the Objection and Motion); (ii) fails to address arguments and evidence cited by NCSEA showing that the proposed changes are overbroad, unsupported by evidence, and unrelated to the alleged "concerns" cited by Duke in support of the changes; and (iii) fails to articulate a coherent policy justification for Duke's requested extension of the half-mile rule. NCSEA further submits that the Objection and Motion meets the standard for a motion to rescind, alter, or amend the Avoided Cost Order under G.S. § 62-80, should the Commission decide to treat it as such.

In further support of its Objection and Motion, NCSEA states as follows:

1. NCSEA acknowledges that, as pointed out in Duke's Joint Response, Ordering Paragraph 18 of the Avoided Cost Order provides "That the proposed schedules, supporting calculations, and purchase power agreements and terms and conditions, except as specifically addressed in this order, are approved and shall be implemented." However, the Commission did not discuss specifically the proposed condition at issue here, and did not make any finding of fact that Duke's proposed changes to the terms and conditions (either the specific one at issue here or the proposed changes more generally) were reasonable.[2]

[2] Unlike the Avoided Cost Order in this docket, the Orders cited by Duke in which the Commission provided blanket approval for a number of suggested changes also included findings of fact regarding the reasonableness of the proposed changes, either specifically or in the aggregate. See *Order Approving Rate Increase and Cost Deferrals and Revising PJM Regulatory Conditions*, Docket No. E-22, Sub 532 at 9-18 (Dec. 22, 2016) (finding various elements of stipulation among parties, including proposed changes to standard terms and conditions, to be reasonable); *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities* Docket No. E-100, Sub 136 at 11 (Feb. 21, 2014) (finding of fact no. 26).

2. In light of the Ordering language cited above, Duke requests that NCSEA's Objection and Motion be treated as a motion to rescind, alter, or amend the Avoided Cost Order under G.S. §62-80, insofar as that Order approves Duke's proposed terms and conditions. NCSEA submits that the standards for such a motion are clearly met here.

3. A 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). The Commission cannot arbitrarily or capriciously rescind, alter or amend a prior order. There must be some change in circumstances or a misapprehension or disregard of a fact that provides a basis for such action. *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); *see also* Docket No. E-100 Sub 101, *Order Granting Reconsideration and Amending Generator Interconnection Standard* (Dec. 16, 2008) (granting Duke motion for reconsideration where possibility existed that Commission had "misunderstood" significance of key facts).

4. Among other things, the Commission appears to have misapprehended, misunderstood, or disregarded the scope and implications of Duke's proposed changes to the standard offer terms and conditions – specifically, that the revised terms would impact not only new (Sub 148) QFs but also existing standard offer projects. Duke's arguments and testimony do not discuss the possible application

of the changed terms to existing QFs, but rather give the impression that the change would impact only new projects. *See* Joint Response at 7 (discussion operation of half-mile rule solely with respect to 1 MW standard offer limit), 9 ("the Companies' tariffs … are intended to provide public notice of the terms and conditions governing the relationship between DEC or DEP and the QF"). Nor did the testimony of Duke witnesses adduced by Cypress Creek at the avoided cost hearing discuss the change in relation to existing pre-Sub 148 projects.

5. However, as discussed in the Objection and Motion, Section 1(b) of the Standard Offer 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. Objection and Motion ¶ 15.[3] The Joint Response does not discuss this critical fact,[4] which was not addressed in any testimony, was not discussed in the Avoided Cost Order, and was presumably also not well understood by the Commission when it gave blanket approval to Duke's proposed terms and conditions.

[3] In fact, the proposed change could not only bar the transfer of existing standard-offer QFs; it could also result in an operating QF suddenly being deemed to have violated its standard offer PPA, if it was sold in the past to a developer who also owns, and independently developed, another QF —*even one with a non-standard offer PPA*— within a half-mile of the acquired facility. This after-the-fact abrogation of contract rights presents multiple legal problems and would be certain to result in protracted litigation before the Commission and in the courts.

[4] The Commission could mitigate the negative impact of the proposed change by clarifying that this restriction would apply only to Sub 148 (or later) PPAs – although NCSEA maintains that there is no evidence to support application of Duke's proposed terms and conditions even on a prospective-only basis.

6. The Commission should also reconsider its approval of Duke's proposed terms and conditions because that approval (if it was intended by the Commission) disregards the total lack of evidence or supporting legal or policy justification provided by Duke in support of the proposed changes.

7. As noted above and in the Objection and Motion, the purpose of the half-mile rule is to prevent QF developers from artificially dividing their projects to avoid the size limitation on projects eligible for the Commission's standard offer. What purpose, however, is served by preventing a developer who owns one qualifying facility from acquiring another one nearby, where the second facility was independently (and non-collusively) developed by another party? As NCSEA acknowledged in it Objection and Motion, the only possible justification for such an otherwise abhorrent restraint on trade would be if it were necessary to prevent developers from colluding to circumvent the half-mile rule by plotting in the following fashion: Developer A obtains a PPA for a QF within a half-mile of a facility owned by Developer B, but with the intent all along to later convey the facility to Developer B, who would have been barred by the half-mile rule from developing the facility itself.

8. NCSEA's Objection and Motion discusses in detail the acknowledged lack of evidence supporting Duke's alleged concerns about this sort of "gaming" of the standard offer threshold via the sale of QF projects.

9. The only evidence referenced in the Joint Response that was not discussed in the Objection and Motion is the fact that six companies account for approximately 65%

of the standard offer projects in Duke's interconnection queues. But there is no logical connection between this modest market concentration and alleged concerns over gaming. Indeed, to the extent Duke's real goal is to shape economic policy concerning the concentration of ownership of qualifying facilities, that is a matter it should take up with Congress or the General Assembly.

10. It also bears repeating that Duke's own witnesses testified that they had seen no evidence of "gaming" the eligibility threshold via post-development sale of projects. Objection and Motion ¶ 11. Indeed, there is not a scintilla of evidence in the record that a single event of "gaming" of this sort has ever occurred. NCSEA does not believe that the Commission intended to impose a harsh restriction on the buying and selling of QFs in the absence of any evidence that such a restriction is needed to serve a legitimate public policy objective.

11. Nor does the Joint Response discuss the substantial evidence that the proposed change is grossly overbroad and will inhibit the sale of projects, even where it is clear that no gaming could have occurred (Objection and Motion ¶¶ 13-14), *or* the fact that the proposed restriction appears to violate North Carolina's general prohibition on contracts in restraint of trade (*id.* ¶ 16). The Commission appears to have disregarded these facts in approving the proposed terms and conditions, and its decision should therefore be reconsidered.

12. Finally, Duke claims that its proposed change "in no way impedes the sale or transfer of a QF between parties," because a QF whose standard offer PPA is terminated for violation of the proposed condition would still be free to sell its

power under a negotiated PPA. Joint Response at 8-9. This is clearly false. The devastating economic impact to a project of losing its PPA and having to negotiate a new contract with lower rates and a shorter term (given that Duke now refuses to enter into negotiated contracts longer than five years) quite obviously impedes the sale of such a project.

13. In sum, the Commission – to the extent it intended to approve Duke's proposed change to the standard terms and conditions – misapprehended critical facts about the applicability of the proposed change; disregarded the fact that Duke introduced no evidence to support its proposal; and disregarded the fact that the proposed change was overbroad, would not address the supposed "concerns" Duke used to justify its proposal, and violates North Carolina law barring contracts in restraint of trade.

WHEREFORE, movant respectfully requests that the Commission clarify, alter, or amend the Avoided Cost Order, as stated in NCSEA's Objection and Motion.

Respectfully submitted, this the 12th day of January, 2018.

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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 12th day of January, 2018.

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