

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION
DOCKET NO. E-7, SUB 1052

FILED

JUL 07 2014

Clerk's Office
N.C. Utilities Commission

In the Matter of:

Application of Duke Energy)
Carolinas, LLC for Approval of)
Renewable Energy and Energy)
Efficiency Portfolio Standard)
(REPS) Compliance Report and Cost)
Recovery Rider Pursuant to N.C.)
Gen. Stat. 62-133.8 and Commission)
Rule R8-67)

[PUBLIC]
POST-HEARING BRIEF

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NCSEA'S POST-HEARING BRIEF

The North Carolina Sustainable Energy Association ("NCSEA") submits this post-hearing brief in accordance with the 16 June 2014 *Notice of Mailing of Transcript and Due Date for Proposed Orders/Post Hearing Briefs* issued by the North Carolina Utilities Commission ("Commission") in this docket.

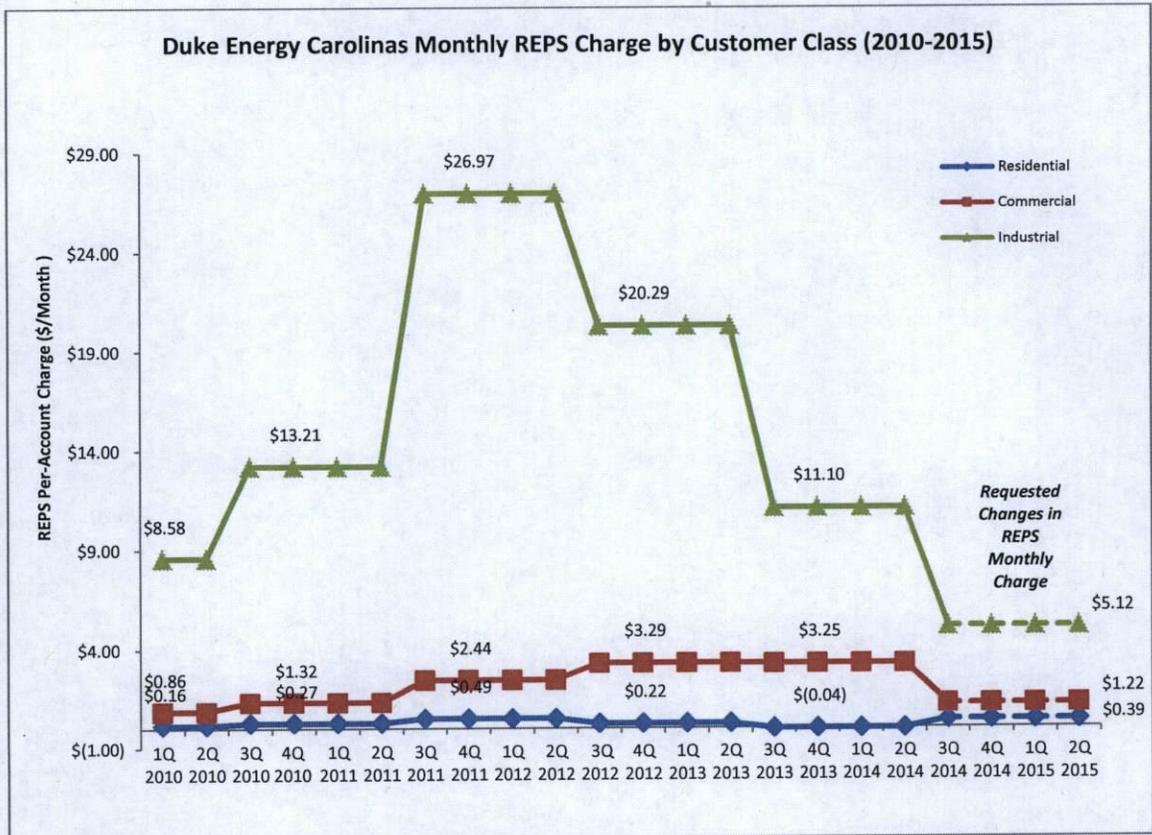
NCSEA does not challenge herein as unreasonable or imprudently incurred any costs Duke Energy Carolinas, LLC ("DEC") seeks to recover. NCSEA does, however, seek (1) to provide a temporal context for DEC's proposed Renewable Energy and Energy Efficiency Portfolio Standard ("REPS") charges and (2) a Commission order directing DEC to cease using the term "REC" in its REC purchase and sale contracts to describe something that is different from a statutorily-defined REC.

DEC'S PROPOSED RIDER CHARGES IN CONTEXT

In this proceeding, DEC requests approval of a per-account monthly REPS charge of \$0.39 per month charge for the residential class, a \$0.35 increment from the current rider; a \$1.22 per month charge for the general/commercial class, a \$2.03 decrement from the current rider; and a \$5.12 per month charge for the industrial class, a \$5.98 decrement

from the current rider. The graph below depicts the per-account monthly charges that have been approved in recent years and the per-account monthly charges being proposed in this proceeding.

Figure 1¹



¹ Order Approving REPS Riders, p. 2, Commission Docket No. E-7, Sub 872 (15 December 2009); Order Approving REPS and REPS EMF Riders, p. 14, Commission Docket No. E-7, Sub 936 (13 August 2010); Duke Energy's Renewable Energy Portfolio Rider REPS NC, p. 1 of 1, Commission Docket No. E-7, Sub 984 (26 August 2011); Duke's Renewable Energy Portfolio Standard Rider (NC), p. 1 of 1, Commission Docket No. E-7, Sub 1008 (27 August 2012); Duke's Revised REPS Cost Recovery Riders, p. 1 of 1, Commission Docket No. E-7, Sub 1034 (29 August 2013); Duke's Supplemental Testimony and Exhibits of Byrd and Williams - Redacted Version, Revised Williams Exhibit No. 4, p. 1 of 1, Commission Docket No. E-7, Sub 1052 (20 May 2014).

When these per-account *monthly* charges are multiplied by twelve, they yield the following per-account *annual* charges: \$4.68 for residential customers, \$14.64 for general/commercial customers and \$61.44 for industrial customers. These proposed per-account annual charges are all well below the statutory caps of \$12.00 for residential customers, \$150.00 for general/commercial customers, and \$1,000.00 for industrial customers that are set out in N.C. Gen. Stat. § 62-133.8(h)(4).

NCSEA does not challenge herein as unreasonable or imprudently incurred any costs DEC seeks to recover in its REPS rider application.

A TALE OF TWO RECS

Beyond DEC's cost recovery request, this proceeding might appear – at first blush – to present a legal question for clarification: *What exactly is a “renewable energy certificate” or “REC?”* This is not, however, the legal question that requires a clarifying answer. In fact, “REC” is very clearly defined for legal purposes . . . in two different ways in two different places. REC is clearly defined in N.C. Gen. Stat. § 62-133.8(a)(6); REC is also clearly, but more encompassingly, defined in DEC's standard REC transaction agreement. The real question facing the Commission is: *How should the Commission proceed in the face of these two clear, but different, definitions?*

The Two Definitions of “REC”

N.C. Gen. Stat. § 62-133.8(a)(6) defines “renewable energy certificate,” for purposes of the REPS, as follows:

a tradable instrument that is equal to one megawatt hour of electricity or equivalent energy supplied by a renewable energy facility, new renewable energy facility, or reduced by implementation of an energy efficiency measure that is used to track and verify compliance with the requirements of this section as determined by the Commission. A “renewable energy certificate” does not include the related emission reductions, including, but not limited to, reductions of sulfur dioxide, oxides of nitrogen, mercury, or carbon dioxide.

At the same time, DEC’s current standard REC transaction agreement includes the following broader contractual definition of REC:

[BEGIN CONFIDENTIAL] 

[END CONFIDENTIAL]

Public Staff Byrd Cross-Examination Exhibit 4 at p. 14 (a confidential version of DEC’s standard REC transaction agreement being used in 2014).

The current DEC standard agreement goes on to define “Environmental Attributes” as follows:

[BEGIN CONFIDENTIAL] 

[REDACTED]

[END CONFIDENTIAL]

Id. at p. 14.

There are at least two key indicators that the statutory definition of REC and the DEC standard contract definition of REC are different, with the contractually-defined REC encompassing more attributes than the statutorily-defined REC. First and foremost, the statutory definition of REC explicitly *excludes* “related emission reductions, including, but not limited to . . . carbon dioxide[;]” the DEC contractual definition of REC, on the other hand, explicitly *includes* [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]² [END CONFIDENTIAL]

² At hearing, there was testimony tending to indicate that some of DEC’s pre-2014 REC purchase and sale agreements included “REC” and “Renewable Energy Attributes” definitions that *excluded* related emission reductions in some situations and *included* related emission reductions in other situations. Tr. at pp. 108-110 (confidential testimony of DEC Witness Byrd in response to Commissioner Brown-Bland’s questions tending to indicate that, for certain resource types, certain attributes remained with the seller). Thus, for example, under these earlier agreements, RECs did not include [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL] See Public Staff Byrd Cross-Examination Exhibit 1 at pp. 6-7 (2012 contractual definition of “REC” and “Renewable Energy Attributes”); Public Staff Byrd Cross-Examination Exhibit 3 at pp. 6-7 (2011 contractual definition of “REC” and “Renewable Energy Attributes”). It should be noted that even these earlier hybrid contractual definitions of REC were broader than the statutory definition of REC as they

Despite the clear differences between a statutorily-defined REC and a DEC contractually-defined REC, Duke Energy appears to be arguing generally, including in this docket, that RECs inherently represent more than the legislature has explicitly and clearly said they represent. For example, in recently pre-filed testimony in Commission Docket No. E-100, Sub 140, Duke Energy Witness Kendal Bowman makes the following statement:

The REPS enacted by the General Assembly through Session Law 2007-397 (“Senate Bill 3”) is designed to be self-contained and not to impact avoided cost calculations. While the REPS requires the State’s electric power suppliers to procure increasing percentages of energy from a broad spectrum of renewable energy technologies over the next decade, the “renewable value” or “incremental cost” associated with these procurement requirements is captured through RECs. These RECs represent the commoditization of the non-energy and non-capacity value of renewable resources and are “incremental to” or “in excess of” a utility’s avoided costs. . . . *Stated another way, to the extent certain generating facilities offer environmental or societal benefits, over and above the energy and capacity that they provide, North Carolina’s REPS policy provides for such facilities to be compensated for those characteristics by the sale of RECs.*

Supplemental Direct Testimony of Kendal Bowman on Behalf of Duke Energy Carolinas, LLC, and Duke Energy Progress, Inc., pp. 9-10, Commission Docket No. E-100, Sub 140 (30 May 2014) (emphasis added).

Duke Energy’s current position differs from past positions that its own operating companies have advanced. As far back as 2010, North Carolina’s electric utilities – including DEC – conceded that environmental attributes are not tracked or measured for REPS compliance: “[I]t is only important to acknowledge that the applicant intends to produce RECs for compliance. *Further, associated environmental attributes, which are neither tracked nor measured for compliance, have no relevance to the need for registration as a new renewable energy facility.*” *Joint Comments of Dominion North*

Carolina Power, Duke Energy Carolinas, LLC, GreenCo Solutions, LLC and Progress Energy Carolinas, Inc., p. 2, Commission Docket Nos. E-100, Sub 113 & Sub 121 (4 October 2010) (emphasis added). More recently, in Commission Docket No. E-2, Sub 927, PEC – DEP’s predecessor in interest – filed the following statement strongly indicating that RECs do not include, for example, all related emission reductions:

[M]odifying the tariff language for the purposes of clarifying PEC’s entitlement to the environmental, energy efficiency and demand response benefits and attributes associated with the program does not warrant further investigation. The proposed language is identical to the language included in other program tariffs recently approved by the Commission (Docket No. E-2, Subs 928, 936, and 938). For approved Energy Efficiency programs, it allows PEC to use the energy reductions for compliance with the Renewable Energy Portfolio Standard (“REPS”) as established by NC Senate Bill 3 (G.S. 62-133). *The language in question is intended to grant PEC and its customer body all “green” certificates generated by the program. The only such certificates of value to PEC at the moment are renewable energy and energy efficiency certificates generated pursuant to N.C. Gen. Stat. § 62-133.8. To the extent the program creates other such certificates of value in the future, those certificates will belong to PEC and its overall customer body.*

Comments in Reference to North Carolina Sustainable Energy Association’s Motion to Intervene and Comments, pp. 2-3, Commission Docket No. E-2, Sub 927 (7 June 2012) (emphasis added) (the Commission took judicial notice of this filing during the evidentiary hearing). If a statutory REC contains all environmental and societal benefits, why would PEC have even bothered to contemplate “other such certificates of value” being created in the future?

Despite the clear definitional differences and Duke Energy’s own past position statements to the contrary, a DEC witness nevertheless appears to have testified in this proceeding that DEC believes the two REC definitions are co-extensive and cover the same attributes. On cross-examination, the DEC witness stated, **[BEGIN**

CONFIDENTIAL] [REDACTED]

[REDACTED]⁴ Tr.
at p 120. **[END CONFIDENTIAL]** NCSEA does not believe the evidence of record supports this testimony.

Instead, NCSEA believes the same term “REC” is being used to described two tradable instruments which are not co-extensive and this double use of the term is tending to, at a minimum, cause confusion. A change in terminology would eliminate confusion and assist stakeholders – including the Commission, DEC, the Public Staff, and the public, including renewable energy project developers – in better understanding the real questions at issue. If, for example, the DEC standard REC transaction agreement used the term “SuperREC” instead of “REC” for the agreement’s more encompassingly-defined tradable instrument, then certain questions become easier to articulate and address, such as:

- In connection with a standard REC purchase and sale agreement, can DEC refuse to negotiate to purchase mere RECs and instead insist on the purchase of SuperRECs?
- If so, should ratepayers be required to bear the burden of DEC’s cost recovery for the full SuperREC price when only a presumably less expensive REC need be retired for REPS compliance purposes?
- If DEC insists on the purchase of SuperRECs and potential sellers refuse to sell at the offered price because they believe they are not being adequately compensated for the additional attributes not included in a statutorily-defined REC, are ratepayers the ultimate losers (because their utility, by insisting on acquiring

⁴ The witness’s testimony that the two RECs **[BEGIN CONFIDENTIAL]** [REDACTED] **[END CONFIDENTIAL]** provides the basis for NCSEA’s assertion, *see infra*, that the DEC contractual definition of REC appears to be confusing even DEC itself.

SuperRECs, is foregoing the opportunity to procure what might be very reasonably priced RECs)?

- If DEC purchases a SuperREC, what exactly is being retired to comply with the REPS? The entire SuperREC or just those attributes of the SuperREC that comprise a statutorily-defined REC? If the latter, does DEC retain the discrete additional attributes not included in a statutorily-defined REC? If so, how is it accounting for or banking these additional attributes?

Rebutting DEC’s Argument that it Needs Expansively-Defined RECs to Guard Against Double Counting

DEC argued at hearing that it needed to acquire the equivalent of “SuperRECs” in order to prevent double counting of RECs. NCSEA respectfully disagrees.

“[T]he Commission [has] concluded that ‘REPS compliance should be based, to the extent possible, solely on RECs.’” *Order Approving Programs*, p. 5, Commission Docket No. E-2, Sub 928 (14 October 2008). Thus, SuperRECs are not legally required for REPS compliance.⁵ Moreover, it appears as though DNCP is adequately protecting its ratepayers against double counting without resorting to forced purchase and sale of SuperRECs.

In 2011 and 2012, it appears as though DNCP distinguished between environmental attributes and RECs. In negotiating a power purchase agreement with a qualified facility developer – EP&S – DNCP sought a right of first refusal to purchase the environmental attributes of the energy produced. EP&S maintained “that such a right of first refusal is not appropriate and would make it difficult for EP&S to sell the [separate]

⁵ NCSEA understands that, if the Commission subscribes to DEC’s argument that DEC needs “SuperRECs” in order to protect ratepayers from the double counting of mere RECs, the Commission will enter an order saying so. NCSEA believes, however, that entry of such an order may require the Commission to also address some of the questions NCSEA sets out in this filing, *supra*, to help stakeholders more clearly understand how to move forward with greater certainty.

renewable energy certificates (RECs).” *Final Order on Arbitration*, p. 8, Commission Docket No. SP-467, Sub 1 (5 March 2012). DNCP agreed to delete the right of first refusal provision and the Commission directed that it be deleted without prejudice. *Id.*

More recently, earlier this year, DNCP pre-filed testimony in Commission Docket No. E-100, Sub 140 indicating that – contrary to DEC’s assertions that RECs must contain all associated environmental attributes – DNCP believes at least some environmental attributes are captured in the energy rates it pays to qualified facilities (and thus are not captured in the RECs DNCP may acquire from qualified facilities):

Environmental benefits are currently reflected in DNCP’s energy rates, but – again – only to the degree that the utility actually avoids costs related to those benefits. Where, absent the QF, the Company is required to make payments for variable water consumption, *purchase environmental allowances for emissions*, or expects to incur incremental waste processing and disposal costs, those avoided costs have been reflected in the calculated avoided energy costs and the resulting QF energy rates.

Responding Testimony of Roger T. Williams on Behalf of Dominion North Carolina Power, p. 4, Commission Docket No. E-100, Sub 140 (30 May 2014).

As SuperRECs are not legally required for REPS compliance, and as DNCP appears to be adequately protecting its ratepayers against double counting without resorting to forced purchase and sale of SuperRECs, NCSEA believes there is ample basis for questioning DEC’s assertion that it needs to acquire the equivalent of “SuperRECs” in order to prevent double counting of RECs.

Prospective Relief Being Requested

As the statutory definition of REC existed first and DEC’s contractual definition of REC tends to mislead and confuse both the public and DEC itself, NCSEA believes

the Commission should direct DEC to cease using the term “REC” in its contracts when it is describing something that is different from a statutorily-defined REC.

NCSEA believes the Commission has authority to grant the relief NCSEA requests – *i.e.*, an order directing DEC to cease using the term “REC” in its contracts for something that is different from a statutorily-defined REC. The Commission has statutory authority to require a utility to discontinue use of a misleading or confusing “name[.]” N.C. Gen. Stat. § 62-117 provides:

No public utility holding or operating under a franchise issued under this Chapter shall adopt or use a name used by any other public utility, or any name so similar to a name of another public utility as to mislead or confuse the public, and the Commission may, upon complaint, or upon its own initiative, in any such case require the public utility to discontinue the use of such name, preference being given to the public utility first adopting and using such name.

This statutory provision can reasonably be said to stand for the broader proposition that anytime a public utility uses a similar name/term (in a contract or otherwise) that misleads or confuses the public, the Commission may direct the public utility to discontinue the use of such name/term, with preference being given to the first adoption and use of the name/term. Under N.C. Gen. Stat. § 62-31, the Commission undoubtedly has the power and authority “to make and enforce [such a] reasonable and necessary rule[.]”

To be clear, NCSEA is not anywhere asserting that DEC cannot enter into contracts to purchase attributes that are not part and parcel of a statutorily-defined REC, particularly if DEC believes it better serves its customers by contracting to purchase these attributes. NCSEA is merely asserting that (a) the language DEC is choosing to use is, at a minimum, creating undue confusion *and* (b) a terminological change would eliminate

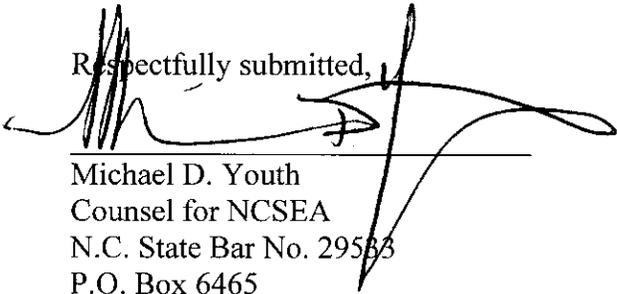
the confusion and bring clarity to the questions/issues that developers and the Public Staff are facing.

Finally, NCSEA believes that any Commission order granting the relief NCSEA is requesting could be made prospective so as to eliminate potential disruption to existing contractual relationships.

CONCLUSION

NCSEA does not challenge herein as unreasonable or imprudently incurred any costs DEC seeks to recover in its REPS rider application. NCSEA does, however, believe the Commission should order DEC, going forward, to cease using the term "REC" in its contracts when it is describing something that is different from a statutorily-defined REC.

Respectfully submitted,

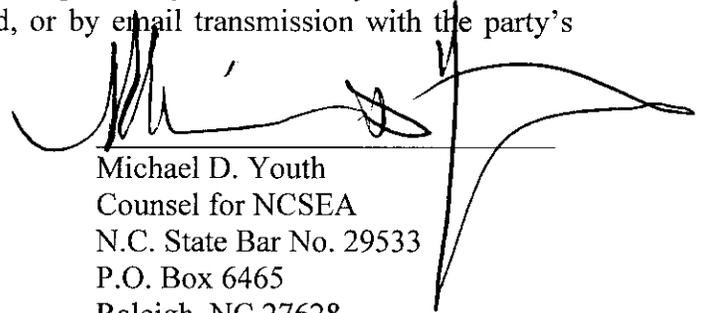


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CERTIFICATE OF SERVICE

I hereby certify that all persons on the docket service list have been served true and accurate copies of the foregoing Post-Hearing Brief 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 7th day of July, 2014.



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