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

In the Matter of:)
2012 Biennial Integrated Resource Plans)
and Related 2012 REPS Compliance)
Plans)

REPLY

FILED

MAR 25 2013

Clerk's Office
N.C. Utilities Commission

NCSEA'S REPLY

On 5 February 2013, the North Carolina Sustainable Energy Association ("NCSEA") filed a motion for disclosure ("Motion") in this docket. On 7 March 2013, Duke Energy Carolinas, LLC ("DEC") and Progress Energy Carolinas, Inc. ("PEC") filed a joint response to the Motion. On 8 March 2013, Dominion North Carolina Power ("DNCP") filed a response to the Motion. On the same day, Sierra Club and Southern Alliance for Clean Energy ("SACE") filed a joint response to the Motion. The table below sets out in summary form the relief sought in the Motion and each respondent's position thereon:

	Relief Sought in Motion	Position of Respondent		
		DEC/PEC	DNCP	Sierra Club/SACE
Past REPS compliance plans	Disclosure of certain currently redacted information in DEC's 2008 REPS compliance plan	Do not oppose NCSEA Motion ¹	No position	Support NCSEA Motion
	Imposition of an on-going requirement that DEC, PEC, and DNCP annually review their public REPS compliance plans from 4 years earlier and disclose redacted info or explain why redacted info continues to merit protection	Do not oppose imposition of review requirement; ¹ oppose explanation requirement	Oppose NCSEA Motion	Support NCSEA Motion
Current REPS compliance plans	Disclosure of certain currently redacted information in PEC's 2012 REPS compliance plan	Oppose NCSEA Motion	No position	Support NCSEA Motion

¹ The summary statement contained in the table is subject to an exception for the names of counterparties and is subject to compliance with contractual obligations DEC or PEC have with such counterparties.

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NCSEA replies as follows:

DEC's 2008 REPS COMPLIANCE PLAN

1. DEC “agree[s] to NCSEA’s Motion as to [DEC’s 2008 REPS compliance plan,] except for the names of counterparties and subject to prohibitions in [its] contracts with counterparties.” *DEC/PEC Response to NCSEA Motion for Disclosure*, p. 3 (7 March 2013). Given DEC’s agreement and the absence of any opposition to NCSEA’s Motion as far as DEC’s 2008 REPS compliance plan is concerned, NCSEA believes the relief it has requested should be granted.

**ANNUAL REVIEW OF REPS COMPLIANCE
PLANS FILED FOUR YEARS EARLIER**

2. DEC and PEC have “agree[d] to review and make public the categories of information from four-year old REPS Compliance Plans as requested by NCSEA, except for the names of counterparties and subject to compliance with contractual obligations [DEC or PEC] have with such counterparties. [However, DEC and PEC] object to providing ‘a specific explanation as to why a particular piece of information should not be unsealed’ in the four-year old plans as sought by NCSEA as unduly burdensome.” *DEC/PEC Response to NCSEA Motion for Disclosure*, p. 9 (7 March 2013).
3. DNCP, on the other hand, “respectfully requests that the Commission deny NCSEA’s blanket request that [DNCP, PEC, and DEC] be required to review on an annual basis their REPS Plan submitted to the Commission four years earlier[.]” *DNCP Initial Response to NCSEA Motion for Disclosure*, p. 1 (8 March 2013).

4. The economist John Maynard Keynes said, “It is better to be roughly right than precisely wrong.” NCSEA proposed the annual review process because, from a theoretical standpoint, the *status quo* is “precisely wrong” (to use Keynes’ phrase). Despite the investor-owned utilities’ full or partial opposition to NCSEA’s annual review proposal, NCSEA remains convinced that its annual review proposal, though not ideal, is more “roughly right” than the *status quo*. For this reason, explained more fully in the paragraphs below, NCSEA believes its motion should be granted.
5. Commission Rule R8-60(h)(5), which represents the *status quo* for IRP proceedings, provides as follows:

If a utility considers certain information in its biennial or annual report to be proprietary, confidential, and within the scope of G.S. 132-1.2, the utility may designate the information as “confidential” and file it under seal.²

² Current Commission Rule R8-60(h)(5) appears to be more the result of drift than deliberation. Prior to 1998, no such rule existed. The creation of a rule seemed important, however, in the face of impending deregulation. See *Order Requesting Comments and Proposed Rules*, p. 6, Commission Docket No. E-100, Sub 78A (16 September 1997). On 29 April 1998, the Commission adopted the following rule in connection with the IRP:

If a utility considers certain information and data to be confidential, it may designate it as confidential in its filing, and such information and data will be treated pursuant to applicable Commission rules, procedures, and orders dealing with filings under seal and nondisclosure agreements.

Order Adopting Revised Rules, Appendix A, p. 2, Commission Docket No. E-100, Sub 78A (29 April 1998). Though not express in the text of the rule, this rule required the applicant utility to make an up-front showing. See, e.g., *Order Approving Integrated Resource Plans*, p. 11, Commission Docket No. E-100, Sub 97 (20 February 2003) (holding “[a]ny claim of confidentiality under the North Carolina Public Records Act shall be set forth with specificity at the time this information is filed and shall conform to each of the conditions listed in G.S. 132-1.2”) (emphasis added). The rule took its current form – eliminating the showing requirement – in a 2007 proceeding without much, if any, discussion or debate. See *Order Revising Integrated Resource Planning*

6. Commission Rule R8-60(h)(5) permits utility REPS compliance plans³ to be filed under seal without any up-front showing or the memorializing of any Commission findings in an appealable order.
7. NCSEA has come to conclude that the *status quo* – as embodied in Commission Rule R8-60(h)(5) – is “precisely wrong” by returning to a fundamental principle. *See* N.C. Const., Art I, § 35 (“A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty”).
8. The fundamental principle at issue here is the State constitutional mandate that courts be open. N.C. Const., Art. I, § 18.
9. N.C. Const., Art. I, § 18 applies to the Commission.⁴
10. N.C. Const., Art. I, § 18 has given rise to a presumption of public access to courts and court records.
11. To be clear, the constitutional presumption of access

is not absolute and is subject to reasonable limitations imposed in the interest of the fair administration of justice or for other compelling public purposes. Thus, although the public has a qualified right of access to civil court proceedings and records, the trial court may limit

Rules, Appendix A, p. 3, Commission Docket No. E-100, Sub 111 (11 July 2007); *see also, generally*, Commission Docket No. E-100, Sub 111.

³ Pursuant to Commission Rule R8-67(b)(3) a REPS compliance plan is “part of” a utility’s IRP.

⁴ Though an undergraduate court did not constitute a “court” for purposes of the State Constitution, the Court of Appeals noted that the undergraduate court “*functionally* [id] not wield the power of the State as does a court in the General Court of Justice.” *DTH Publ’g Corp. v. University of North Carolina*, 128 N.C. App. 534, 496 S.E.2d 8 (1998), *rev. denied*, 348 N.C. 496, 510 S.E.2d 381-2 (1998). Here, by virtue of N.C. Gen. Stat. § 62-60, the Commission does wield the power of the State. Consequently, the constitutional open courts provision applies to the Commission, particularly its proceedings judicial in nature such as this one.

this right when there is a compelling countervailing public interest and closure of the court proceedings or sealing of documents is required to protect such countervailing public interest. In performing this analysis, the trial court must consider alternatives to closure. Unless such an overriding interest exists, the civil court proceedings and records will be open to the public.

Virmani v. Presbyterian Health Services Corp., 350 N.C. 449, 476, 515 S.E.2d 675, 693 (1999) (internal citations omitted).

12. While the public's right of access is not absolute, our State Supreme Court has held that

[w]here the trial court closes proceedings or seals records and documents, it must make findings of fact which are specific enough to allow appellate review to determine whether the proceedings or records were required to be open to the public by virtue of the constitutional presumption of access.

Virmani, 350 N.C. at 476-477, 515 S.E.2d at 693 (emphasis added).

13. NCSEA understands that the protection of trade secrets, as defined in N.C. Gen. Stat. § 132-1.2 *et seq.*, constitutes a countervailing public interest for which the Commission and Commission records can be closed to the public.⁵
14. NCSEA also understands that a trade secret closure should ideally be based on both (a) a specific up-front showing by a utility that a trade secret is at issue and (b) a specific up-front appealable finding by the Commission that a trade secret is at issue and closure is necessary. 350 N.C. at 476-477, 515 S.E.2d at 693.

⁵ Contrary to the utilities' assertions in their filed responses, NCSEA does not seek to create a "public interest" exception to the trade secret protection laws; instead, NCSEA seeks to have the utilities hew more closely to the *Virmani* ideal and show that they are entitled to the protection the trade secret laws afford.

15. Indeed, from a theoretical standpoint, an up-front showing by a utility and a specific appealable finding by the Commission are necessary prerequisites for denying public access to Commission records. *Id.*
16. Commission Rule R8-60(h)(5) does not conform to this ideal procedure enunciated in *Virmani*. For this reason, the *status quo* is – in theory – “precisely wrong” (to use Keynes’ phrase again).
17. NCSEA recognizes, however, that theory must sometimes yield to practical considerations and that efficient judicial administration may require that there be some “give” with regard to the up-front showings and the Commission’s scrutiny of these showings.
18. Determining the appropriate amount of “give” presents a question of balance. As a court moves procedurally away from the *Virmani* ideal, it increases the amount of both (a) the trust it is placing in the parties being given the power to unilaterally seal court records and (b) the risk that the public will be unconstitutionally denied access. Where the beneficiaries of the court’s trust prove over time to be exemplary stewards of the trust placed in them (*i.e.*, they have a track record of not overreaching in their claims of confidentiality), corrections to an established amount of “give” may not be necessary. On the other hand, where the beneficiaries of the court’s trust establish a track record of overreaching, the court should reign in the “give” to reduce the risk of improper denial of access.
19. The utilities have overreached on multiple occasions with their confidential designations. For example, DNCP overreached with its confidential

designations in last year's IRP update. *See Order Approving 2011 Annual Updates to 2010 Biennial Integrated Resource Plans and 2011 REPS Compliance Plans*, Commission Docket No. E-100, Sub 128 (30 May 2012). DEC and PEC have similarly overreached recently in their confidential designations of merger-related emails and settlement agreements, leading the Commission in one instance to admonish them to be more careful in their redaction of information from their public filings. *Order on Public Records Act Requests*, p. 8, Commission Docket No. E-7, Sub 1017 (19 October 2012). Given the utilities' recent track record, the Commission should adjust the amount of "give" it has permitted them.

20. Taking into account (a) the ideal procedure enunciated in *Virmani*, (b) the practical considerations associated with the Commission's administration of a heavy caseload, and (c) the utilities' recent track record of overreaching, NCSEA proposed the annual review concept.
21. NCSEA's annual review proposal attempts to strike a balance between theory and practical considerations – a balance that is much more "roughly right" than the *status quo*. NCSEA's annual review proposal ensures that at least one of the *Virmani* safeguards is in place so that a specific explanation is being offered – albeit four years after the fact – for any information that will continue to be closed off from the public.
22. Based on its Motion and the foregoing, NCSEA believes its annual review proposal is fair, not unduly burdensome, and should be granted as requested.

PEC's 2012 REPS COMPLIANCE PLAN

23. Because of Commission Rule R8-60(h)(5) and the relaxation of the *Virmani* safeguards in IRP proceedings, PEC was able to file portions of its 2012 REPS compliance plan under seal without setting forth with specificity why the redacted portions merited denying public access.
24. With regard to the redacted information, NCSEA recognized (and PEC acknowledges) that PEC has “publicly file[d] similar information in the past[.]” *DEC/PEC Response to NCSEA Motion for Disclosure*, p. 6 (7 March 2013). This unexplained dissonance with past PEC practice prompted NCSEA to challenge the redactions⁶ in its Motion.
25. PEC’s responsive filing provides an explanation as to “precisely why PEC filed the relevant information in its 2012 REPS Compliance Plan under seal[:.]”

PEC’s REPS compliance plans filed in 2011 and earlier did not reveal near-term REC shortages because PEC’s general compliance obligation did not begin until 2012. Thus, while public disclosure of such information prior to the commencement of the REC requirements in 2012 may not have created as difficult negotiation challenges for PEC and its customers, disclosure of such information in 2012 and going forward would materially harm PEC and its customers by disadvantaging the Company in its future negotiations for renewable energy.

DEC/PEC Response to NCSEA Motion for Disclosure, p. 7 (7 March 2013).

26. Having secured this explanation, NCSEA believes the explanation is insufficient to rebut the constitutional presumption of access and therefore

⁶ It is worth noting that NCSEA is not challenging all of the redactions in PEC’s 2012 REPS compliance plan; it is only challenging the redaction of data in 5 tables – tables which PEC has publicly disclosed in earlier compliance plans.

reasserts that 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.” *NCSEA’s Motion* at p. 6.

27. NCSEA bases its belief and assertion on at least two facts:

- a. First, with regard to PEC’s “difficult negotiation challenges” assertion, there is no evidence that sellers of RECs could actually use the unsealed information at issue to collude or “fix” REC prices or otherwise materially harm PEC. PEC portrays itself as susceptible to price-inflation by the market’s numerous sellers, but – as testimony during the merger proceeding foretold – post-merger PEC and DEC are a monopsony (*i.e.*, the single buyer in the REC market with overwhelming influence on market price). *Transcripts of Testimony*, Vol. 4, p. 91 & Vol. 5, p.193, Commission Docket Nos. E-2, Sub 998 and E-7, Sub 986 (12 October 2011) (Kalt and Hahn testimony). As such, it is difficult to fathom PEC, and by extension its customers, being bullied into a higher-priced contract because of a seller’s awareness of a near-term REC shortage. Indeed, if such bullying were possible, it seemingly would have occurred in the swine and poultry REC arena last year when everyone knew about PEC’s and DEC’s impending near-term shortages . . . and yet, sellers of RECs were not

able to command prices higher than what PEC and DEC were willing to pay. *See Transcripts of Testimony*, Vols. 2 & 3, Commission Docket No. E-100, Sub 113 (5-6 September 2012) (McKittrick testimony).

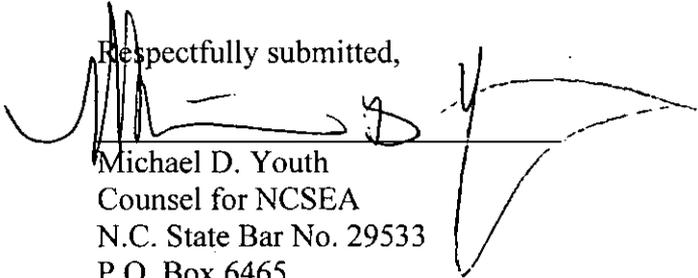
- b. Second, with regard to PEC's basing its argument on the fact that its "general compliance obligation did not begin until 2012[,]" the Commission is well aware that PEC had a solar obligation that began in 2010. Despite this obligation, its filings through 2011 did not redact the solar information that its 2012 filing does. By PEC's current rationale, the pre-2012 public filing of this solar REC information would have revealed any "near-term REC shortages" in connection with solar and therefore caused "difficult negotiation challenges" and higher prices for its customers. But PEC's earlier transparency did not have any such effect. To the contrary, the transparency of PEC's previous filings with regard to solar RECs most likely played a role in helping the marketplace find its way to today's current low solar REC prices.

28. In short, NCSEA continues to believe that PEC has not and cannot show that the redacted 2012 information constitutes "terms [that] would impair [its] 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).

29. Based on its Motion and the foregoing, NCSEA believes PEC should be ordered to unseal the portions of its 2012 REPS compliance plan identified in NCSEA's Motion.

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

Respectfully submitted,

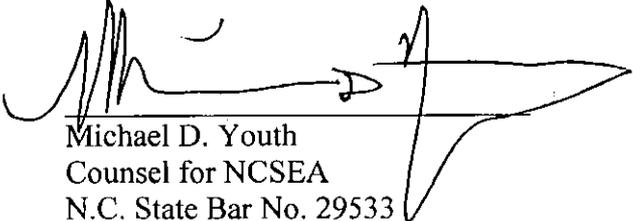


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CERTIFICATE OF SERVICE

I hereby certify that all persons on the docket service list have been served true and accurate copies of the foregoing Reply 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 25th day of March, 2013.



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