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November 21, 2012

OFFICIAL COPY

VIA HAND DELIVERY

Ms. Gail Mount
Chief Clerk
North Carolina Utilities Commission
Fifth Floor, Room 5063
430 N. Salisbury Street
Raleigh, NC 27603

FILED

NOV 21 2012

Clerk's Office
N.C. Utilities Commission

**Re: In the Matter of Biennial Determination of Avoided Cost Rates for
Electric Utility Purchases from Qualifying Facilities-2012
Docket E-100, Subs 127 and 136**

Dear Ms. Mount:

Enclosed for filing in the above-referenced dockets is an original and thirty-one (31) copies of the Comments of the Renewable Energy Group in Response to Motion to Suspend Availability of Avoided Cost Rates.

Please stamp the extra copy as "Filed" and return to me via our courier.

Thank you for your assistance with regard to this matter. If you have any questions concerning this submission, please do not hesitate to contact me.

Regards,



Charlotte A. Mitchell

Enclosures

cc: All parties of record

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STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-100, SUB 127
DOCKET NO. E-100, SUB 136

FILED
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Clerk's Office
N.C. Utilities Commission

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION:

In the Matter of:

Biennial Determination of Avoided Cost
Rates for Electric Utility Purchases from
Qualifying Facilities - 2012

**COMMENTS IN RESPONSE
TO MOTION TO SUSPEND
AVAILABILITY OF
AVOIDED COST RATES**

NOW COME Argand Energy Solutions, LLC ("Argand"), Birdseye Renewable Energy, LLC ("Birdseye"), Carolina Solar Energy, LLC ("CSE"), Community Energy Solar, LLC ("CES"), ENlight Solar, LLC ("ENlight"), FLS Energy, Inc. ("FLS"), Mid-Atlantic Renewable Energy Coalition ("MAREC"), National Renewable Energy Corporation ("NARENCO"), O2 Energies, Inc. ("O2"), SfL+a Architects, PA ("SfL+a"), Solbridge Energy, LLC ("Solbridge"), Strata Solar, LLC ("Strata"), SunEdison ("SunEdison"), Sunpower Corporation ("Sunpower"), and Sustainable Energy Solutions ("Sustainable") (collectively referred to as "Renewable Energy Group", "REG", or "Respondents"), by and through their undersigned attorneys, and respectfully submit comments in response to the order of the North Carolina Utilities Commission (the "Commission") issued November 8, 2012 requesting comments on the motion of Progress Energy Carolinas, Inc. ("PEC") to suspend availability of avoided cost rates. By order dated November 19, 2012, the Commission allowed the request of REG to intervene in the above-captioned docket.

I. BACKGROUND

1. On November 1, 2012, PEC filed, in the above-captioned docket, a Motion to Suspend Availability of Previously Approved Schedule CSP-27 Long-Term Rates requesting authorization to suspend, as of December 1, 2012, the long-term rates available in Schedule CSP-27.

2. As a preliminary matter, PEC has two pending requests related to the suspension of rates. First, in its motion filed November 1, PEC requests interim relief through the suspension of its currently-approved rates as of December 1, 2012. Second, in its Initial Statement and Exhibits filed on November 1, 2012, PEC requests prospective relief through permission to revise its tariff language to include a suspension provision, which would, in effect, serve as a mechanism to replace the practice of filing a motion to suspend the availability of the currently approved rates at the onset of the next biennial avoided cost proceeding. These comments respond only to PEC's request for interim relief, and REG reserves the right to comment on PEC's request for prospective relief in its general comments to be filed at a later date.

3. REG acknowledges that it has been past practice of this Commission to suspend then-approved avoided cost rates during the pendency of the avoided cost proceeding. However, prior Commission orders have conditioned such suspensions to protect the rights of qualifying cogenerators or small power producers, as will be more specifically explained herein.

4. Moreover, as set forth in Section 210 of the Public Utilities Regulatory Policies Act of 1978 ("PURPA") and the regulations promulgated thereunder, a qualifying facility ("QF") that chooses to sell all of its output pursuant to a legally enforceable obligation

over a specified term is entitled to fixed long-term rates. PURPA and its regulations establish the right of the QF to elect long-term fixed rates derived from avoided costs, based on the status of the QF and not based on dates or deadlines established by the utility.

5. Granting the relief requested, as requested, would deprive certain QFs that are entitled to long-term fixed rates of this option during the pendency of the avoided cost proceeding, in contravention of the Commission's previous interpretation of PURPA and the public policy underlying PURPA.

II. DISCUSSION

A. The Relief Requested By PEC Is Inconsistent With Commission Precedent and Rules.

6. PEC justifies its request, in part, on the assertion that its proposal to suspend its long-term fixed rates is consistent with DEC's process for suspension of the availability of its analogous rates – Schedule PP, most recently approved by the Commission in its *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities*, Docket No. E-100, Sub 127, issued July 27, 2011. However, the Commission's order in that docket applied prospectively and was not based on a request by DEC for relief during the pendency of that avoided cost proceeding.

7. Moreover, PEC's request is not consistent with the way in which the Commission ruled on DEC's request for interim relief made in the 1996 avoided cost proceeding, Docket No. E-100, Sub 79.

8. In the 1996 avoided cost proceeding, DEC (then Duke Power Company) requested that the Commission suspend, as of the date of its motion, the Schedule PP

rates and standard contract terms that had been approved in the previous biennial avoided cost proceeding; Docket No. E-100, Sub 74, and authorize DEC to offer to QFs the proposed rates and standard terms until such time as the new rates and standard terms were approved by the Commission. *Duke Power Company's Motion to Suspend the Availability of Previously Approved Schedule (PP) Rates And Standard Contracts*, Docket No. E-100, Sub 79, filed October 17, 1996 ("1996 DEC Motion"). In that motion, DEC agreed to "to sign contracts at the rates established in [the previous avoided cost proceeding] with those QFs that have obtained certificates of public convenience and necessity from the Commission by the date of this motion and QFs who filed applications for certificates prior to the date of this motion and have certificates actively pending." 1996 DEC Motion, ¶ 9.

9. Public Staff filed a response to the 1996 DEC Motion in which it stated that the relief requested was consistent with the position taken by Public Staff in the 1994 avoided cost proceeding. In the 1994 avoided cost proceeding, Public Staff had supported a similar motion by DEC to suspend rates, so long as DEC agreed to execute contracts at the then-current avoided cost rates with those QFs that had obtained CPCNs as well as QFs that had applied for CPCNs prior to the date of the filing of the motion. *Public Staff's Response to Duke's Motion to Suspend Rates*, Docket No. E-100, Sub 79, filed November 27, 1996. Upon information and belief, the CPCN-related exception included QFs that had CPCN applications pending in the interest of fairness because once a QF files an application for a CPCN the QF is no longer in control of when the CPCN will be issued and the length of time for an application to be granted varies considerably, QF to QF.

10. In ruling on the 1996 DEC Motion, the Commission allowed DEC to suspend its current long-term avoided cost rates as of the date of the filing of the 1996 DEC Motion with the CPCN-related exception, specifically ruling that the “suspension[] would *not* apply to QFs that have obtained certificates of public convenience and necessity or have applied for such certificates prior to [the date on which the 1996 DEC Motion was filed].” *Order on Motions*, Docket No. E-100, Sub 79, issued December 13, 1996. Thus, in the interest of protecting the expectations of QFs and their ability to obtain financing, the Commission required DEC to make exceptions for QFs not yet under contract that were either: a) certificated; or b) had filed applications for CPCNs.

11. In its final order in the 1996 avoided cost proceeding, as a mechanism to replace the practice of requiring DEC to file a motion to suspend the availability of the currently approved avoided cost rates, the Commission authorized DEC to amend its standard contract terms to make the currently approved avoided cost rates unavailable as of the expected due date for the filing of the proposed new rates in the next biennial avoided cost proceeding.

12. Importantly, as was the case in the last biennial avoided cost proceeding, the Commission authorized DEC to act *prospectively*, ruling that DEC was allowed to limit the availability of its standard avoided cost rates and contract terms established in that proceeding (E-100, Sub 79) to QFs that executed such contracts by November 4, 1998 and began delivery by May 4, 2001. *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities*, Docket No. E-100, Sub 79, issued June 19, 1997. The Commission’s final order in Docket No. E-100, Sub 79 established the process and effectively gave QFs ample notice that, going forward, DEC’s rates would be suspended

as of the date of the filing of its proposed rates in the next biennial avoided cost proceeding.

13. Since being authorized to do so by the Commission in Docket No. E-100, Sub 79, the DEC contract process has been standardized. REG's collective experience dictates that under DEC's process, QFs that obtain a CPCN prior to the filing of its proposed rates in the avoided cost proceeding are entitled to a contract with DEC and are eligible for a 15-year term at a then-approved fixed rate. DEC's rate schedule advertises this requirement, and DEC representatives customarily advise potential customers in the interconnection queue of this requirement.

14. PEC, however, in its pending motion, requests permission to amend its standard contracts to include a provision analogous to that included in DEC's contracts and would have that provision take effect as of December 1, 2012, only one month after it was filed. In contrast with the 1996 DEC Motion, PEC's pending motion does not include a CPCN-related exception, and it provides negligible advance notice to QFs already in project development, particularly those with pending applications for CPCNs.

15. PEC's currently approved standard terms do not include the requested provision and, therefore, do not alert the potential customer to any such suspension date. Retroactively amending the standard terms, as PEC seeks to do with its pending motion, frustrates both the rights and the expectations of QFs that have sought or are seeking financing for projects based on the currently approved terms in CSP-27.

16. Importantly, the Commission "has entered suspension orders before when new, lower avoided cost rates were proposed, but the Commission has always allowed exemptions from the suspensions. These exemptions are ultimately based on PURPA

regulations that give QFs the right to rates calculated at the time their obligation is incurred. Therefore, those QFs deemed ready, willing and able to enter into a legally enforceable obligation were entitled to the old rates and were exempted.” *Order on Motion of Consolidated Hydro*, Docket No. E-100, Sub 79, issued June 19, 1997.

17. In addition, QFs under 2 megawatts in capacity are exempt from certification by section 62-110.1(g) of the North Carolina General Statutes. These QFs are required to file reports of proposed construction and registration statements in accordance, respectively, with Rule R8-65 of the Rules and Regulations of the North Carolina Utilities Commission.

18. Note that Rule R8-65(b) allows a QF to file a report of proposed construction without the assistance of an attorney, and those smaller QFs typically proceed with the regulatory approvals process without the assistance of an attorney. Given the Commission’s previous interpretation of PURPA referenced in Paragraph 23 hereof, the moment at which an LEO (defined hereinafter) arises for smaller QFs that are exempt from certification is unclear, and, therefore, the rights of these QFs to avoided cost rates are not protected by a CPCN-related exception. To this end, if PEC’s requested relief were granted, without an exception for smaller QFs, then the utility could unilaterally control whether the option of then-approved long-term fixed rates is available to these smaller QFs by refusing to enter into PPAs until the new rate is approved.

19. Smaller QFs that utilize the exemption provided by section 62-110.1(g) and comply with Rule R8-65 are entitled to the same protection as larger QFs as PURPA does not discriminate among QFs.

20. Finally, allowing PEC to give one month's notice of its intent to suspend long-term fixed rates based on the date on which it executes a contract with QFs is fundamentally unfair. In the last avoided cost proceeding, DEC and Dominion were only allowed to suspend rates prospectively through amendment to their standard contracts. PEC, in contrast, did not make a similar request in the last avoided cost proceeding, thereby creating a false impression for QFs and inducing reliance on the CSP-27 rates. Not only did PEC not give QFs advanced notice of its intent to suspend rates, PEC also indicated no change in its current and projected avoided cost rates when it filed its 2012 Integrated Resource Plan ("IRP") and related Renewable Energy and Energy Efficiency Portfolio Standard ("REPS") Compliance Plan on September 4, 2012 in Docket No. E-100, Sub 137, p. D-7. Allowing this type of last minute downward adjustment to avoided cost rates jeopardizes many QFs that are in project development. In fact, at least one of the members of REG has multiple projects in the pipeline for which a CPCN has been issued, an interconnection agreement has been executed, interconnection fees paid to PEC, but for which PEC has yet to execute the PPA. Allowing the relief requested by PEC, and in effect allowing PEC to unilaterally control whether a QF receives a PPA at the currently approved rates, is fundamentally unfair.

21. Given Commission precedent and rules, and in the interest of fairness, should the Commission be compelled to allow PEC's request to suspend rates, the Commission should require an exception, as it has done in the past, for QFs: i) that have obtained a CPCN; ii) that have applied for a CPCN as of the deadline for the filing of proposed avoided costs; and iii) that have made the filing required by Rule R8-65.

B. The Relief Requested By PEC Is Inconsistent With PURPA.

i. PURPA establishes a QF's right to rates derived from avoided costs based on QF status not a utility's willingness to contract.

22. In addition to concerns discussed above, PEC's request is inconsistent with the underlying purpose of PURPA and its regulations.

23. PURPA and its regulations establish the right of a QF to rates derived from avoided costs at the time the legally enforceable obligation ("LEO") arises, which is based on the status of the QF and not based on any date or deadline established by the utility. See 18 C.F.R. § 292.304(d)(2)(ii).

24. This Commission has interpreted PURPA and its regulations to establish that a LEO arises when the QF commits itself to sell its output to a utility (which concomitantly commits the utility to purchase the output from the QF) and the QF has a certificate of public convenience and necessity ("CPCN") in hand. See discussion related to legally enforceable obligation set forth in *Order on Arbitration*, Docket No. E-2, Sub 966 issued January 26, 2011, pp. 5-10.

25. Thus, since PURPA and its regulations establish that a QF that chooses to sell all of its output pursuant to a legally enforceable obligation over a specified term is entitled to rates derived from avoided costs as soon as the LEO arises, at a minimum the Commission's previous interpretation of the statute and regulations make clear that a QF has a right to the currently-approved avoided cost rate at the moment it has committed to sell its output to the utility and has a CPCN in hand. The utility cannot truncate this right by establishing an arbitrary deadline as to when it will cease to offer that rate.

ii. PURPA establishes that a QF is entitled to long-term fixed rates, at the QF's option.

26. In previous avoided cost proceedings, when addressing suspension of rates, Public Staff has raised the issue of whether standard rate options offered by the utilities are sufficiently fixed to comply with the requirements of PURPA. See *Initial Statement of the Public Staff*, Docket No. E-100, Sub 127, filed March 1, 2011. Specifically, Public Staff has taken the position that offering only variable rates during the pendency of the avoided cost proceeding is inconsistent with the Commission's previous determination and the requirement of PURPA that QFs that meet certain eligibility requirements are entitled to long-term, levelized rates and cannot be deprived of that option during the pendency of the avoided cost proceeding. In Docket No. E-7, Sub 978 Public Staff advocated for the Commission to return to its previously established policy of allowing the availability of the proposed avoided cost rates during the pendency of the proceeding, subject to being increased if the Commission actually approved higher avoided costs, to QFs that are otherwise eligible to enter contracts.

27. The basis for the Public Staff's concern relates to the decision of the Federal Energy Regulatory Commission ("FERC") in *J.D. Wind 1, LLC*, 129 FERC ¶ 61,148 (2009), *reconsideration denied*, 130 FERC ¶ 61,127 (2010) (February 19 Order). In the *J.D. Wind* case, FERC affirmed the QF's right to long-term avoided cost contracts with rates determined at the time the legally enforceable obligation arose, even if the avoided costs at the time of delivery differ from those calculated at the time the obligation is incurred. 18 C.F.R. §292.304(d)(2).

28. As has been previously argued by Public Staff, FERC “explicitly concluded in its Order 69 that, under PURPA, QFs are entitled to be protected from future changes in avoided cost protections and not deprived of the benefits of fixed rates established at the time the QF made its commitment” (internal citation omitted). *Public Staff’s Post Hearing Statement of Position*, Docket No. E-2, Sub 966, filed October 7, 2010. In addition, the Public Staff has pointed out that “to the extent FERC’s regulations and orders are not clear, the fact that the overriding purpose of PURPA is to encourage the development of QFs dictates that the regulations be interpreted so as to provide that encouragement.” *Id.*

29. As FERC has stated, “in order to be able to evaluate the financial feasibility of a [QF], an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility.” FERC Order 69.

30. Thus, given PURPA’s requirements and the FERC’s statements that: i) a QF is entitled to fixed rates; ii) fixed rates enable the investor to determine the expected return on a project and thus, ultimately, whether to finance the project; and iii) the overriding purpose of PURPA is to encourage the development of QFs, PEC’s request that only variable rates be available to the QF during the pendency of the avoided cost proceeding appears to be inconsistent with the position articulated by FERC and advocated by the Public Staff in past proceedings.

31. Crucially, the facts before the Commission in the instant matter differ from those in past proceedings. With respect to the availability of long-term fixed rates, in its final order in the 2010 avoided cost proceeding, in concluding that DEC’s process for the suspension of rates is reasonable and making only the variable rate available to QFs

during the pendency of the avoided cost proceeding, the Commission cited DEC's statement that most of DEC's PPAs with QFs are at variable rates as evidence for its conclusion. *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities*, Docket No. E-100, Sub 127, issued July 27, 2011, p. 18. PEC makes no such statement in its motion. And, even if such a statement could be made by PEC about its past experience, clearly QFs would make a different choice at a time of declining avoided cost rates. Moreover, in the current market, long-term fixed rates are a prerequisite for securing project financing. For a large scale solar or wind facility that did not exist two years ago, the elections of other QFs two years ago are not indicative of what the current elections would be. Finally, even if some QFs did elect variable rates during the pendency of the proceeding, this choice is the QFs, not the utility's, as clearly set forth in title 18, section 292.304(d)(2) of the Code of Federal Regulations.

III. CONCLUSION

32. REG opposes PEC's motion, as specifically set forth herein, as the utility's request for relief is inconsistent with Commission precedent and QFs' rights as established by PURPA. For this reason, REG respectfully requests that the Commission deny PEC's motion.

33. However, in the event the Commission is inclined to authorize PEC to suspend its rates, REG respectfully requests that the Commission condition its authorization with a CPCN-related exception, such that the rates approved in Docket E-100, Sub 127 are available to those QFs that have obtained CPCNs or have applied for CPCNs as of the date of the Commission's order on PEC's motion. In addition, in light of the certification exemption set forth in section 62-110.1(g) of the North Carolina General Statutes, the

authorization also should be conditioned on an exception for those smaller QFs that have made the filings required by Rule R8-65 of the Rules and Regulations of the North Carolina Utilities Commission.

34. Finally, with respect to a QF's right to long-term fixed rates, should the Commission be compelled to allow PEC to suspend current rates and allow PEC to make the proposed long-term fixed rate available, such suspension should be subject to true-up if the Commission approves a rate higher than the rate proposed by PEC, but not subject to being decreased if the Commission approves a lower rate.

WHEREFORE, Renewable Energy Group respectfully requests that the Commission consider these comments provided in this docket.

This the 21st day of November, 2012.

STYERS, KEMERAIT & MITCHELL, PLLC



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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing Reply Comments by Argand Energy Solutions, LLC ("Argand"), Birdseye Renewable Energy, LLC ("Birdseye"), Carolina Solar Energy, LLC ("CSE"), Community Energy Solar, LLC ("CES"), ENlight Solar, LLC ("ENlight"), FLS Energy, Inc. ("FLS"), Mid-Atlantic Renewable Energy Coalition ("MAREC"), National Renewable Energy Corporation ("NARENCO"), O2 Energies, Inc. ("O2"), SFL+a Architects, PA ("SFL+a"), Solbridge Energy, LLC ("Solbridge"), Strata Solar, LLC ("Strata"), SunEdison ("SunEdison"), Sunpower Corporation ("Sunpower"), and Sustainable Energy Solutions ("Sustainable") (collectively referred to as "Renewable Energy Group", "REG", or "Petitioners"), has been served this day by hand delivery, electronic mail or by depositing copies of same in a depository under the exclusive care and custody of the United States Postal Service in postage prepaid envelopes and properly addressed as follows:

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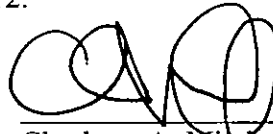
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This 21st day of November, 2012.




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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served a copy of the foregoing upon each of the parties of record in this proceeding or their attorneys of record by causing a copy of the same to be properly addressed to each and sent by email or deposited in the United States Mail, postage prepaid.

This the 21st day of November, 2012.


Gisele L. Rankin