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Clerk's Office
N.C. Utilities Commission

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION
DOCKET NO. E-100, SUB 136

In the Matter of:)
Biennial Determination of Avoided Cost Rates)
for Electric Utility Purchases from Qualifying)
Facilities - 2012)
REPLY
BRIEF IN OPPOSITION TO
PROGRESS ENERGY
CAROLINA'S MOTION

NCSEA'S REPLY BRIEF IN OPPOSITION TO MOTION

On 1 November 2012, Progress Energy Carolinas, Inc. ("PEC") filed a *Motion to Suspend the Availability of Previously Approved Schedule CSP-27 Long-Term Rates* ("Motion to Suspend"). On 8 November 2012, the North Carolina Utilities Commission ("Commission") issued an *Order Requesting Comments on [the Motion to Suspend]*. On 21 November 2012, pursuant to the Commission's 8 November Order, the Public Staff filed comments. The North Carolina Sustainable Energy Association ("NCSEA") files this reply brief to respond to several points made in the Public Staff's recently filed comments and to support NCSEA's previously briefed primary position that PEC's Motion to Suspend should be denied *in toto*:

1. Both PURPA and North Carolina law call for regulatory encouragement of the development of small power production, including solar power production. For example, 16 U.S.C. § 824a-3(a) directs the Federal Energy Regulatory Commission to make rules "to encourage cogeneration and small power production[.]" In North Carolina, N.C. Gen. Stat. § 62-133.8(d) provides in pertinent part that "[t]he terms of any contract entered into between an electric power supplier and a new solar electric facility or new metered solar thermal energy facility shall be of sufficient length to stimulate development of solar energy." (Emphasis added).

(ST)

AG

Grason

7- Comm

Watson

Green

Conrad

Duffley

Hoover

Sescoms

Kite

Hilburn

Jones

Hodge

1-Grabin

3-ps Legal

3-ps Acctg

2-ps Ec/As

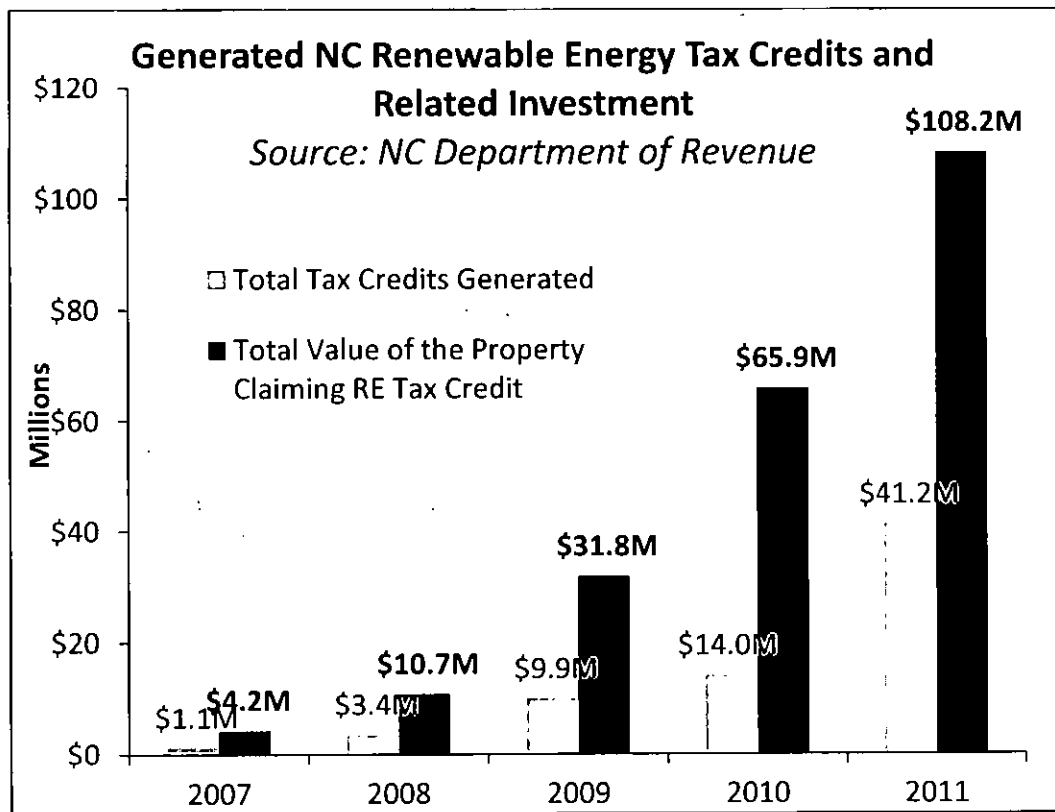
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2. While the availability of *proposed* fixed avoided cost rates instead of variable rates might satisfy the referenced North Carolina statutory language, the absence of an option for solar and other renewable developers to select a Commission-vetted and Commission-approved fixed 5-, 10-, or 15-year avoided cost rate does not comply with PURPA. Put another way: PURPA *and* North Carolina law are violated when only a take-it-or-leave-it variable rate is made available until new rates are established; PURPA is still violated (even if State law is not) by the mere added availability of *proposed, but unvetted*, fixed 5-, 10-, and 15-year avoided cost rates that are subject to upward true-up when new rates are established by Commission order.
3. The Public Staff's proposal in its recently-filed comments to make *proposed* fixed rates available to those QFs that miss any Commission-imposed deadline for grandfathering into the existing rates (*see* Public Staff Comments at ¶ 17) is an unacceptable option for two reasons:
 - a. First, despite this Commission's past holdings in similar circumstances, PEC's *proposed* fixed rates have not been determined to represent PEC's avoided costs in compliance with 18 C.F.R. 292.304.
 - b. Second, the magnitude of the drop in PEC's *proposed* fixed rates is a distinguishing factor that should be considered by the Commission in addressing PEC's Motion to Suspend. PEC's **20% lower** *proposed* fixed rates almost certainly underestimate avoided costs (neither Duke Energy Carolinas, LLC's or Dominion North Carolina Power's proposed rates reflect equally precipitous drops). Even if PEC's unvetted, *proposed* **20%**

lower fixed rates are made available to QFs, they may serve to discourage rather than stimulate development of small power production, including solar power production. Such discouragement may occur even if the rates only disrupt financing during the period between the filing of the *proposed* fixed rates and the Commission's approval of new, higher rates. *See, e.g.,* Public Staff Comments at ¶ 13 (the Public Staff "believes that denying long-term fixed avoided cost rates to QFs even for six months is unlawful because of the resulting negative effect on the availability of financing at a crucial time[.]"). PURPA should not be interpreted to empower incumbent utilities, through the mere *proposal* of significantly lower rates, to throttle back the encouragement and stimulation of QF development (even if only temporarily or on an interim basis).

4. It is for the reasons set out in the preceding paragraph that, "[g]enerally, an *approved* rate should remain in effect until a hearing is held and a new rate approved[.]" *Order on Pending Motions*, p. 1, Commission Docket No. E-100, Sub 74 (13 February 1995) (reciting Public Staff's argument) (emphasis added).
5. The rates established for PEC in Commission Docket No. E-100, Sub 127 have proven to be consistent with PURPA and North Carolina law; these rates – together with the REPS law and tax credits – are "encourag[ing] . . . small power production" and "stimulat[ing] development of solar energy." 16 U.S.C. § 824a-3(a); N.C. Gen. Stat. § 62-133.8(d).

6. There is evidence of this encouragement and stimulation, of which the Commission can take judicial notice under N.C. Gen. Stat. § 62-65.¹ As shown on the graph below,² in 2011 – the first full year of the E-100, Sub 127 biennium – private investment in property eligible for the State’s renewable energy tax credits exceeded \$100 million (at a maximum potential cost to taxpayers of less than \$42 million in credits eligible to be taken over a five year period).



¹ N.C. Gen. Stat. § 62-65(b) permits the Commission to take judicial notice of “public information and data published by official State . . . agencies”

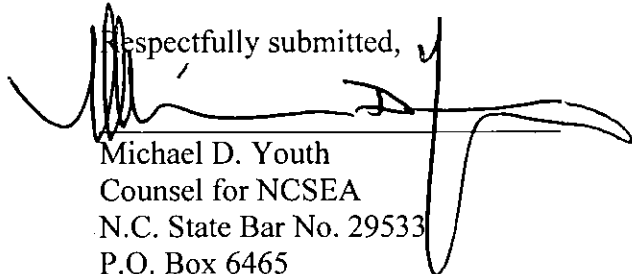
² The graph is derived from publicly available North Carolina Department of Revenue data. See http://www.dornrc.com/publications/incentives/2012/23b_ren_engy_prop_11.pdf (2011 data); http://www.dornrc.com/publications/incentives/2011/2_3b_%20ren_engy_prop10.pdf (2010 data); http://www.dornrc.com/publications/cred_inct_10/business_energy.pdf (2009 data); http://www.dornrc.com/publications/cred_inct_09/business_energy_credits.pdf (2008 data); and http://www.dornrc.com/publications/cred_inct/article3band3etc2007.pdf (2007 data).

NCSEA anticipates that the Department of Revenue's 2012 numbers, once released, will reflect an even larger positive investment-to-maximum potential cost impact during the second year of the E-100, Sub 127 biennium. NCSEA's expectation is supported by the large number of (and the aggregate nameplate capacity represented by) small power producer ("SP") dockets opened at the Commission in 2012.

7. The fixed rates approved in Commission Docket No. E-100, Sub 127 have been vetted and determined by the Commission to represent PEC's estimated avoided costs at least until new rates are established. These fully-vetted rates are successfully encouraging small power production and can continue to be used without violating PURPA regulations. *See, e.g.*, 18 C.F.R. 292-304(b)(5) ("In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery."). Given the unvetted, unexplained, development-suppressing **20% drop** in PEC's *proposed* fixed rates, the Commission should maintain the availability of PEC's Commission-vetted, Commission-approved, development-stimulating E-100, Sub 127 fixed rates until the *proposed* rates have been fully vetted and new fixed rates have been approved.

CONCLUSION

For the foregoing reasons, PEC's Motion to Suspend should be denied *in toto* and the PEC rates established in Commission Docket No. E-100, Sub 127 should continue to be made available to QFs until new rates are established.³

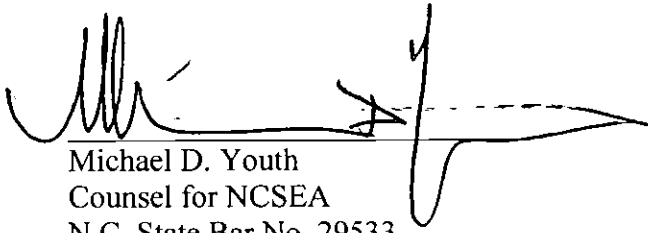
Respectfully submitted, 

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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 Brief in Opposition to Motion 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 December, 2012.


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³ NCSEA's alternative "fallback" arguments remain as set out in its 21 November 2012 Amended Brief.