Kendrick C. Fentress
Associate General Counsel

Mailing Address:
NCRH 20/P. O. Box 1551
Raleigh, North Carolina 27602

o: 919.546.6733
f: 919.546.2694

Kendrick.Fentress@duke-energy.com

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Dec 11 2017

December 11, 2017

VIA ELECTRONIC FILING

M. Lynn Jarvis
Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4300

Re: Joint Response in Opposition to NCSEA's Objection to Duke Compliance Filing and Motion for Clarification
Docket No. E-100, Sub 148

Dear Ms. Jarvis:

On behalf of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC, please find enclosed for filing a Joint Response in Opposition to Objection to Duke Compliance Filing and Motion for Clarification filed on November 28, 2017 by North Carolina Sustainable Energy Association in the above-referenced docket.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Kendrick C. Fentress
Associate General Counsel

Enclosure

cc: Parties of Record

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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	**DUKE ENERGY CAROLINAS, LLC'S AND DUKE ENERGY PROGRESS, LLC'S JOINT RESPONSE IN OPPOSITION TO OBJECTION TO DUKE COMPLIANCE FILING AND MOTION FOR CLARIFICATION FILED BY NORTH CAROLINA SUSTAINABLE ENERGY ASSOCIATION**

NOW COME Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP"), (collectively, the "Companies"), and hereby jointly respond in opposition to the Objection to Duke Compliance Filing and Motion for Clarification, filed in the above-captioned docket on November 28, 2017 ("Objection and Motion"), by North Carolina Sustainable Energy Association ("NCSEA"). Specifically, NCSEA objects to the Companies' November 13 compliance filing, wherein DEC and DEP included language in their respective Terms and Conditions to limit the transfer of a standard offer Schedule PP power purchase agreement ("PPA") to certain qualifying facilities ("QFs") that were owned by parties that sought to sell or were already selling power to DEC or DEP from QFs located within one-half mile. The Companies' amended Terms and Conditions are consistent with and authorized by Ordering Paragraph No. 18 of the Commission's October 11, 2017 *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities* ("Avoided Cost Order"). In contrast, the arguments NCSEA

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raises for the first time in response to the Companies' compliance filing are without merit and should be denied for the reasons discussed herein.

NCSEA's Objection and Motion are without Factual Basis and Merit and Should Be Denied.

With respect to its Objection and Motion, NCSEA requests that the Commission direct the Companies to file revised Terms and Conditions, omitting reference to the provision in Paragraph 1(e) of their Terms and Conditions that provides that standard offer PPAs "shall not be transferred and assigned by a Seller QF to any person, firm, or corporation that is party to any other PPA under which it sells or seeks to sell power to the Companies as a QF, if that party is located within one-half mile of the original Seller QF." NCSEA than requests that the Commission modify its Order to add findings and conclusions that the Companies' inclusion of this language in their Terms and Conditions is unwarranted and unreasonable. (Objection and Motion at 4). In support of its Objection and Motion, NCSEA argues that the Commission did not specifically approve inclusion of this provision in its Avoided Cost Order. Additionally, NCSEA argues that the Companies' proposed change is not reasonable or appropriate because it prevents a QF developer from artificially subdividing projects to avoid the eligibility threshold, which is contrary to the public interest. NCSEA's arguments are unfounded, however, and its Objection and requested Modification to the Commission's Avoided Cost Order should be denied.

A. Background

On November 15, 2017, the Companies filed their Joint Initial Statement, in which they proposed significant changes to the Commission's traditional Public Utility Regulatory Policies Act of 1978 ("PURPA") policies due to the "changing economic and

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regulatory circumstances – specifically the 'surging' growth of utility-scale QF power in North Carolina[.]" (Avoided Cost Order at 10). At the time of the evidentiary hearing in this matter, the Companies' testimony indicated that there were an estimated 4,900 MW of additional third-party QF solar capacity (approximately 3,800 MW in DEP and 1,100 MW in DEC) already in development and requesting to interconnect and sell power to the Companies. Evidence also showed that North Carolina was the fastest growing solar development marketplace in the Southeast and a leader in distributed utility-scale solar development nationally. (Avoided Cost Order at 10-11). The Companies' witness Lloyd Yates testified that North Carolina was at a "critical crossroads regarding the integration, development, and customer costs of renewable generation, specifically solar QF generation, under PURPA." (Avoided Cost Order at 9). Against this backdrop, the Companies proposed changes to their standard offer PPA and Terms and Conditions that reflected the current economic and regulatory circumstances. Included in these proposed changes was the amendment to Paragraph 1(e) of the Companies' standard Terms and Conditions, which provides as follows:

> A Purchase Power Agreement shall not be transferred and assigned by Seller to any person, firm, or corporation that is party to any other purchase agreement under which a party sells or seeks to sell power to the Company from another Qualifying Facility that is located within one-half mile, as measured from the electrical generating equipment.

For the reasons discussed herein, the Companies' inclusion of that amendment was approved by the Commission and is reasonable and appropriate.

B. <u>The Commission Approved and Authorized the Companies' Proposed Revision to Paragraph 1(e) of their Terms and Conditions in its Order</u>.

As NCSEA acknowledges, the Companies included the proposed amendment to Paragraph 1(e) of their standard Terms and Conditions in their November 15, 2016 Joint

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Initial Statement. Contrary to NCSEA's assertion that the Companies did not provide any explanation of why such a change was necessary and appropriate (Objection and Motion at ¶11, p. 6), the Companies' Joint Initial Statement clearly explained the reasoning for and importance of incorporating this clarifying provision into the Companies' standard Terms and Conditions that accompany the Companies' Schedule PPs:

> This clarification relates to the availability of the Companies' Schedule PPs. Schedule PP is not available to a QF owned by a customer or affiliate or partner of a customer who sells power to the Companies from another QF of the same energy resource located within one-half mile, as measured from electrical generating equipment, unless the combined capacity is equal to or less than one MW. These amendments to the Terms and Conditions are intended to prevent evasion of this geographic restriction through subsequent consolidation of ownership of QFs after their PPAs under the standard offer have been executed.

(Joint Initial Statement at 30-31).

The Commission also heard testimony on this proposed amendment at the evidentiary hearing from the Companies' witnesses Kendal C. Bowman and Gary R. Freeman under examination by intervenor Cypress Creek Renewables, LLC – a large developer/investor in solar QF projects ("Cypress Creek"). (Tr. Vol. 4 at 10-19). The Companies then expressly included approval of the provision in their joint Proposed Order Establishing Standard Rates and Contract Terms for Qualifying Facilities ("Joint Proposed Order"), filed in this docket on June 22, 2017, including a proposed, specific finding of fact supporting inclusion of the provision, as well as specific evidence and conclusions. (Joint Proposed Order, Finding of Fact No. 22 and at 161-62). Thus, the issue of including this amendment in the Companies' Terms and Conditions was properly and squarely before the Commission for determination.

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Although the Commission did not make a specific finding of fact on the inclusion of this provision in its Avoided Cost Order, the Commission did expressly state in its Ordering Paragraph No. 18 that "the proposed schedules, supporting calculations, and purchase power agreement and terms and conditions, except as specifically addressed in this order, *are approved* and shall be implemented." (Avoided Cost Order at 111) (Emphasis added). Therefore, contrary to NCSEA's assertion underlying its Objection and Motion, the Commission clearly and expressly approved the amendment to the Terms and Conditions in addition to those changes specifically approved in the Avoided Cost Order. Moreover, including language providing for general approval of a utility's rate schedules and terms and conditions of service, except as expressly addressed and modified by the Commission, is reasonable and consistent with prior Commission practice approving terms and conditions of utility service in other recent complex cases. *See e.g., Order Approving Rate Increase and Cost Deferrals and Revising PJM Regulatory Conditions*, Docket No. E-22, Sub 532 at 147 (Dec. 22, 2016) (approving numerous revisions to utility rate schedules except as specifically addressed by the Commission in its Order); *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities* Docket No. E-100, Sub 136 at 50 (Feb. 21, 2014). As such, NCSEA's Objection and Motion is without factual basis and should be denied.

C. NCSEA Has Failed to Justify the Commission's Reconsideration of its Prior Approval of Inclusion of a Provision in the Companies' Terms and Conditions that is Consistent with the "Half-Mile Rule."

Because the Commission has already approved inclusion of the amendment to the Companies' standard Terms and Conditions in its Order, NCSEA's motion for "modification" or "clarification" appears to be in fact a motion for reconsideration of the

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Commission's prior determination. *See* G.S. § 62-80 (providing that the Commission may under the circumstances listed "rescind, alter, or amend any order or decision made by it"). The Commission's decision to rescind, alter or amend an order upon reconsideration under G.S. § 62-80 is within the Commission's discretion. *Order Denying NC Warn's Motions for Reconsideration and to Compel Discovery*, Docket Nos. E-2, Sub 998 and E-7, Sub 986, at 8-9, Dec. 10, 2012 ("Reconsideration Order"), *citing* 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, however. Rather, there must be some change in circumstances or a misapprehension or disregard of a fact that provides a basis for the Commission to rescind, alter or amend a prior order. Reconsideration Order at 9, *citing* 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).

NCSEA has identified no change in circumstances nor any misapprehension or disregard of fact that compels the Commission to alter its prior decision. NCSEA's arguments against inclusion of this provision are not new; they are untimely. As NCSEA notes, the Companies identified the proposed amendment, explained the rationale supporting the proposed amendment in the Joint Initial Statement, provided testimony in response to cross-examination on the issue at the evidentiary hearing, and then specifically included approval of the provision in their Joint Proposed Order. In contrast, NCSEA did not appear to challenge this provision at the evidentiary hearing and made no mention of this issue in its Proposed Order, filed in this docket on June 22, 2017. Although NCSEA now argues inclusion of this amendment is inappropriate, it appears

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that NCSEA did not deem it sufficiently concerning to challenge until now.[1] NCSEA should not be allowed to sit on its rights to counter this issue at the evidentiary hearing and then through its Proposed Order, only to raise the issue after the Commission has made its decision and issued an order.

Moreover, the evidence at the hearing supports the Commission's decision. NCSEA's selective citation of the testimony at the evidentiary hearing in its Objection and Motion does not discuss the provision's relationship to the "half-mile rule" included in the Companies' Schedule PPs. Significantly, the half-mile rule does not prevent the sale or transfer of ownership of a QF in any way. It simply limits the availability of the rates and terms of standard offer Schedule PP to require that QFs requesting to sell power under Schedule PP not be owned by a customer or affiliate or partner of a customer who sells power of the same energy resource to DEC or DEP, located within one-half mile, as measured from the electrical generating equipment, unless the combined capacity of the two is equal to or less than 1 MW. In this respect, the half-mile rule reflects the intent of the standard offer, which is to make available standard Terms and Conditions to smaller QFs that "probably would not have the resources or the expertise to negotiate a contract with a utility if these standard options were not available." *Order Establishing Levelized Rates for Cogenerated Power and Maintaining Interconnection and Wheeling Policies* at 12, Docket No. E-100, Sub 41A (Jan. 22, 1985). As the evidence at the hearing demonstrated, however, "solar QFs are no longer being developed by small, fledgling project developers . . . ." (T. Vol. 2 at 388). Instead, at the time of the evidentiary hearing, "six large power generation developers, which are participants in the energy

[1] It appears only Cypress Creek and not NCSEA raised this amendment to the Companies' Terms and Conditions prior to the Commission issuing its Avoided Cost Order. NCSEA, however, is the sole party seeking reconsideration through the instant Objection and Motion.

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supply industry across the United States, account[ed] for more than 65% of the standard offer projects in the Companies' combined interconnection queues between 1 MW and 5 MWs." (Tr. Vol. 2 at 388). Prior to the evidentiary hearing, two solar developers with facilities in North Carolina, Cypress Creek and FLS, had merged. (Tr. Vol. 4 at 15). In the Companies' experience, QFs may change ownership multiple times (Tr. Vol. 4 at 17), which may result in the corresponding transfer of PPAs. The Companies were concerned about "gaming the system" by breaking up projects into smaller ones to obtain the standard offer. (T. Vol. 4 at 12; *see also,* T. Vol. 2 at 387 (discussing disaggregation of larger projects into smaller ones to obtain the standard offer)). Because the ownership of the smaller QFs appeared to be concentrating more into larger QF solar developers, the Companies believed it was necessary to protect and clarify the intent and operation of the half-mile rule in the new Schedule PPs to be approved in this proceeding. They did so by including this provision in their Terms and Conditions to prevent evasion of the eligibility limitation (now 1 MW) in the standard offer through subsequent consolidation of ownership of QFs after their PPAs under the standard offer had been executed. Thus, the intent of this amendment to DEC's and DEP's respective Schedule PP Terms and Conditions complements and is consistent with pre-existing half-mile rule because it prevents QF developers from developing or owning multiple standard offer QFs that would exceed the nameplate eligibility approved in the standard offer tariff. Like the half-mile rule, this amendment in no way impedes the sale or transfer of a QF between parties. QFs that are subject to the half-mile rule remain eligible to sell power to the Companies through negotiated PURPA rates but are not eligible to both aggregate

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multiple QFs within a half-mile and to also benefit from the standard offer Schedule PP available to small QFs. (Tr. Vol. 4 at 18).

NCSEA further argues that the Commission should alter its prior decision in this matter because the Companies have not shown evidence of any collusive activity by QFs that would justify inclusion of this provision in the Terms and Conditions. (Objection and Motion at 5-7). Again, this is not new information, as this evidence was squarely before the Commission when it rendered its decision. (Tr. Vol. 4 at 14 and 15). There is no requirement, however, that the Companies must wait for demonstrable collusion or harm before including provisions in their Terms and Conditions for the Commission's approval. To the contrary, the Companies' tariffs (of which the Terms and Conditions are a component) are intended to provide public notice of the terms and conditions governing the relationship between DEC or DEP and the QF. *See Summary Judgment and Order Denying Petition to Intervene*, Docket No. E-2, Sub 823 at 7, issued March 7, 2003 (explaining that the tariff is the means by which the utility "communicates its rates, terms and obligations to the public[.]"). The Companies' standard offer tariffs also work to prevent unreasonable discrimination among QFs eligible for the standard offer. For example, application of the half-mile rule without this clarifying provision could result in different treatment of QFs of the same generating technology that are located within a one-half mile of another QF owned by an affiliate, simply due to whether common ownership was established prior to or after execution of a PPA. Although the Companies' witness Freeman testified that the provision imposed additional restrictions on the applicability of the standard offer, the Companies' Terms and Conditions reflect in part the Companies' response to the rapid pace of development and the "distorted

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marketplace" for solar projects that existed at the time of the filing. (Avoided Cost Order at 16). Furthermore, the Commission's approval of inclusion of this amendment is consistent with its finding that the current economic and regulatory circumstances made it appropriate "to establish avoided cost rates and to alter the contract terms for QFs in light of these changed circumstances." (Avoided Cost Order at 19). Accordingly, NCSEA's Objection and Motion should be denied, and the Commission should not alter or modify its prior approval of the Companies' Terms and Conditions.

WHEREFORE, for the reasons set forth above, Duke Energy Carolinas, LLC and Duke Energy Progress, LLC respectfully request that the Commission deny NCSEA's Objection and Motion.

This the 11th day of December, 2017.

Kendrick C. Fentress
Associate General Counsel
Duke Energy Corporation
P.O. Box 1551/NCRH 20
Raleigh NC 27602
(919) 546-6733 (phone)
Kendrick.Fentress@duke-energy.com

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CERTIFICATE OF SERVICE

I certify that a copy of Duke Energy Carolinas, LLC's and Duke Energy Progress, LLC's Joint Response in Opposition to NCSEA's Objection to Duke Compliance Filing and Motion for Clarification in No. E-100, Sub 148 has been served by electronic mail, hand delivery, or by depositing a copy in the United States Mail, 1st Class Postage Prepaid, properly addressed to parties of record.

This the 11th day of December, 2017.

Kendrick C. Fentress
Associate General Counsel
Duke Energy Corporation
P.O. Box 1551 / NCRH 20
Raleigh, North Carolina 27602-1551
Telephone: 919.546.6733
Fax: 919.546.2694
Kendrick.Fentress@duke-energy.com