



14 August 2014

**FILED**

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Clerk's Office  
N.C. Utilities Commission

To: Chief Clerk Gail Mount  
The North Carolina Utilities Commission  
4325 Mail Service Center  
Raleigh, NC 27699-4325

From: The North Carolina Sustainable Energy Association  
P.O. Box 6465  
Raleigh, NC 27628

Re: Letter Regarding Electric Utilities' Motion to Dismiss and Response to CCCP  
Complaint  
(Docket Nos. E-2, Sub 1050; E-7, Sub 1060; E-22, Sub 511)

Honorable Clerk and Commissioners:

I serve as counsel and policy director for the North Carolina Sustainable Energy Association ("NCSEA"). On 6 August 2014, a number of electric utilities, including Duke Energy Progress, Inc. ("DEP"), filed a *Motion to Dismiss and Response to [the] Complaint* filed by Coastal Carolina Clean Power LLC ("CCCP") ("*Motion and Response*"). NCSEA is not a party to this proceeding but does believe the Motion and Response raises a legal question of broad significance that merits careful Commission scrutiny.

*A Question of Law Meriting Careful Commission Scrutiny*

An electric utility has a number of options for structuring its purchase of energy, capacity, and renewable energy certificates ("RECs") from a qualified facility ("QF"), such as CCCP. The utility may, for example, (a) purchase energy and capacity from the QF, (b) purchase RECs from the QF, or (c) purchase both energy and capacity *and* RECs from the QF. As to option (c), the utility has two sub-options. The utility can execute separate agreements to purchase energy and capacity and RECs from a single QF (*i.e.*, the utility can execute a power purchase agreement ("PPA") for purchasing the QF's energy and capacity and execute a separate REC purchase agreement for purchasing the QF's RECs). Alternatively, the utility can execute a single "bundled" agreement for the QF's energy, capacity, and RECs. The Motion and Response appear to refer to such a "bundled" agreement as a "renewable energy purchase agreement" or "RPPA."

The Motion and Response places before the Commission a question of law that has implications beyond the instant matter. To wit: **Is PURPA applicable to a utility's purchase of QF energy and capacity even when that purchase takes place as a component of a "bundled" RPPA?**

The Motion and Response appears to argue that this question of law is settled and that the answer is no. NCSEA, however, believes the question is unsettled and that the answer should be yes.

*How the CCCP-DEP Relationship Illustrates  
the Importance of the Question*

"DEP admits that it and CCCP are parties to a[n] RPPA that became effective on July 30, 2008 and expires on December 31, 2014, pursuant to which DEP purchases energy, capacity, and RECs from CCCP." Motion and Response, Section V, Paragraph 17. "DEP denies[, however,] that CCCP has attempted since late 2012 to secure a new PPA for energy and/or capacity with DEP. [DEP asserts that] CCCP has never requested nor made any efforts to enter into a PPA under PURPA with DEP, and therefore, DEP denies that CCCP has been prepared to commit its capacity to DEP or has sought a 15-year PPA with DEP." *Id.* at Section V, Paragraph 18. Yet DEP subsequently admits "that it has offered CCCP its avoided cost rate for energy and capacity, and CCCP has demanded a price higher than DEP's avoided cost." *Id.* at Section V, Paragraph 29.

The Commission should ask itself: *Why would DEP have offered CCCP its avoided cost rate for energy and capacity if, as DEP asserts, CCCP had never requested nor made any efforts to enter into a PPA under PURPA?* DEP's apparent answer to this question involves a stretch legal argument regarding the applicability of PURPA.

*DEP's Argument for Non-Applicability  
of PURPA to RPPAs*

The Motion and Response does not deny that at least one of the named respondents has a PURPA obligation in this proceeding: "The sole electric supplier with a PURPA obligation to purchase energy and capacity from CCCP is DEP." *Id.* at Section III, Paragraph 1. The Motion and Response does, however, appear to deny that CCCP has any PURPA-based rights to arbitration. The Motion and Response asserts that "CCCP has never requested that DEP enter into a PPA under PURPA." *Id.* Instead, according to the Motion and Response, "CCCP has expressed an interest in selling, *exclusively under an arrangement that falls outside of PURPA*, biomass-to-energy, poultry-litter to energy, and associated RECs to DEP and the RFP Group." *Id.* at Section V, Paragraph 22 (emphasis added).

By way of explanation, DEP states,

DEP has always been, and continues to be, willing to pay CCCP its avoided cost for energy and capacity under a PPA, if CCCP desires to enter into such an agreement under PURPA. PURPA does not require DEP or any other Respondent to enter into a[n] RPPA] and/or a [REC]

purchase agreement, as *inter alia*, renewable energy and RECs arise as a matter of North Carolina, not federal law.

*Id.* at Section III, Paragraph 1. The Motion and Response goes on to argue that “[t]he matter of procuring renewable energy or RECs from any developer or project is an issue explicitly left to the electric power suppliers to manage through the individual procurement processes to comply with the obligations of Senate Bill 3.” *Id.* at Section III, Paragraph 2.

NCSEA's Basis for Commission Application of PURPA  
(and PURPA-Based Arbitration Rights) to, at a Minimum,  
the Energy and Capacity Components of an RPPA

The Motion and Response essentially argues that if a “PPA under PURPA” is bundled with a REC purchase agreement, it is somehow transformed into “an arrangement that falls outside of PURPA.” This argument elevates form over substance. In substance, an RPPA is nothing more than a PPA under PURPA bundled with a REC purchase agreement. In fact, when it comes to the utility’s annual cost recovery rider applications, the utility will have to be able to segregate the costs incurred under the RPPA for (a) energy and capacity and (b) RECs.<sup>1</sup> The reality is that, despite the bundled purchase of energy, capacity, and RECs in one agreement, the purchases are discrete under the law, meaning the purchase of energy and capacity as part of an RPPA remains in substance a purchase pursuant to a PPA under PURPA.

Furthermore, the Commission has made clear that

[u]nder PURPA, a larger QF is just as entitled to receive payment of full avoided costs as a smaller QF . . . [and] that, absent an approved, active solicitation, issues that are not resolved in negotiations between a utility and a larger QF are subject to arbitration by the Commission at the request of either the utility or the QF for the purpose of determining the utility’s actual avoided cost, including both capacity and energy components, as long as the QF is willing to commit its capacity to the utility for a period of at least two years. Such arbitration would be less time-consuming and expensive for the QF than the previously available complaint process.

*Order Establishing Standard Rates and Contract Terms for Qualifying Facilities*, p. 17, Commission Docket No. E-100, Sub 106 (19 December 2007).<sup>2</sup>

As such, no reason exists to exclude the energy and capacity components of an RPPA from eligibility for PURPA-based arbitration.

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<sup>1</sup> To recover the cost for purchased RECs under a REPS cost recovery rider, the cost must be discrete. N.C. Gen. Stat. § 62-133.8; Commission Rule R8-67. Similarly, to recover the cost for purchased energy and capacity under a fuel and fuel-related cost recovery rider, the cost must be discrete. N.C. Gen. Stat. § 62-133.2; Commission Rule R8-55.

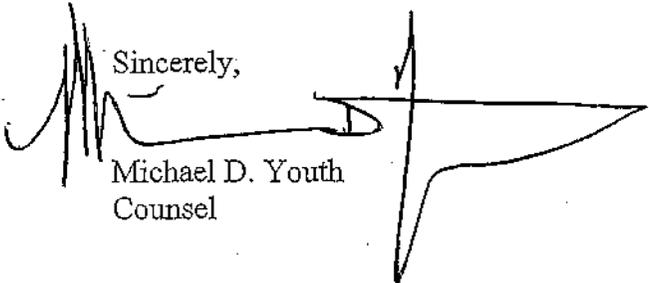
<sup>2</sup> For simplicity’s sake, within this letter, the term “arbitration” includes a consent arbitration proceeding brought pursuant to N.C. Gen. Stat. § 62-40 as well as a complaint proceeding that essentially seeks forced arbitration brought pursuant to N.C. Gen. Stat. § 62-73.

*The Commission Has Authority to Review More Than Just  
the Energy and Capacity Components of an RPPA  
that is Being Arbitrated*

Once eligibility for PURPA-based arbitration has been established, the scope of the arbitration appears to be within the discretion of the Commission. *See, e.g., Order Establishing Standard Rates and Contract Terms for Qualifying Facilities*, pp. 24-25, Commission Docket No. E-100, Sub 127 (27 July 2011) (“any unresolved issues arising from such negotiations will be subject to arbitration”). Given the breadth of the Commission’s general powers<sup>3</sup> and its “full power and authority to administer and enforce the provisions of this Chapter,”<sup>4</sup> including the REPS requirements codified in N.C. Gen. Stat. § 62-133.8, it would appear to be well within the Commission’s discretion to at least mediate, if not arbitrate, the REC purchase agreement component of an RPPA where arbitration on the energy and capacity components is ongoing.

Commission extension of the scope of the RPPA arbitration proceeding to include mediation/arbitration of REC pricing would not have the deleterious effect the Motion and Response asserts. Rather than “undermining the negotiating process and placing the Commission in the position of selecting winners and losers in what should remain a bargaining/market process[,]” Motion and Response, Section III, Paragraph 3, Commission exercise of supplemental jurisdiction over the REC pricing issue would actually serve to ensure that, at least in arbitration proceedings, the utility-asserted “bargaining/market process” is not simply a one-sided process in which the utility exercises unilateral discretion to set REC prices and thereby select winners and losers.

Sincerely,

  
Michael D. Youth  
Counsel

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<sup>3</sup> N.C. Gen. Stat. § 62-30

<sup>4</sup> N.C. Gen. Stat. § 62-31