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December 5, 2012

FILED

DEC 05 2012

Clerk's Office
N.C. Utilities Commission

Gail L. Mount
Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, NC 27699-4325

RE: Docket No. E-100, Sub 136
Docket No. E-100, Sub 127

Dear Mrs. Mount:

Enclosed for filing are the original and thirty (30) copies of Duke Energy Carolinas, LLC and Progress Energy Carolinas, Inc.'s Reply Comments in the above referenced dockets.

Sincerely,

Kendrick C. Fentress
Associate General Counsel

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STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

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

FILED
DEC 05 2012
Clerk's Office
N.C. Utilities Commission

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of:

Biennial Determination of)	PROGRESS ENERGY CAROLINAS, INC.'S
Avoided Cost Rates for)	AND
Electric Utility Purchases)	DUKE ENERGY CAROLINAS, LLC'S
from Qualifying Facilities -)	REPLY COMMENTS
2012)	
)	

Pursuant to the North Carolina Utilities Commission's *Order Requesting Comments on Motion to Suspend Availability of Avoided Cost Rates*, issued on November 8, 2012, ("Order") Progress Energy Carolinas, Inc. ("PEC") and Duke Energy Carolinas, LLC ("DEC") (collectively, the "Companies) jointly submit their comments in reply to the comments of the Public Staff of the North Carolina Utilities Commission ("Public Staff"), the North Carolina Sustainable Energy Association ("NCSEA"), the Renewable Energy Group ("REG"), and EWP, LLC ("EWP") filed on November 21, 2012.

Background

1. On November 1, 2012, PEC filed a motion in the above-captioned dockets to suspend ("motion to suspend") as of December 1, 2012, its long-term avoided cost rates as shown in its Schedule CSP-27. In support of its motion to suspend, PEC stated that on November 1, 2010, in Sub 127, it filed its then current avoided cost information pursuant to Section 292.103 of the Federal Energy Regulatory Commission ("FERC") regulations implementing Section 210 of the Public Utility Regulatory Policies Act of

1978 (“PURPA”). The Commission approved the avoided cost rates on PEC’s Schedule CSP-27 by Order issued July 27, 2011. Pursuant to the Commission’s Order of June 18, 2012 in Docket No. E-100, Sub 136, PEC filed its proposed new avoided costs and rates for purchases from Qualified Facilities (“QFs”) eligible for proposed Schedule CSP-29 on November 1, 2012. PEC’s proposed Schedule CSP-29 long-term rates are lower than the existing Schedule CSP-27 rates because of declining cost projections. Thus, PEC contended that the proposed rates may prompt QFs to try to “lock in” at the higher current rates before the Commission issues an order addressing PEC’s proposed rates. PEC’s proposed a solution to this problem by requesting the Commission to authorize it to revise its currently approved Schedule CSP-27 to provide that PEC will suspend those long-term rates as of December 1, 2012, and instead make available to QFs seeking purchase power agreements (“PPAs”) its currently-approved variable rates on Schedule CSP-27. These rates would remain available to QFs seeking to contract with PEC during the period of time between December 1, 2012 and the date that the Commission issues its order in Docket No. E-100, Sub 136 (“Sub 136”), approving PEC’s new long-term rates. PEC further stated that QFs that execute PPAs containing the variable rates after the December 1, 2012 expiration of the long-term rates on CSP-27 would be allowed to amend their contracts to select one of the long-term rates for which they are eligible once new avoided cost rates are approved by the Commission.

2. On November 6, 2012, NCSEA filed a brief opposing PEC’s motion to suspend, asking that it be denied or, in the alternative, allowed subject to certain conditions the Commission had previously allowed and as outlined in the brief.

3. On November 8, 2012, the Commission issued its Order, requesting that interested parties file comments no later than November 21, 2012, and that PEC and all other parties file reply comments on December 5, 2012.

4. On November 21, 2012, the Public Staff, NSCEA, REG and EWP filed comments as summarized below.

Comments

Public Staff

5. Given the declines that appear to have occurred in the current projections of fuel costs and the potential effects that such declines may have on avoided energy rates, the Public Staff shared PEC's concern that the avoided cost rates approved in the previous biennial avoided cost proceeding should not remain available until Commission's final order in the Sub 136 proceeding. It did not, however, support PEC's proposed solution. Instead, the Public Staff argued that PEC's solution was inconsistent with PURPA and the implementing regulations of the FERC. The Public Staff also asserted that PEC's proposed solution is unfair to QFs that have incurred the expense of pursuing applications for certifications of public convenience and necessity (CPCNs) prior to PEC's filing of its proposed rates on November 1, 2012. Citing the Commission's decisions in two arbitrations involving QFs, the Public Staff contended that the Commission had previously addressed a QF's right to long-term avoided cost rates and the circumstances that give rise to a legally enforceable obligation ("LEO"). In those arbitrations, the Commission recognized that the creation of an LEO gives a QF the option to choose to sell power "as available" or to sell power pursuant to the LEO over a specified term. If the QF chooses the latter option, it then may chose rates calculated at

the time the obligation is incurred. Thus, according to the Public Staff, PEC's proposal to suspend the availability of long-term rates temporarily during the Commission's review of the pending rates is inconsistent with the Commission's interpretation of PURPA.

6. The Public Staff also contested PEC's proposal to suspend the long-term rates for those QFs that have not signed a PPA with PEC as of November 1, the date the new proposed rates are filed. Using the signing of a PPA as the determining factor is inappropriate, according to the Public Staff, because it leaves the QF's options entirely in the hands of the utility.

7. The Public Staff also acknowledged that the current avoided cost tariffs of DEC and Virginia Electric & Power Company, d/b/a/ Dominion North Carolina Power ("DNCP"), approved in Sub 127, provide for a process that is similar to PEC's proposal. The Public Staff stated that it intended to address this process in its initial comments on the electric public utilities' filings in the Sub 136 proceeding.

8. The Public Staff offered an alternative solution that it indicated was consistent with PURPA, the FERC's regulations and orders, and the Commission's previous determinations. For QFs that filed their CPCNs on or before November 1, 2012, and receive their CPCNs by Orders issued January 16, 2013, they are eligible for any of the avoided cost rate options in the currently approved Schedule CSP-27, including the long-term options. For QFs that file applications for CPCNs after November 1, 2012, PEC should be required to sign contracts at whichever of the new proposed rates the QF chooses – subject to upward adjustment if the Commission ultimately approves avoided cost rates that are higher. The Public Staff also recommended that, because QFs fewer than two megawatts (MW) are exempted from the CPCN requirement, they are eligible

for the currently approved Schedule CSP-27 if they filed their report of proposed construction by or on November 1, 2012. If they have not filed by that deadline, then they would be eligible for the proposed, long-term rates.

REG

9. REG's initial comments were similar to the Public Staff's. REG also argued that PEC's requested relief is contrary to Commission precedent and rules because PEC's request does not contain a CPCN exception, and it provides insufficient notice to QFs in project development. REG also commented that PEC's proposal jeopardizes many QFs that are in project development due to the unforeseen downward adjustment.

10. Specifically, REG asserted that PEC's request is inconsistent with DEC's request for interim relief in the 1996 avoided cost proceeding in Docket No. E-100, Sub 79. In that proceeding, DEC requested that the Commission suspend the previously approved rates and authorize DEC to offer to QFs the proposed rates until the Commission approved new rates. DEC agreed to sign contracts at the rates established in the previous avoided cost proceeding with QFs with CPCNs as of the date of its motion and QFs with applications for CPCNs actively pending filed prior to the date of this motion. The Commission allowed DEC's motion, requiring DEC to make exceptions for QFs not yet under contract, which were either: (a) certificated; or (b) had filed applications for CPCNs. The Commission subsequently allowed DEC to amend its standard contract and tariff to suspend the rates in the next biennial proceeding.

11. Like the Public Staff, REG noted that QFs under two MWs are exempt from the CPCN requirement and are instead required to file reports of proposed construction. These QFs should be entitled to the same protections as larger QFs.

12. Also like the Public Staff, REG argued that PEC's proposal was contrary to PURPA because QFs are entitled to rates derived from avoided costs at the time the LEO arises. The Commission has determined that an LEO arises when the QF commits itself to sell its output and has a CPCN in hand. Additionally, PURPA establishes that a QF is entitled to long-term, fixed rates at the QF's option so that an investor can estimate with reasonable certainty an expected return on a potential investment. REG cited the Public Staff's arguments that instead of allowing variable rates be made available, the Commission should "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."¹ Finally, REG echoed the Public Staff's proposed alternative to PEC's solution, except that it argued that the old rates should apply to QFs that had obtained CPCNs or have applied for CPCNs as of the date of the Commission's order on PEC's motion.

NCSEA

13. NCSEA asserted that PEC's motion to suspend its long-term rates should be denied for the reasons stated by the Public Staff in opposition to a similar motion filed by Duke Power in the 1994 avoided cost proceeding and in response to DEC's and DNCP's proposal to include a similar cut-off date in their proposed tariffs in the 2010 avoided cost proceeding.

14. NCSEA also contended that PEC's motion to suspend should be denied because of its impact on new solar and solar thermal facilities. These facilities rely upon their PPAs to obtain project financing. In support, NCSEA cited North Carolina Gen.

¹ REG's Comments at p.10.

Stat. § 62-133.8(d), which provides that the 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 the development of solar energy. A variable rate is of insufficient length to stimulate development of solar energy, because it does not enable the investor to estimate with reasonable certainty the expected return on a potential investment. Thus, NCSEA concluded that the rates that the Commission approved in the 2010 avoided cost proceeding should remain in effect for new solar electric and new metered solar thermal facilities until the Commission approves new rates.

15. In a footnote, NCSEA asserted that making the proposed 5-, 10-, or 15 year avoided cost rates available to QFs in the interim, subject to later true-up when new rates are approved by the Commission, is not acceptable because the proposed rates have not been approved by the Commission in compliance with 18 CFR 292.304(a) and (b)(2) and (3).

16. In the alternative, however, NCSEA proposed that if the Commission were to allow PEC's motion to suspend, it do so subject to certain conditions. First, PEC should not be able to seek retroactive relief. Second, PEC should exempt certain projects that obtained CPCNs prior to the filing of the motion. Third, as in Docket No. E-100, Sub 74, the "cut-off" date for the CPCN exception should be approximately three months from when PEC filed the motion – February 13, 2013.

EWP

17. EWP is currently redeveloping an existing hydroelectric plant known as Eury Dam on the Little River in Montgomery County, North Carolina. It began its

redevelopment efforts in 2011. In expending its own funds and obtaining funding commitments from others, EWP has performed financial analysis based on PEC's Schedule CSP-27. As this project is intended to become operational before the Commission's approval of new long-term avoided cost rates to replace CSP-27, EWP has relied upon the availability of the long-term rates stated in CSP-27. EWP characterizes PEC's motion to suspend as "abandon[ing] the long term rates made effective August 26, 2011 in Schedule CPS-27."² EWP then contrasted the notice that DEC provides in its tariff with the lack of such a provision in PEC's currently approved tariff, arguing that PEC failed to give EWP an opportunity to obtain the rates upon which it relied when deciding to bring the Eury project back into operation.

Reply Comments by DEC and PEC

18. Having reviewed the Comments of the Public Staff, REG, NSCEA, and EWP, the Companies believe that PEC can resolve the majority of the issues raised by the parties by agreeing to implement the Public Staff's proposed solution. In other words, PEC agrees that, for QFs that filed their applications for CPCNs no later than November 1, 2012, and receive CPCNs by Orders issued by January 16, 2013, they are entitled to any of the avoided cost rate options in Schedule CSP-27, which was approved in 2011 in the 2010 avoided cost proceeding, including the long-term options to which they are otherwise eligible. For QFs that filed applications for CPCNs after November 1, 2012, PEC shall sign contracts at whichever of the new, proposed rates the QFs chooses, subject to an upward adjustment if the Commission ultimately approves avoided cost rates that are higher. The upward adjustment, or "true-up" would start at the effective

² Comments in Opposition to Progress Energy Carolinas Motion to Suspend Previously Approved Schedule CSP-27, at Para. 5.

date of the impacted PPAs. The same process would apply to QFs that are under two MW in size. For those QFs that have filed their reports of construction by November 1, 2012, they are eligible for avoided cost rates shown in Schedule CSP-27, and for QFs that do not meet this deadline, they are eligible for the new, proposed rates, subject to an upward adjustment if the Commission ultimately approves higher avoided cost rates.

19. In agreeing to this proposal, PEC does not concede that the process it initially proposed in its motion to suspend is contrary to PURPA, FERC regulations or orders, or to the Commission's previous determinations. PEC agrees, however, that the process offered by the Public Staff balances both PEC's concerns about QFs trying to "lock in" at stale, long-term avoided cost rates that no longer reflect its actual avoided costs and the majority of the Public Staff's, REG's, NCSEA's and EWP's concerns about the continued availability of long-term rates, while remaining consistent with PURPA, FERC's regulations and orders, and the Commission's previous determinations. PEC believes it is unlikely that QFs would fault this proposal if PEC's proposed rates were increasing, and not decreasing. Additionally, the Public Staff stated that it would address the currently proposed avoided cost tariffs of DEC, PEC, and DNCP, which propose to suspend the proposed long-term rates in the 2014 avoided cost proceeding, in its Sub 136 comments. DEC and PEC intend to respond to those arguments on the merits at that time, and do not now concede that the proposed tariffs are improper. Nevertheless, PEC believes that it may resolve its pending motion to suspend at this time by adopting this process now for purposes of the Sub 136 proceeding only.

20. Accordingly, DEC and PEC request that the Commission approve its proposal to adopt the Public Staff's proposed process at this time. First, as noted by the

Public Staff, its proposal is consistent with this Commission's prior decisions. In Docket No. E-100, Sub 79, Duke Power, Carolina Power & Light (CP&L) and North Carolina Power (N.C. Power) filed motions to suspend the availability of their previously approved long-term rates, each making essentially the same arguments that PEC does here – current avoided costs were lower than those on which the older, approved avoided cost rates were based, thereby resulting in an overpayment for purchased energy and capacity using the older rates. In addition, the utilities argued that filing a proposal to lower avoided cost rates sometimes prompt QFs to “lock in” at the higher, currently approved rates before the Commission acts. In its *Order on Motions*, the Commission allowed the motions by Duke Power, CP&L, and N.C. Power provided that, *inter alia*, (i) the suspensions would apply only to current long-term rates, not the variable rates, and the proposed long-term rates would be available during the time of the suspension and (ii) the suspensions would not apply to QFs that have obtained CPCNs or have applied for CPCNs prior to the day each utility filed its motion to suspend.³

21. NCSEA contends in a footnote, however, that making the 5-, 10-, or 15-year avoided cost rates available to QFs in the interim and subject to later true-up is unacceptable because the proposed rates have not been determined in compliance with 18 C.F.R. 292.304 and cannot be determined at this early stage of the proceeding. Therefore, NCSEA continues that only the fixed rates reviewed and approved by the Commission in Sub 127 can continue to be used without violating PURPA's regulations. Not so. While a rate approved by the Commission typically remains in effect until a new

³ *In the Matter of Biennial Determination of Avoided Cost Rates for Electric Utility Purchases from Qualifying Facilities – 1996*, Docket No. E-100, Sub 79, *Order on Motions*, Dec. 13, 1996 at 2-3. CP&L filed its motion on October 25, 1996, but on December 11, filed a letter in this docket indicating that it had agreed with the Public Staff on an October 28 deadline.

one is approved, avoided cost proceedings are different in that they regularly occur every two years so that the Commission, in compliance with PURPA, can review updated avoided cost data. PURPA (16 U.S.C. § 824a-3) provides that the rate paid by a utility to a QF shall not exceed the cost the utility would incur but for the purchase from the QF. Further Section 210 of PURPA and the regulations promulgated thereunder provide that a QF is entitled to rates derived from avoided costs as calculated no earlier than when the utility's obligation to contract with the QF is incurred. 18 CFR § 292.304(d). If PEC enters into new contracts with QF developers at the 2010 long-term avoided cost rates, it will incur contractual obligations to pay for purchased capacity and energy at prices substantially in excess of its current, 2012, avoided costs. Moreover, entering into contracts that cause PEC to incur long-term obligations for payments exceeding current avoided cost projections is not in the best interest of PEC or its customers and is contrary to the principles of PURPA discussed above. In addition, if the Commission finds that PEC's proposed long-term rates were too low, it may order an upward adjustment to those rates, trued up to the effective date of the impacted PPAs. The Public Staff's proposal and Commission precedent, however, do not provide for a downward adjustment in rates if, after review, the Commission finds PEC's proposed long-term rates are higher than its actual avoided costs.

22. Adopting the Public Staff's proposal also obviates the need to consider NCSEA's proposal that PEC's motion should be specifically denied as to new solar facilities and new solar thermal facilities. Contrary to NCSEA's assertion, N.C. Gen.Stat. 62-133.8(d); does not relate to the expiration of the long-term avoided cost rates shown on PEC's CSP-27; instead, it relates to compliance with the Renewable Energy/Energy

Efficiency Portfolio Standards. Moreover, the Public Staff's proposal makes long-term fixed rates, either under the older CSP-27 or under the proposed rates, available to otherwise eligible QFs. Thus, there is no need for the Commission to consider carving out an exception for any one particular group of QFs with respect to the motion to suspend.

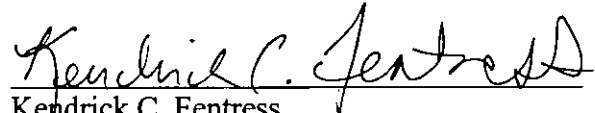
23. Finally, PEC and DEC note that acceptance of the Public Staff's proposal allows for sufficient notice to QFs of the changing rates. NCSEA argued that the Commission should allow a cut-off date in February 2013, based on its interpretation of the Commission's actions in Docket No. E-100, Sub 74. As discussed above, however, in a subsequent avoided cost docket – Docket No, E-100, Sub 79 - the Commission suspended the long-term rates as of the date of the motions to do so. Additionally, the Commission commences avoided cost proceedings every two years. On June 18, 2012, the Commission issued its Order directing that the electric utilities file their proposed rates and underlying data on November 1, 2012, thereby providing almost five months of notice that avoided cost rates and terms were subject to change. The Commission does not have an established date by which it issues an order approving the proposed avoided cost rates; the Commission could issue an order on the proposed rates at any time after November 1, 2012. Thus, QFs have been on notice since June 2012, if not before, that after November 1, the avoided cost rates were subject to change. No additional notice is necessary under the Public Staff's proposed alternative.

24. Based on the foregoing, PEC and DEC respectfully request that the Commission approve PEC suspending the availability of its long-term rates as proposed by the Public Staff in its initial comments and set forth in these Reply Comments.

25. DEC and PEC would also note, however, that they would not object if the Commission determined that, due to the circumstances of PEC's motion to suspend, it allowed PEC to adopt the Public Staff's proposed solution with a December 1, 2012 deadline, instead of a November 1, 2012 deadline, provided applications for CPCNs and reports of proposed construction filed on or before December 1, 2012 were complete and sufficient.

Respectfully submitted, this the 5th day of December, 2012.

PROGRESS ENERGY CAROLINAS, INC.
DUKE ENERGY CAROLINAS, LLC



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**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

**DOCKET NO. E-100, Sub 127
DOCKET NO. E-100, Sub 136**


BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of:

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

**CERTIFICATE OF
SERVICE**

I, Kendrick C. Fentress, hereby certify that Duke Energy Carolinas, LLC's and Progress Energy Carolinas, Inc.'s Reply Comments have been served on all parties of record either by hand delivery, email or by depositing said copy in the United States mail, postage prepaid, addressed as follows, this the 5th day of December, 2012.


Kendrick C. Fentress
Associate General Counsel