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Oct 13 2015

October 13, 2015

VIA ELECTRONIC FILING

Mrs. Gail L. Mount, Chief Clerk
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
Raleigh, North Carolina 27603

Re: Docket No. E-100, Sub 140

Dear Mrs. Mount:

On behalf of Virginia Electric and Power Company, d/b/a Dominion North Carolina Power ("DNCP"), Duke Energy Carolinas, LLC ("DEC"), and Duke Energy Progress, LLC ("DEP"), enclosed for filing in the above-referenced docket is the Response of Dominion North Carolina Power, Duke Energy Carolinas, LLC and Duke Energy Progress, LLC to Memorandum of Additional Authority.

Thank you for your assistance with this matter. Please do not hesitate to contact me if you have any questions.

Very truly yours,

s/Andrea R. Kells

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Enclosures

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. E-100, SUB 140

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of)	RESPONSE OF DOMINION NORTH
Biennial Determination of Avoided Cost)	CAROLINA POWER, DUKE ENERGY
Rates for Electric Utility Purchases from)	CAROLINAS, LLC AND DUKE
Qualifying Facilities – 2014)	ENERGY PROGRESS, LLC TO
)	MEMORANDUM OF ADDITIONAL
)	AUTHORITY

NOW COME Virginia Electric and Power Company d/b/a Dominion North Carolina Power (“DNCP”), Duke Energy Carolinas, LLC (“DEC”), and Duke Energy Progress, LLC (“DEP”) (together the “Responding Parties”) and submit this Response to the Memorandum of Additional Authority filed with the Commission in this proceeding on October 8, 2015 by the North Carolina Sustainable Energy Association (“NCSEA”).

The procedural background of this proceeding, which has been provided in the numerous comments and proposed orders filed to date under this docket, concluded with the filing of proposed orders by the parties on September 18, 2015. Relevant to this Response, one of the issues evaluated during this proceeding has been the form proposed initially by DNCP in its March 2, 2015 filing in this proceeding, and subsequently amended by DNCP’s August 7, 2015 Reply Comments and the Joint Letter filed by DNCP together with DEC and DEP on September 17, 2015, which would clarify the date that a legally enforceable obligation (“LEO”) arises between a facility seeking to sell its output to a utility under PURPA and the utility to which the facility seeks to “put” its power. DNCP has termed this form the “LEO Form” in its pleadings in this docket. In a letter filed on September 10, 2015, the Public Staff noted that all of the parties that had

been discussing the form (itself, DNCP, DEC, DEP and NCSEA) had agreed to sections 1 through 4 of the LEO Form as it was filed with DNCP's Reply Comments on August 7, 2015.

On September 22, 2015, in a separate proceeding involving DNCP and a solar developer complainant (Docket No. E-22, Sub 521), the Commission issued an Order Establishing Date of Legally Enforceable Obligation ("Ecoplexus Order"). In the Ecoplexus Order, the Commission concluded, among other things, that the complainants in that case "were not required to have obtained QF status in order to satisfy the Commission's two-prong LEO test." Ecoplexus Order at 15.

On October 8, 2015, NCSEA filed what it termed a "Memorandum of Additional Authority" ("Memorandum") that stated that "[w]hile NCSEA has agreed to the language in Section 1 of DNCP's proposed form, NCSEA has also maintained, and continues to maintain, that QF use of the form should be *permissive* rather than mandatory." Memorandum at 1 (emphasis original). NCSEA also noted the Commission's issuance of the Ecoplexus Order, and asserted that

"[g]iven that (1) the language of Section 1 in DNCP's 'LEO Form' – to which the parties have agreed – presupposes QF self-certification and (2) the Commission's [Ecoplexus Order] indicates that 'Complainants were not required to have obtained QF status in order to satisfy the Commission's two-prong LEO test[.]' NCSEA submits this memorandum because NCSEA believes the LEO Order is relevant to this proceeding, *particularly the issue of whether the LEO form should be permissive or mandatory.*"

Memorandum at 2 (emphasis partially added). NCSEA cited in support for its filing of the Memorandum the provision of the North Carolina Rules of Appellate Procedure providing for additional authorities to be brought to the court's attention. *See* N.C. R. App. P. Rule 28(g).

Despite NCSEA's effort to justify its filing on the basis of North Carolina appellate procedure, it is not appropriate at this juncture of this proceeding for a party to make such a filing. As NCSEA notes, there is no Commission rule providing for additional filings after the submission of proposed orders in a contested proceeding. In addition, while the Commission generally applies this state's appellate procedural rules and does so fairly flexibly, NCSEA's Memorandum goes beyond the scope of what would be appropriate procedure for this proceeding, which has now concluded. First, there is no need to inform the Commission of its own order issued mere days ago. Second, it is inappropriate to use this rule to essentially argue that the Commission should rely, for purposes of making determinations in this proceeding of general application, on an order issued in a separate complaint proceeding that involved a particular set of facts between a utility and a specific developer. Finally, NCSEA's Memorandum exceeds the bounds of what is allowed even under the plain language of Rule 28(g) and precedent applying that Rule. North Carolina courts have stated in response to a "purported 'memorandum of additional authority,'" that "[w]e caution the bar that it may not use a memorandum of additional authority as a reply brief or for additional argument. A memorandum of additional authority 'shall simply state the issue to which the additional authority applies and provide a full citation of the authority.' Any summary of the authority or further argument is a violation of Rule 28(g)." *Whitaker v. Akers*, 137 N.C. App. 274, 281 (2000) (citations omitted). As NCSEA's Memorandum provides commentary on the Ecoplexus Order that goes beyond stating the issue and citing the authority, it should be rejected.

Moreover, contrary to NCSEA's intimations in the Memorandum, the Responding Parties object to NCSEA's suggestion that the Ecoplexus Order is relevant to this proceeding as to the specific issue of whether the LEO Form should be mandatory or optional. As the Ecoplexus Order does not even mention the LEO Form being discussed in this proceeding, much less address the issue of whether completion of the LEO Form is mandatory, it is entirely irrelevant to this proceeding with respect to that issue.

WHEREFORE, the Responding Parties respectfully request that the Commission reject the Memorandum for the reasons set forth above.

Respectfully submitted,

By: /s/Andrea R. Kells

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*Attorney for Duke Energy Carolinas, LLC and
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Dated: October 13, 2015

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response of Dominion North Carolina Power, Duke Energy Carolinas, LLC and Duke Energy Progress, LLC to Memorandum of Additional Authority, filed in Docket No. E-100, Sub 140 was served electronically or via U.S. mail, first-class, postage prepaid, upon all parties of record.

This, the 13th day of October, 2015.

s/ Andrea R. Kells

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