STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-7, SUB 1137
DOCKET NO. E-2, SUB 1136

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Slender Branch Solar, LLC,
Fair Bluff Solar, LLC, Crooked Run
Solar, LLC, Homer Solar, LLC, Bay Tree
Solar, LLC, and Ruff Solar, LLC, Cypress
Creek Renewables, LLC,
Complainants

v.

Duke Energy Carolinas, LLC, and
Duke Energy Progress, LLC
Respondents

ORDER SERVING COMPLAINT
AND REQUIRING RESPONSE


In summary, Complainants allege that the Solar QFs are six renewable energy projects located in Duke's service territory and that each is entitled to sell power to Duke under terms established pursuant to the Public Utility Regulatory Policies Act of 1978 (PURPA). In addition, the Complainants allege that each Solar QF has obtained a certificate of public convenience and necessity (CPCN) from the Commission authorizing construction of its facility, and that each of the Solar QF's has committed to sell its electric output to Duke under a negotiated long-term power purchase agreement (PPA) for qualifying facilities (QFs) having a capacity in excess of 5 MW, thus creating a legally enforceable obligation (LEO) upon Duke to purchase the Solar QF's electrical output. Complainants state that each Solar QF established its LEO prior to Duke filing its proposed new avoided cost rates and other changes on November 15, 2016, in Docket No. E-100, Sub 148.

The Complainants further state that there is a dispute between Complainants and Duke based on Duke's failure to provide indicative pricing or to enter into long-term PPAs with the Solar QFs, as required by PURPA and North Carolina law. In particular, Complainants allege that Duke has refused to offer the Solar QFs a long-term PPA and,
instead, has offered a PPA with a 5-year term. Complainants assert that the Solar QFs cannot obtain financing based on a PPA having only a 5-year term and, thus, Duke's insistence upon a 5-year term is contrary to PURPA's requirement that PPAs with QFs be of sufficient duration to enable the QFs to attract capital from potential investors.

The relief requested by Complainants is that the Commission treat their Complaint as a formal complaint against Duke and a request for declaratory judgment pursuant to G.S. 1-253; issue an Order directing DEP and DEC to enter into, with each Solar QF as applicable, a PPA incorporating fixed, levelized avoided cost rates for energy and capacity and a contract term of sufficient length to allow the QF to be financed and constructed; issue a Declaratory Order declaring that a 5-year PPA term is insufficient to allow the Solar QFs to obtain the financing necessary to construct their respective QFs, and is not of sufficient length to stimulate the development of QFs and solar energy, as required by PURPA, G.S. 62-133.8(d), and Commission Rule R8-67(f)(1); and set this matter on an expedited procedural schedule.

Based on the allegations of the verified Complaint, it appears that the Complainants and Duke have a controversy regarding PPAs sought to be negotiated by the Solar QFs with Duke. Therefore, the Chairman finds good cause to serve the Complaint, attached hereto as Attachment A, and this Order on Duke. Further, the Chairman finds good cause to direct that Duke shall either satisfy the demands of the Complainants and so advise the Commission, or file a response to the Complaint on or before February 20, 2017.

IT IS, THEREFORE, ORDERED as follows:

1. That the Chief Clerk shall serve a copy of the Complaint, attached hereto as Attachment A, and this Order on Duke Energy Carolinas, LLC, and Duke Energy Progress, LLC.

2. That on or before February 20, 2017, Duke Energy Carolinas, LLC, and Duke Energy Progress, LLC, shall either satisfy the demands of the Complainants and so advise the Commission, or file a response to the Complaint.

ISSUED BY ORDER OF THE COMMISSION.

This the 31st day of January, 2017.

NORTH CAROLINA UTILITIES COMMISSION

Linnetta Threatt, Acting Deputy Clerk
BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of

Slender Branch Solar, LLC, Fair Bluff Solar, LLC, Crooked Run Solar, LLC, Homer Solar, LLC, Bay Tree Solar, LLC, and Ruff Solar, LLC, Cypress Creek Renewables, LLC.

Complainants,

v.

Duke Energy Progress, LLC and Duke Energy Carolinas, LLC,

Respondent.

COME NOW Complainants Slender Branch Solar, LLC, Fair Bluff Solar, LLC, Crooked Run Solar, LLC, Homer Solar, LLC, Bay Tree Solar, LLC, and Ruff Solar, LLC (“the Solar QFs”), and Cypress Creek Renewables, LLC (“Cypress Creek”) (collectively, “Complainants”), pursuant to N.C. Gen. Stat. § 62-73 and § 1-253 and Rule R1-9 of the Rules and Regulations of the North Carolina Utilities Commission, and file this complaint against Duke Energy Progress, LLC (“DEP”) and Duke Energy Carolinas, LLC (“DEC”) (collectively, “Duke”), based on Duke’s refusal to provide indicative pricing or to enter into long-term power purchase agreements (“PPAs”) with the Solar QFs as required by federal and North Carolina law. For their Complaint, the Solar QFs and Cypress Creek respectfully show the North Carolina Utilities Commission (the “Commission”) as follows:
**NATURE OF ACTION**

This action arises from Duke’s stated refusal to enter into long-term Power Purchase Agreements ("PPA") with each of the Solar QFs, the owners and developers of six renewable energy projects, who are entitled to sell power to Duke under the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3 ("PURPA"), N.C. Gen. Stat § 62-133.8(d), the Commission’s rules, and Duke’s own tariff and schedules. Each of the Solar QFs is developing a solar generating facility, certified as a qualifying facility ("QF") under PURPA; each has established a legally enforceable obligation ("LEO") with respect to the sale of energy and capacity to Duke, and each requested indicative pricing for a long-term PPA with Duke, at rates that reflect Duke’s avoided cost as of the date of the respective LEO. Contrary to past practice, Duke has refused to provide rates for (or enter into) a long-term PPA to each of the Solar QFs, and instead has announced its intention, going forward, only to enter into 5-year PPAs with QFs that are not eligible for the Commission-approved standard offer rates and contract terms. Through this action, Complainants seek to compel Duke to fulfill its legal obligation to enter into a financially viable long-term PPA with each of the Solar QFs.

**PARTIES, JURISDICTION AND VENUE**

1. Complainants are developing solar photovoltaic generating facilities in various locations in North Carolina. Slender Branch Solar, LLC, Fair Bluff Solar, LLC, Crooked Run Solar, LLC, Homer Solar, LLC, and Bay Tree Solar, LLC are domestic North Carolina limited liability companies whose mailing address is 3250 Ocean Park Boulevard, Suite 355, Santa Monica, CA 90405. Ruff Solar, LLC is a domestic North Carolina limited liability company whose mailing address is 130 Roberts Street, Asheville,
NC 28801. All of the Solar QFs are wholly-owned indirect subsidiaries of Cypress Creek (or, in the case of Ruff Solar, LLC, of Cypress Creek Holdings, LLC, Cypress Creek’s parent, which recently acquired FLS Energy, Inc., the parent of Ruff Solar, LLC).

2. Complainant Cypress Creek is a Delaware limited liability company, licensed to do business in North Carolina. Cypress Creek’s principal place of business is located at 3250 Ocean Park Blvd., Suite 355, Santa Monica, CA 90405. Cypress Creek is engaged in the development, financing, acquisition, ownership, and operation of independent solar power production facilities in North Carolina and throughout the United States. Cypress Creek manages a portfolio of approximately 1.5 GW of operating solar generating facilities and specializes in developing utility-scale solar projects that are deployed across the country. Cypress Creek is developing a substantial portfolio of solar projects in North Carolina.

3. Respondents DEC and DEP are electric public utilities operating under the laws of the State of North Carolina for the purposes of generating, transmitting, and distributing electricity in its service territories in North Carolina. Respondents are operating subsidiaries of Duke Energy Corporation. DEP’s principal office is located at 410 S. Wilmington St., Raleigh, NC 27601. DEC’s principal office is located at 526 South Church Street, Charlotte, NC 28202-1802.

4. Complainants’ legal representative in this proceeding, to whom all notices, pleadings and other documents related to this proceeding should be directed, is:

Charlotte Mitchell
Law Office of Charlotte Mitchell, PLLC
PO Box 26212
Raleigh, NC 27611
919.260.9901
cmitchell@lawofficecm.com
5. This Commission has jurisdiction over the subject matter and parties of this action, and venue is proper.

STATEMENT OF COMPLAINT

6. PURPA was part of a package of legislation called the National Energy Act and was designed to combat a nationwide energy crisis by encouraging conservation of oil and natural gas, and promoting the development of alternative energy resources. One of the stated goals of PURPA and its implementing regulations is to “encourage” the development of small power production facilities with renewable fuel sources, such as solar energy. 16 U.S.C. § 824a-3; Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp., 461 U.S. 402, 405 n.1 (1983).

7. Section 210 of PURPA obligates electric utilities to purchase the energy and capacity of cogeneration facilities and small power production facilities that meet the requirements of PURPA Section 201 (“Qualifying Facilities” or “QFs”).

8. PURPA charges the Federal Energy Regulatory Commission (“FERC”) with implementing the mandatory purchase and sell obligations, requiring electric utilities to purchase electric power from, and sell power to, qualifying cogeneration and small power production facilities. S. Cal. Edison Co. v. FERC, 443 F.3d 94, 95 (D.C. Cir. 2006) (citing PURPA Section 210(a)(1)-(2), 16 U.S.C. § 824a-3(a)(1)-(2)). State regulatory authorities are, in turn, required to implement PURPA in a way that gives effect to FERC’s own regulations implementing PURPA. See PURPA Section 210(f)(1), 16 U.S.C. § 824a-3(f)(1); FERC v. Mississippi, 456 U.S. 742, 751 (1982).
9. The regulations promulgated by FERC allow the QF to elect to sell energy “as available” or to sell “energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term.” 18 C.F.R. § 292.304(d).

10. In explaining a QF’s rights under PURPA and its regulations, FERC has said that qualifying facilities are entitled to “long-term avoided cost contracts or other legally enforceable obligations [“LEOs”] with rates determined at the time the obligation is incurred, even if the avoided costs at the time of delivery ultimately differ from those calculated at the time the obligation is originally incurred.” JD Wind 1, LLC, 130 FERC ¶ 61,127, P 23 (2010); see also Order Setting Avoided Cost Input Parameters, N.C.U.C. Docket No. E-100 Sub 140 (Dec. 31, 2014) (“Order Setting Parameters”) at 19 (acknowledging QF’s legal right to long-term fixed rates under Section 210 of PURPA under JD Wind Orders).

11. FERC has not, by regulation or by order, specified a minimum or maximum term for PPAs offered by electric utilities to QFs. However, FERC has held that QFs are entitled to contracts “long enough to allow QFs reasonable opportunities to attract capital from potential investors.” Windham Solar LLC & Alloco Fin. Ltd., 157 FERC ¶ 61,134 at P. 8 (Nov. 22, 2016) (emph. added). In other words, under PURPA a QF is entitled to a PPA of sufficient duration to be reasonably financeable.

12. In prior proceedings before this Commission related to the implementation of Section 210 of PURPA, Duke’s witnesses have acknowledged that under PURPA, QFs are entitled to sell their output on terms that allow them to secure financing. See Docket No. E-100 Sub 140, Hearing Transcr. Vol. 1 (July 7, 2014) at 452:16-18 (testimony of Ms. Bowman); Order Setting Parameters at 20 (“In her responses to cross-examination
questions about various Duke Energy Renewables projects, DEC/DEP witness Bowman acknowledged the foregoing by stating that PURPA does not require the best financing, just the ability to secure it.

13. North Carolina law also requires that the term of any contract entered into between an electric utility and a new solar electric facility “shall be of sufficient length to stimulate development of solar energy.” N.C.G.S. § 62-133.8(d). The Commission’s Rules and Regulations similarly provide 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.” R8-67(f)(1).

14. As observed by FERC and by this Commission, reasonable certainty as to the long-term revenue stream of a solar QF is an essential precondition of financing. Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,880, 30,868; Windham Solar LLC & Allco Fin. Ltd., 157 FERC ¶ 61,134. A long-term PPA at fixed rates is the only practical way to provide such certainty for a QF located in the service territory of a vertically integrated, fully regulated electric utility (such as Duke in North Carolina) where QFs cannot make retail sales and where there is no practical access to wholesale markets.

15. DEP, DEC, and Dominion North Carolina Power all have, on numerous occasions, requested that this Commission reduce the maximum contract term for the Commission-approved contracts available to small QFs from fifteen years to ten years. The Commission has repeatedly rejected these proposals. See, e.g., Order Setting Parameters at 19-22. The Commission has never specified minimum or maximum contract terms for PPAs between electric utilities and large QFs not eligible for the
Commission-approved contract, thus leaving QFs and electric utilities to establish the term through negotiation.

16. On November 15, 2016, Duke filed its Joint Initial Statement and Proposed Standard Avoided Cost Rate Tariffs of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC the Commission in Docket No. E-100 Sub 148 (the “2016 Duke Avoided Cost Proposal”). The 2016 Duke Avoided Cost Proposal requests sweeping changes to the Commission-approved rates and contract terms and conditions available to small QFs, eligibility for such Commission-approved rates and contract terms and conditions, and the methodology by which the electric utilities’ avoided costs are calculated. Among other changes, Duke has requested that the Commission eliminate the 5-year and 15-year offers from the Commission-approved contract available to small QFs, in favor of a single 10-year contract term with capacity rates that are fixed over the 10-year term and energy rates that are updated every two (2) years of the 10-year term. 2016 Duke Avoided Cost Proposal at 29.

17. The 2016 Duke Avoided Cost Proposal does not ask the Commission to make any changes with respect to Duke’s obligations to enter into PPAs with QFs not eligible for the standard offer. The proposal does, however, claim that DEP and DEC “routinely negotiate PURPA PPAs with larger QFs, mitigating concerns raised in 2014 in the Sub 140 [avoided cost] proceeding” about the difficulty of obtaining a negotiated PPA with DEP or DEC. 2016 Duke Avoided Cost Proposal at 27.

18. Complainant Cypress Creek is in the business of developing solar energy facilities and is developing the Solar QFs that are the subject of this proceeding. Cypress Creek owns and operates a portfolio of approximately 767 MW of solar generating
capacity in North Carolina, and has about 2,190 MW of projects in development in the state. Many of these projects have not been eligible for the Commission-approved rates and contract terms and conditions, and, as a result, Cypress Creek has successfully negotiated PPAs for these projects with Duke and Dominion, as applicable. The long-term PPAs that Cypress Creek has successfully negotiated have been of sufficient length to allow for the development of the generating facilities. None of the negotiated PPAs has had a term of five years or shorter.

19. The Solar QFs are qualifying facilities for the purposes of PURPA and have self-certified by filing a Form 556 with the Federal Energy Regulatory Commission.

20. Each Solar QF applied for and received a Certificate of Public Convenience and Necessity (“CPCN”) from the Commission on or before October 11, 2016. The Commission issued CPCNs to the Solar QFs in the following dockets and on the following dates:

   a. Slender Branch Solar, LLC: Docket No. SP-8116 Sub 0 (Oct. 11, 2016);
   b. Fair Bluff Solar, LLC: Docket No. SP-8210 Sub 0 (Oct. 11, 2016);
   c. Crooked Run Solar, LLC: Docket No. SP-8061 Sub 0 (Oct. 4, 2016);
   d. Homer Solar, LLC: Docket No. SP-8056 Sub 0 (Sept. 19, 2016);
   e. Bay Tree Solar, LLC: Docket No. SP-7926 Sub 0 (Sept. 6, 2016); and

21. Each of the Solar QFs has a nameplate capacity in excess of five (5) MW. Specifically, Slender Branch has a nameplate capacity of 80 MW; Ruff has a nameplate capacity of 22 MW; and the remaining Solar QFs have nameplate capacities of 75 MW. In accordance with the orders of this Commission, the Solar QFs are not eligible for the
Commission-approved rates or contract terms and conditions. The Solar QFs must therefore negotiate the terms and conditions of their respective PPAs with DEP or DEC, as applicable.

22. Cypress Creek requested PPAs and rates for the Homer Solar and Bay Tree projects on September 20, 2016. Using the Commission-approved form, Cypress Creek tendered to DEP a Notice of Commitment to Sell for those projects on the same day. DEP responded to the request by email on November 29, 2016.

23. Cypress Creek requested PPAs and rates for the Crooked Run project on October 4, 2016; and for the Slender Branch and Fair Bluff projects on October 12, 2016. Using the Commission-approved form, Cypress Creek tendered to DEP a Notice of Commitment to Sell for each of those projects on the same days. DEP responded to the request by email on December 7, 2016.

24. FLS requested a PPA and rates for the Ruff project on October 25, 2016. Using the Commission-approved form, FLS tendered to DEC a Notice of Commitment to Sell for Ruff on the same day. DEC responded to the request by email on December 7, 2016.

25. In response to FLS and Cypress Creek’s requests for PPAs and rates for each of the Solar QFs, Duke has refused to offer a long-term PPA and instead has offered a PPA with a 5-year term.

26. Duke explained in emails to FLS and Cypress Creek that “[t]he reasons for reducing the rate term to five (5) years are more fully set forth in the avoided cost application submitted to the NCUC on November 15, 2016, which is attached for your
convenience.” Attached to the emails was the 2016 Duke Avoided Cost Proposal. These emails (without attachments) are attached hereto as CONFIDENTIAL Exhibit 1.

27. Each of the Solar QFs established a LEO prior to Duke’s filing of the 2016 Duke Avoided Cost Proposal with the Commission.

28. The 2016 Duke Avoided Cost Proposal requests that the Commission eliminate 5-year and 15-year term options for standard offer PPA, leaving only a 10-year option in place. The proposal does not, however, make any reference to the term of negated PPAs, does not indicate or otherwise reveal an intention to reduce the term offered to five (5) years, and does not otherwise provide any rationale for the reduction in the maximum term of its negotiated PPA to five (5) years.

29. Complainants are unable to secure financing for construction of any of the QFs based on the 5-year PPA term offered by Duke. Notwithstanding the foregoing, Duke has rebuffed all attempts by Complainants to negotiate a term longer than five (5) years.

30. A 5-year PPA is neither long term, as is required by PURPA and FERC regulations, nor “of sufficient length to stimulate development of solar energy[,]” as is required by North Carolina law and the Rules and Regulations of this Commission.

31. Upon information and belief, no solar QF in North Carolina has obtained financing under a 5-year PPA term.

32. Until November 2016, Duke offered PPAs with a term longer than five years. Duke’s refusal to offer long-term PPAs with the Solar QFs thus marks a significant departure from past practice.

33. As stated in the 2016 Duke Avoided Cost Proposal, Duke proposes to replace the current PURPA regulatory regime in North Carolina with a framework for the purchase
of solar energy and capacity driven by a competitive solicitation process. Upon
information and belief, Duke’s unilateral and sudden refusal to enter into long-term PPAs
reflects an effort to modify the current PURPA regulatory regime in North Carolina in
advance of any necessary approval of such modification and of a competitive solicitation
model by this Commission, the North Carolina General Assembly, and/or FERC.

34. Based on the foregoing, Duke’s offer of a 5-year term is not only inconsistent
with law and regulations, but also unjust and unreasonable.

35. Section 62-73 of the North Carolina General Statutes empowers this
Commission to hear complaints against public utilities brought “by any person having an
interest, either direct or as a representative of any persons having a direct interest in the
subject matter of such complaint.”

36. In addition to the Commission’s complaint authority pursuant to N.C. Gen.
Stat. § 62-73, the North Carolina Declaratory Judgment Act, N.C. Gen. Stat. § 1-253,
empowers courts of record to declare rights, status, and other legal relations, whether or
not further relief is or could be claimed. Such declarations shall have the force and effect
of a final judgment or decree. Pursuant to N.C. Gen. Stat. § 62-60, the Commission may
exercise this power under the Declaratory Judgment Act with respect to all subjects over
which the Commission has jurisdiction.

**RELIEF DESIRED**

37. Complainants respectfully request that the Commission grant the following
relief:

a. Treat this matter as a formal Complaint against DEP and DEC pursuant to
Section 62-73 of the North Carolina General Statutes and the Commission
Rules of Practice and Procedure, and as a request for a declaratory judgment pursuant to Section 1-253 of the North Carolina General Statutes;
b. Issue an Order directing DEP and DEC to enter into, with each Solar QF as applicable, a PPA incorporating fixed, levelized avoided cost rates for energy and capacity and a contract term of sufficient length to allow the QF to be financed and constructed;
c. Issue a Declaratory Order declaring that a 5-year PPA term is insufficient to allow the Solar QFs to obtain the financing necessary to construct their respective QFs, and is not of sufficient length to stimulate the development of QFs and solar energy, in violation of PURPA, Section 62-133.8(d) of the North Carolina General Statutes, and Rule R8-67(f)(1) of the Rules and Regulations of the Commission;
d. Set this matter on an expedited procedural schedule; and
e. Grant such other and further relief as this Commission may find just and reasonable.

Respectfully submitted this is the 27th day of January, 2017.

/s Charlotte A. Mitchell  
NC Bar # 34106  
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PO Box 26212  
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Attorney for Complainants
VERIFICATION

The undersigned, being first duly sworn, deposes and says that he is Patrick McConnell, the Managing Director or Cypress Creek Renewables, LLC. He furthers states that he has read the foregoing petition, and that, to his personal knowledge and belief, the matters and statements contained therein are true, except as to those matters or statements made upon information and belief, and as to those, he believes them to be true; and that he verifies the attached petition on behalf of Complainants.

This the ___ day of January, 2017.

__________________________________
Patrick McConnell

Sworn to and subscribed before me this _____ day of January, 2017.

____________________________
Notary Public

My Commission Expires: ______