MEMORANDUM

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Whitepaper Proffer Concerning Settlement Agreement Among Duke Energy Carolinas, LLC ("DEC"), Duke Energy Progress, LLC ("DEP"), the Public Staff – North Carolina Utilities Commission ("Public Staff"), the North Carolina Clean Energy Business Alliance ("NCCEBA") and 24 Solar Developers

This Whitepaper/Proffer is intended to provide a preliminary factual background concerning an Order entered by the North Carolina Utilities Commission ("NCUC") on August 27, 2018, and entitled: "Order Regarding Duke Settlement Agreement and Requiring Testimony in Cost Recovery Proceedings." A copy of this Order is attached to this Whitepaper as **Exhibit 1**. This Order corresponds to the subject area entitled "Agreement between Duke and Solar Industry 'Solar Deal'" set forth in the Proffer Topics transmitted on February 6, 2019. This matter, for reasons set forth in this Whitepaper, is often referred to as the "nameplate" dispute and resolution. In addition, many of the factual matters surrounding the nameplate dispute are set forth in the Settlement Agreement dated January 30, 2018, and filed with the NCUC on February 2, 2018. A copy of the Settlement Agreement is attached to this Whitepaper as **Exhibit 2.**

On June 30, 2017, House Bill 589 ("HB 589" or "the Bill") was ratified by the North Carolina General Assembly. The Bill was entitled, "An Act to Reform North

Carolina's Approach to Integration of Renewable Electricity Generation Through Amendment of Laws Related to Energy Policy and to Enact the Distributed Resources Access Act." Representatives John Szoka and Dean Arp were the primary sponsors of HB 589. Among other things, the Bill reformed how projects under the Public Utility Regulatory Policies Act ("PURPA") would be handled in North Carolina. For many solar developers, HB 589 reduced the size and terms for PURPA standard wholesale purchase offers for PURPA qualifying facilities ("QF") that Duke Energy ("Duke") had to offer them and created a competitive procurement process for certain renewable energy projects, which in turn reduced the cost passed on to Duke's customers.

The "nameplate" dispute centered on how Section 1.(c) of the Bill should be interpreted and implemented. That section provides as follows:

> A small power production facility which would otherwise be eligible for the standard offer rate schedules and power purchase agreement terms and conditions approved by the Commission in Docket No. E-100, Sub 140, but which fails to commence delivering power to the utility on or before September 10, 2018, shall, notwithstanding such failure, remain eligible for such rate schedules and terms and conditions, unless the *nameplate capacity* of the generation facility when taken together with the *nameplate capacity* of other generation facilities connected to the same substation transformer exceeds the ***nameplate capacity*** of the substation transformer.

HB 589, § 1.(c) (emphasis added).

A result of give-and-take negotiation, Section 1.(c) of HB 589 acted as a "grandfather" clause to allow projects that qualified for the NCUC's higher avoided cost rates set in its 2014/2015 avoided cost docket, E-100, Sub 140, but were not yet "on line" by September 10, 2018, to still qualify for the higher NCUC-approved QF purchase rates from Duke if certain conditions were satisfied. Specifically, such a project could qualify for the higher rates if its "nameplate capacity," in combination with the nameplate

capacities of other projects connected to a substation transformer, did not exceed the total nameplate capacity for that substation transformer. This limitation reflected the reality that when new projects interconnected to a substation transformer exceeded the transformer's capacity, Duke or the QF would have to incur costs to expand that capacity, and that if Duke had to incur these costs, they would be passed along to Duke's customers. Consequently, if a new project not on line prior to September 10, 2018, would cause the substation capacity to be exceeded, then that project would not qualify for the substantially higher avoided cost rates and terms grandfathered in by Section 1.(c).

The dispute over Section 1.(c) came in determining what is the "nameplate capacity," a term not defined anywhere in HB 589. A "nameplate" is simply the metal label that is affixed to the equipment that describes its capacity. However, most of these nameplates list a number of capacity ratings which could vary depending on operating conditions or other factors. Duke's belief was that the "nameplate capacity" clause in HB 589 referred to the lowest capacity on the nameplate, and assumed that was a shared belief, although later events revealed that many stakeholders did not understand that there were multiple ratings on a nameplate.

Duke in its present form was created by the merger of Duke Energy ("DEC") and Progress Energy ("DEP"). DEP's service territory is in the eastern part of North Carolina along with a 9-county area around Asheville (and parts of South Carolina), while DEC's service territory is in the central and western portions of North Carolina (and parts of South Carolina). The standard practice of DEC had been to use the lowest capacity rating listed on the nameplate to be the "nameplate capacity." DEP,

however, had not always utilized the lowest capacity rating, and had sometimes utilized the upper nameplate capacity rating at different times in the interconnection process.

On September 11, 2017, Duke released written Method of Service Guidelines related to the interconnection of solar power and other projects to the electrical grid. This and related guidance made clear that, as of October 1, 2017, Duke interpreted "nameplate capacity" as the lowest capacity rating listed on a nameplate – essentially adopting what had been DEC's standard practice. This position had the effect of excluding a number of solar projects from Section 1.(c) coverage. A group of solar developers, led primarily by the North Carolina Clean Energy Business Alliance ("NCCEBA"), an industry association that advocates for solar development, among other forms of renewable energy, took the position that the highest listed capacity should be used as the "nameplate capacity," which would have the effect of including more solar projects within Section 1.(c) than Duke's Guidelines. Rep. Szoka also became involved in this dispute over HB 589 as the Bill's primary sponsor, advocating for a resolution of this interpretive issue.

On September 25, 2017, Kathy Hawkins, Vice-President of Governmental Affairs for Duke, met with Ken Eudy of the Office of the Governor. Their meeting primarily concerned "Project New World," a joint effort to attract Toyota/Mazda to North Carolina for the purpose of constructing a $1 Billion plus manufacturing facility. Duke worked closely with the Office of the Governor and others in an effort to attract this development to North Carolina (the project eventually went to Huntsville, Alabama). During the course of this conversation, Mr. Eudy raised the topic of the dispute over nameplate capacity.

The same day, September 25, 2017, Duke conducted a conference call with developers about various interconnection issues, including how to interpret "nameplate capacity." Thereafter, on September 29, 2017, multiple solar developers submitted Notices of Dispute under NCUC procedures over the nameplate capacity interpretation issue and other interconnection issues. Duke responded on October 13, 2017. Furthermore, the NCCEBA indicated its intention to bring litigation in Superior Court concerning the interpretation of "nameplate capacity" in HB 589. Thus, Duke ultimately faced the prospect of litigation over its adoption of the DEC interpretation practice in both State court and before the NCUC.

From the inception of the nameplate dispute, and into December 2017, Duke had many informal meetings with solar developers on this and other issues. These meetings included Kelli Kukura, a member of Governmental Affairs, and others at Duke depending on the issue involved.

On October 16 and 26, 2017, representatives of Duke Energy including Kathy Hawkins and Lawrence B. Somers, a Deputy General Counsel for Duke Energy, held meetings with representatives of the NCCEBA and the solar industry relating to the nameplate dispute. The solar attendees at the October 26 meeting included Ralph Thompson, CEO of Holocene Energy and chairman of NCCEBA, Steve Levitis of Cypress Creek (a developer), Brian O'Hara from Strata (a developer), and Alex Miller the solar lobbyist. Mr. Somers led the Duke team at that meeting. The solar developers argued for their interpretation of "nameplate capacity," and Duke argued for its contrary interpretation. In addition, the solar developers raised questions concerning additional interconnection screens Duke had proposed and other issues. The October 2017

meetings ended at an impasse, although it was agreed to continue having discussions. On October 27, 2017, Duke followed up on the meeting with a call to the solar representatives in order to provide a list of the projects that would be affected by the Guidance issued on October 1. Duke continued to hear from developers, Rep. Szoka, and Governor Roy Cooper's office concerning the nameplate dispute.

Duke was aware that Ken Eudy, of the Office of the Governor, at some point contacted the Public Staff concerning this matter. The Public Staff is an independent body established by the laws of North Carolina to advocate for the using and consuming public before the NCUC. Duke also contacted the Public Staff about trying to resolve the nameplate dispute, taking the position that the Public Staff must be involved in any resolution of this dispute. On November 30, 2017, Lynn Good, the Chief Executive Officer of Duke, met with the Governor to discuss a number of issues relating to Duke Energy (this meeting will be part of the next whitepaper/proffer). Among these issues were the implementation of HB 589 and the status of the solar interconnection queue. This conversation also included the status and timing of the ACP permits that were pending before DEQ.

Throughout the Fall, various media outlets and some political figures were using the nameplate interpretation dispute as evidence of a broader argument that Duke Energy was resistant or even hostile to renewable energy generation, and specifically solar power. Because Duke's interpretation of the nameplate capacity feature of HB 589 would have prevented some solar development, Duke's position was portrayed in the media as "anti-solar" and Duke had growing concerns about this perspective,

particularly as it faced the prospect of either litigation in state court or before the NCUC over this issue.

On December 12, 2017, Mr. Somers had a meeting about the nameplate dispute with Chris Ayers, who had been Executive Director of the Public Staff in North Carolina since 2013 and appointed by the prior governor, along with Public Staff employees, David Drooz and Tim Dodge, attorneys for the Public Staff, Layla Cummings, another attorney for the Public Staff (and who had participated in the drafting of HB 589 while a legislative attorney), James McLawhorn, the head of the Electric Division for the Public Staff, and Jay Lucas, an engineer in the Electric Division. Mr. Somers sought the Public Staff's feedback and position on how to potentially resolve the nameplate dispute with the solar developers. Public Staff participation in such a potential settlement was needed because a resolution that resulted in Duke paying for substation work as system upgrades, instead of solar developers paying for them as interconnection project upgrades, would result in higher costs for consumers. In addition, resolution of the dispute could potentially result in larger numbers of developers becoming eligible for higher avoided costs, which would also be passed along to consumers. The Public Staff encouraged Duke to attempt to craft a settlement agreement that covered all of the interconnection issues with solar developers, and not merely the nameplate dispute.

The Public Staff had been aware of the nameplate dispute for some time because the developers had raised this issue several weeks earlier. Throughout this time the Public Staff had engaged in informal conversations with Duke about this issue and other interconnection issues. The discussions included Kendal Bowman, Duke's VP of Regulatory Affairs and Policy, as well as Mr. Somers. After the December 12

discussion with Mr. Somers, Mr. Ayers then talked to various interested parties and set up another meeting to try to resolve the nameplate dispute. Duke is aware that Mr. Ayers and other Public Staff members discussed the matter with Rep. Szoka, with William McKinney, Counsel to the Office of the Governor, Ken Eudy, and with the NCCEBA and other solar developers, and scheduled a meeting to discuss potential settlement of the dispute.

The next meeting occurred on December 14, 2017, at the Public Staff's offices. Mr. Somers, Kendal Bowman, Gary Freeman, and John Gajda of Duke Energy's Renewables Integration group, and Kathy Hawkins attended for Duke Energy (Mr. Freeman and Mr. Gajda attended to provide technical expertise on this issue). Mr. Ayers, the head of the Public Staff, James McLawhorn (Electric), Jay Lucas (Electric), , Tim Dodge (Legal), , and Layla Cummings (Legal), , attended for the Public Staff (along with possibly others) along with Dustin Metz and Tommy Williamson, both of whom are engineers with the Public Staff. Mr. McKinney attended on behalf of the Governor. Rep. Szoka, as the primary sponsor of HB 589, also attended. The developers who participated included Mr. Thompson for Holocene/NCCEBA, Mr. Levitas, Mr. O'Hara, and Mr. Miller.

At this meeting on December 14, 2017, Duke indicated its willingness to agree to a resolution that could be worked out between the solar developers and the Public Staff on behalf of ratepayers (because a proposed resolution of the nameplate dispute could result in higher costs eventually paid by its customers and could reduce the overall customer savings under HB 589). A resolution in principle was reached over the course of the meeting. This resolution in principle dealt with the interpretive issue of

"nameplate capacity,"" among other interconnection issues including the Method of Service Guidelines. It also established a process by which solar developers connecting a new project to a substation would be charged for the costs of necessary upgrades to the substation unless they could prove, and Duke and the Public Staff agreed, that such upgrades provided system-wide benefits and therefore should be paid for by Duke's retail customers.

Duke had engaged Brett Breitschwerdt of McGuireWoods to provide legal advice throughout this process, and Mr. Breitschwerdt drafted a final settlement agreement based on the resolution in principle reached at the December 14 meeting. Drafts with proposed revisions were exchanged among Duke, the solar developers, and the Public Staff well into January 2018 as they ironed out details and specific wording. The Settlement Agreement was finalized and executed on January 30, 2018, between the developers, DEP and DEC, and the Public Staff. Given that the impact that the Settlement Agreement would have on rates paid by the using and consuming public and the relationship of the Settlement Agreement to the NCUC's Interconnection Procedures, the Settlement Agreement was filed for review and approval by the NCUC on February 2, 2018. The NCUC issued an Order approving the Settlement Agreement on August 27, 2018, and noted that "it represents substantial give and take among the parties in order to avoid litigation."

David Fountain, the President of Duke Energy North Carolina, was aware of the nameplate dispute and the ongoing discussions and eventual resolution. However, during this time Duke had pending rate cases before the NCUC and for which hearings were to occur in 2018. Mr. Fountain led the teams that worked on the pending rate

cases and was a primary witness at these hearings. Mr. Fountain did not personally participate in any of the nameplate dispute discussions that led to the resolution as a result of his involvement in the pending rate cases.

In regard to the ACP timeline, the permit requests were already pending before the Department of Environmental Quality ("DEQ") prior to the passage of HB 589 in June 2017 and the inception of the nameplate dispute related to Section 1.(c) of that Bill. When the resolution in principle to resolve this dispute was reached on December 14, 2017, these permit requests before the DEQ were still pending and the separate process of negotiating the Memorandum of Understanding ("MOU") for the ACP was still ongoing. During the course of the nameplate dispute and through its resolution at the December 14 meeting, while others at Duke were aware of the negotiations concerning an MOU, Mr. Somers, who was acting as the lead attorney for the Duke team on the nameplate issue, was unaware of the existence of a proposed MOU or that negotiations were ongoing concerning a proposed MOU regarding the ACP. Finally, the Settlement Agreement was not executed until January 30, 2018, after the issuance of the DEQ permits and the execution of the MOU.

The principal issue, in regard to who stood to benefit from the Settlement Agreement, was the allocation of higher costs and substation upgrades between the solar developers and the ultimate rate-paying consumers represented by the Public Staff. The significance of the nameplate capacity interpretation lays in the inclusion (or exclusion) of developers from access to higher avoided cost rates and potential avoidance of paying for substation upgrades. If more developers had been captured under the "grandfather" clause of Section 1.(c), then Duke would pay higher rates to

more developers for the solar power generated, and could also incur higher costs for substation upgrades. Ultimately, these higher rates and costs would have been passed along to Duke's customers and would have been recovered by Duke in higher rates to customers. Neither Duke nor its shareholders "benefit" from higher (or lower) avoided costs because avoided costs are considered "pass through" costs. As a regulated entity, Duke's rate of return is set by the NCUC. Thus if Duke pays less for solar energy, these savings are passed along to customers and they are not retained by Duke or its shareholders.

Duke has no information that the Governor personally benefitted in any manner from one or another interpretation of nameplate capacity, and the issue of whether the Governor would personally benefit was never raised with Duke nor was it a topic of discussion. Duke was well aware of the preference of the Governor for more solar projects and, as a Company, it is committed to renewable energy at cost-effective rates as part of its overall power portfolio and energy strategy.