STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1294

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Duke Energy Progress, LLC for Approval of Demand-Side Management and Energy Efficiency Cost Recovery Rider Pursuant to N.C. Gen. Stat. § 62-133.9 and Commission Rule R8-69	))))))	BRIEF OF CIGFUR II

NOW COMES the Carolina Industrial Group for Fair Utility Rates II (CIGFUR II or CIGFUR), by and through undersigned counsel, pursuant to the Commission's September 12, 2022 *Order Excusing Witnesses, Canceling Expert Witness Hearing, Requiring Late Filed Exhibit, and Taking Notice of Prior Testimony* and October 12, 2022 *Order Granting Extension of Time for Filing Briefs and Proposed Orders*, and respectfully submits this brief in the above-captioned docket.

On June 16, 2022, CIGFUR II filed a petition to intervene in the above-captioned docket. On June 21, 2022, the Commission granted CIGFUR II's petition to intervene.

In this docket, as has occurred in the past, the Southern Alliance for Clean Energy, the North Carolina Justice Center and the North Carolina Housing Center (SACE et al.) seek to disturb well-settled law requiring that industrial (and large commercial) customers—who pay to implement their own demand-side management and energy efficiency (DSM/EE) measures on their own dime, at no cost to other ratepayers—be allowed to opt out of participating in (and paying for, by way of the DSM/EE Rider) DSM/EE programs administered by Duke Energy Progress, LLC (DEP). *See* Testimony of Forest Bradley-Wright at pp. 3, 7-9, Docket No. E-2, Sub 1294 (Aug. 24, 2022). The

purpose of this brief is to discuss the opt out inasmuch as it was addressed in testimony sponsored by the respective parties to this docket and to provide a legislative and regulatory history of the DSM/EE opt out in support of the position that remains well-settled law.

DISCUSSION

At the outset, CIGFUR notes that it supports DSM/EE measures, including those funded as part of utility-administered programs, those funded through corporate and other non-utility (e.g., ratepayer self-funding) private sector investment, and those subsidized in whole or in part through taxpayer funding. Moreover, CIGFUR emphasizes the importance of energy conservation and DSM/EE measures in industrial operations, in addition to price-responsiveness and demand response for industrial customers with flexible load.

Second, CIGFUR respectfully reminds the Commission that various legal and policy issues related to the DSM/EE opt out generally, and specifically with respect to the eligibility criteria for industrial customers seeking to opt out—as well as the myriad reasons why a "reporting" requirement akin to what SACE et al. are recommending in this docket would be inappropriate, infeasible, and contrary to both North Carolina law and Commission precedent—have already come before this Commission multiple times.

1. **Industrial customers who self-certify that they have implemented, or will in the future implement, their own DSM/EE measures at their own expense are entitled by law to opt out of participating in utility-funded DSM/EE measures.**

In 2007, the North Carolina General Assembly enacted G.S. 62-133.9 as part of the Renewable Energy and Energy Efficiency Portfolio Standard (REPS) legislation codified by the enactment into law of Senate Bill 3 (S.L. 2007-397). As part of the section governing cost recovery for DSM/EE measures, Senate Bill 3 (SB 3) includes a requirement that any industrial customer (or large commercial customer) must be allowed to opt out of

participating in utility-administered DSM/EE programs if each such customer notifies its respective electric utility that the customer has in the past implemented or will in the future implement—at its own expense—DSM/EE measures at its facility or facilities. Indeed, G.S. 62-133.9(f) provides that:

> None of the costs of new demand-side management or energy efficiency measures of an electric power supplier shall be assigned to any industrial customer that notifies the industrial customer's electric power supplier that, at the industrial customer's own expense, the industrial customer has implemented at any time in the past or, in accordance with stated, quantified goals for demand-side management and energy efficiency, will implement alternative demand-side management and energy efficiency measures and that the industrial customer elects not to participate in demand-side management or energy efficiency measures under this section.

Importantly, **the North Carolina General Assembly recently reaffirmed its intent to preserve existing law governing DSM/EE measures**, including both the provision allowing industrial customers to opt-out and the process by which certain parties may challenge a customer's opt-out eligibility, through the enactment of House Bill 951 (S.L. 2021-165) in 2021. Indeed, HB 951 provides in pertinent part that

> Any new generation facilities or other resources selected by the Commission in order to achieve the authorized reduction goals for electric public utilities shall be owned and recovered on a cost of service basis by the applicable electric public utility ***except***:
>
> *a.* ***Existing law shall apply with respect to energy efficiency measures and demand-side management.***

G.S. 62-110.9(2)a. (emphasis added). If SACE et al. want to see the DSM/EE opt-out provisions changed, they should seek a statutory amendment from the North Carolina General Assembly, not attempt an end-run around the clear legislative intent through this Commission.

There are a host of public policy reasons supporting the DSM/EE opt out, which our Legislature saw fit to codify in law, including but not necessarily limited to the following:

(1) Large commercial and industrial customers are heavily economically incentivized to conserve energy to the greatest possible extent.

(2) Large commercial and industrial customers tend to be more sensitive and responsive to price signals than residential customers.

(3) Large commercial and industrial customers are economically incentivized to make their own investments in DSM/EE measures, the costs for which are borne solely by the opted-out customer and are not absorbed or otherwise subsidized by other ratepayers, unlike DSM/EE measures undertaken for customers as part of utility-administered DSM/EE programs.

Indeed, DEP witness Powers testified to this existing alignment in economic incentives underpinning the policy behind the opt out eligibility criteria in her rebuttal testimony:

> [t]he customers that can opt out are large commercial and industrial customers that typically have vast, complex operations on-site. For these customers, energy expenses are typically one of the largest costs incurred in their day-to-day operations. This means that they have a natural incentive to reduce their energy costs, which is why the self certification mechanism is appropriate—it aligns with already existing incentives.

Rebuttal Testimony of DEP witness Lynda Powers, at p. 16, ll. 10-15, Docket No. E-2, Sub 1294 (Sep. 1, 2022).

2. The process by which the eligibility of an industrial customer seeking such an opt out may be challenged is prescribed by statute.

DEP witness Powers described the opt-out process at a high level in her rebuttal testimony. *See* Rebuttal Testimony of Lynda Powers, at p. 15, Docket No. E-2, Sub 1294

(Sep. 1, 2022). In addition, Public Staff witness Boswell addressed the most recently approved DSM/EE Cost Recovery Mechanism, which includes opt-out procedures. *See* Cost Recovery and Incentive Mechanism of Duke Energy Progress, LLC, for Demand-Side Management and Energy Efficiency Programs (Boswell Exhibit I).

Existing law authorizes the utility, the Public Staff – North Carolina Utilities Commission (Public Staff), or this Commission *sua sponte* to "initiate a complaint proceeding before the Commission to challenge the validity of the notification of nonparticipation." G.S. 62-133.9(f). The Commission has previously considered and decided issues related to an industrial customer's burden of proof when demonstrating its eligibility to opt out of participating in utility-administered DSM/EE programs. In its November 25, 2009 Order, the Commission decided that an industrial customer "only needs to promise to implement now or in the future alternative measures [to qualify for the DSM/EE opt out]." Order Approving Revisions to Demand-Side Management and Energy Efficiency Cost Recovery Mechanisms, at p. 13, Docket Nos. E-2, Sub 931; E-7, Sub 1032 (Oct. 20, 2020). Indeed, the proper mechanism to challenge or enforce this showing is not through any sort of "enhanced reporting" requirement as SACE et al. contend, but rather through the complaint process at the time when an opt out is initially sought, consistent with the process set forth in G.S. 62-133.9(f).

3. The Commission has—on multiple occasions—previously addressed the issues raised in this docket by SACE et al. regarding the DSM/EE opt out.[1]

[1] *See, e.g.*, Order Adopting Final Rules, at pp. 128-29, Docket No. E-100, Sub 113 (Feb. 29, 2008) (*concluding* in pertinent part that "Rule R8-69 should not be revised to include either Duke's proposal to require a 'substantially equivalent' test in order for customers to opt out of DSM and EE programs or ED, SACE and SELC's proposal that customers desiring to opt out be required to provide detailed descriptions of measures evaluated and measures implemented or planned together with quantified results and projects of the impact of the measures").

Intervenors tending to represent environmental interests have not infrequently over the years sought to raise controversy surrounding the DSM/EE opt out. Indeed, the ink had hardly dried after SB 3 was signed into law before a coordinated, well-resourced, and sustained effort began to renege the DSM/EE opt out, a critically important element of the compromise among stakeholders precipitating SB 3, and without which SB 3 may never have been enacted into law.[2] Despite these efforts, such intervenors have not to date been

[2] *See, e.g.*, Motion for Reconsideration of Carolina Utility Customers Association, Inc., at pp. 9-11, Docket No. E-2, Subs 926 and 931 (July 13, 2009) (*arguing*, in pertinent part, as follows:

> The passage of Senate Bill 3 was the culmination of a long and complicated process initiated by the sincere desire of many North Carolina Representatives and Senators to improve the environment, reduce pollution and increase the use of renewable resource generation in North Carolina. Many 'stakeholders' participated over several months in the Energy Issues Working Group (EIWG) convened by legislative staff pursuant to legislative direction. The purpose of the EIWG process was to come to agreements that would permit comprehensive energy legislation to come into being. Although there were separate meetings between legislators and individual stakeholders, all changes and compromise were discussed by the EIWG Group before the final substitute bill was submitted to the General Assembly.
>
> Some of these stakeholders included: the utilities, the 'clean air' and/or environmental community, the renewable resources or 'green power' interests, at least two organized groups of advocates for large commercial and industrial interests, and other consumer advocates including the Public Staff and the Attorney General. Each of these 'stakeholder' groups advocated strongly-held, and usually conflicting, views on the central issues involved in Senate Bill 3.
> …
>
> The final version of Senate Bill 3, as enacted, represents both a compromise and a 'balancing of the equities' among the various competing interests described above. In the final version of the legislation as enacted, each of the stakeholder groups received some of the things that it wanted from the legislation while being required to undertake certain burdens, obligations and responsibilities that they would have preferred not to incur. The General Assembly was sensitive to the fact that it had 'struck a balance' between the various competing interests in the final version of Senate Bill 3 that was enacted.
>
> The Commission's Orders, for which reconsideration is sought herein, tend to undermine the balance that was struck between the various competing interests that allowed the passage of Senate Bill 3).

successful in their efforts to, essentially, effectuate a statutory amendment, not by way of legislation as would be the proper and legally defensible channel for the changes being sought by SACE et al., but instead by way of regulatory process before this Commission.

As the Commission has previously found in its decisions, North Carolina law is clear: industrial customers must be allowed to opt out of participating in (and paying for) utility-funded DSM/EE programs if they have

> implemented at any time in the past or, in accordance with stated, quantified goals for demand-side management and energy efficiency, will implement alternative demand-side management and energy efficiency measures and that the industrial customer elects not to participate in demand-side management or energy efficiency measures under this section.

G.S. 62-133.9(f).

For example, in 2008, the Commission addressed the opt out in its SB 3 Rulemaking Order, excerpted in pertinent part as follows:

> The Commission concludes that Rule R8-69 should not be revised to include either Duke's proposal to require a 'substantially equivalent' test in order for customers to opt out of DSM and EE programs or ED, SACE, and SELC's proposal that customers desiring to opt out be required to provide detailed descriptions of measures evaluated and measures implemented or planned together with quantified results and projections of the impact of the measures. Senate Bill 3, in general, and G.S. 62-133.8(f), in particular, do not contain any requirement that DSM or EE programs implemented by the customer or DSM or EE programs proposed to be implemented by the customer must be substantially equivalent to the programs or measures being supplied by the electric power supplier. **Nor does Senate Bill 3 require customers desiring to opt out to provide detailed descriptions of measures evaluated and measures implemented or planned together with quantified results and projections of the impact of the measures.** All that is required of a program used as the basis for a customer's decision to opt out is that: (1) the program has (sic) been implemented in the past or (2) that it be proposed to be implemented in the future in accordance with stated, qualified goals.

Order Adopting Final Rules, at p. 129, Docket No. E-100, Sub 113 (Feb. 29, 2008) (emphasis added).

In 2009, the Commission again had the opportunity to evaluate the opt out as the result of motions for reconsideration filed by various parties in response to the Commission entering an *Order Approving Program* in Docket No. E-2, Sub 926 and an *Order Approving Agreement and Stipulation of Partial Settlement, Subject to Certain Commission-Required Modifications* in Docket No. E-2, Sub 931. The practical effect of those orders, when interpreted and applied in tandem, would have been to effectively prohibit PEC's (now DEP's) industrial customers from opting out of all PEC-administered DSM/EE programs. In response to such orders, PEC argued, among other things, that

> the language of G.S. 62-133.9(f) plainly grants to industrial and large commercial customers the absolute right to opt out of any cost recovery responsibility for all of an electric power supplier's DSM and EE measures upon notifying the electric supplier that the customer has implemented or will implement DSM and EE measures of its own. The Commission may not limit or condition that right.

Order Granting Motions for Reconsideration in Part, at p. 5, Docket No. E-2, Subs 926 and 931 (Nov. 25, 2009). On November 25, 2009, the Commission issued an *Order Granting Motions for Reconsideration in Part*, which concluded as to the DSM/EE issue as follows:

> PEC's interpretation of the opt out provision contained in G.S. 62-133.9(f) is correct for the reasons generally set forth above in the description of the Company's legal analysis. G.S. 62-133.9(f) is unambiguous on this point. The statute says that **none** of the costs of new DSM or EE measures shall be assigned to **any** industrial customer that notifies its electric power supplier that it has in the past or will, at its own expense, implement **alternative** DSM or EE measures and that it elects not to participate in any of the electric power supplier's DSM and EE measures. The words 'none' and 'any' are unambiguous and permit no exceptions. It is impossible to imply exceptions for programs to which the industrial and large commercial customers cannot opt into or out of, for which the customers receive a benefit, or that arise from electric power supplier operations on the supplier's side of the meter. As was correctly stated and asserted by the Public Staff and other petitioning parties, G.S. 62-133.9(f) compels and supports no other interpretation than the one advanced by the various motions for reconsideration.

Id. at 6 (emphasis in original) (internal citations omitted).

Despite repeated attempts by intervenors tending to represent environmental interests to make the DSM/EE opt out a subject of controversy, the Commission has time and again rejected such arguments. For example, the Commission found as follows when it completed a formal review of Duke's DSM/EE mechanism in October 2020:

> With regard to the Joint Commenters' recommendation that the Commission institute a reporting requirement for opt out customers, the Commission agrees with the Public Staff that consideration of an opt out reporting requirement is beyond the scope of this proceeding. The opt out provision is a factor in determinations by industrial and large commercial customers about whether to participate in the utilities' DSM/EE programs. But it has little or nothing to do with the guidelines by which the utilities recover their DSM/EE costs and the incentives they receive for successfully operating such programs. **Further, the Commission is not persuaded that there is any basis for reviewing or modifying its decision in the SB 3 Rules Order declining to adopt a reporting requirement.**

Order Approving Revisions to Demand-Side Management and Energy Efficiency Cost Recovery Mechanisms, at p. 13, Docket Nos. E-2, Sub 931; E-7, Sub 1032 (Oct. 20, 2020) (emphasis added).

4. <u>SACE et al. witness Bradley-Wright's recommendations regarding the DSM/EE opt-out are flawed, speculative, and impractical.</u>

Witness Bradley-Wright's testimony that opted-out customer DSM/EE customers participating in utility-funded DSM/EE programs "would likely translate into even higher utility-system cost reductions" completely ignores that (1) DSM/EE measures among such customers are still occurring independent of the utility-funded programs, at no cost to other ratepayers; (2) while the efficiency savings of such customers' own implementation of DSM/EE measures may not be able to be accounted for and reported in DEP's DSM/EE benchmark metrics, that does not mean that such DSM/EE measures are not occurring. Rather, it simply means those savings are showing up elsewhere; for example, the

individual customer's usage, actual historical sales, and/or load forecasts for industrial customers. DEP's most recently reported historical electricity sales was reported in Table F-15 of Duke Energy's proposed Carolinas Carbon Plan filed in Docket No. E-100, Sub 179. As shown, the average annual growth rate for industrial GWh is -1.4%.

Table F-15: Electricity Sales (GWh) – DEP

Year	Residential GWh	Commercial GWh	Industrial GWh	Military & Other GWh	Retail GWh	Wholesale GWh	Total System GWh
2012	17,764	13,709	10,573	1,591	43,637	12,267	55,903
2013	16,663	13,581	10,508	1,602	42,355	12,676	55,031
2014	18,201	13,887	10,321	1,614	44,023	13,578	57,601
2015	17,954	14,039	10,288	1,597	43,876	15,782	59,658
2016	17,686	14,082	10,274	1,563	43,606	18,676	62,282
2017	17,228	13,903	10,391	1,531	43,053	18,242	61,295
2018	18,939	14,219	10,475	1,560	45,194	19,331	64,525
2019	18,177	13,992	10,534	1,537	44,241	18,694	62,935
2020	17,587	12,894	10,122	1,495	42,099	17,216	59,315
2021	18,645	12,941	9,343	1,389	42,318	17,821	60,139
Avg. Annual Growth Rate	0.5%	-0.6%	-1.4%	-1.5%	-0.3%	4.2%	0.8%

Appendix F, at p. 17, Duke's Carolinas Carbon Plan, Docket No. E-100, Sub 179.

In addition, it is wildly speculative, inappropriate, and improper for SACE et al. witness Bradley-Wright to contend—without providing a single shred of evidence whatsoever to in any way substantiate or support his unfounded, uninformed assertions—that "a reasonable person would suspect that many customers who opt out may not have satisfied the requirements of making efficiency improvements at their facilities, despite it being an eligibility requirement for self-certification." Testimony of SACE et al. witness Bradley-Wright at p. 8, ll. 3-9, Docket No. E-2, Sub 1294 (Aug. 24, 2022). Witness Bradley-Wright all but admits what an egregious jump to conclusions he made here by conceding he has no basis whatsoever for this assertion except for "lack of real world verification of eligibility, and no enforcement in practice." *Id.* In other words, witness Bradley-Wright is saying he has no actual data or evidence to support SACE et al.'s preferred framing and narrative they continue to peddle regarding this issue; so, failing to

prove their point through any actual competent or probative evidence, they instead resort to casting aspersions in the general direction of industrial customers and making completely unfounded accusations that are unsupported by anything other than witness Bradley-Wright's suspicions.

DEP witness Powers testified in detail about some of the practical challenges that, even if witness Bradley-Wright's recommendation regarding "enhanced reporting" were legally defensible, would make implementing such a recommendation so difficult that "[t]he costs associated with this effort would likely outweigh any incremental benefit of these complex audits and verifications." Rebuttal Testimony of DEP witness Powers, at p. 16, ll. 20-22, Docket No. E-2, Sub 1294. She goes on to state that "[t]hese additional complexities would ultimately erode the net benefit provided to customers. Taken as a whole, these recommendations would impose additional costs on the Company's customers, shift focus away from driving additional savings for customers, and provide no net benefit to the Company or its customers." *Id.* at 17, ll. 14-18. Moreover, as DEP witness Powers notes, "[m]any of the operations that the Company would be required to observe and measure are likely proprietary in nature because these customers typically utilize equipment and processes that are competitively-sensitive." *Id.* at 16, ll. 17-20.

5. <u>SACE et al. witness Bradley-Wright's recommendation regarding an "enhanced verification or reporting" requirement for industrial customers to opt out of utility-funded DSM/EE programs is not legally defensible.</u>

Industrial customers who opt out of participating in DEP's DSM/EE programs are not public utilities subject to the jurisdiction of this Commission. To implement the recommendations of SACE et al. witness Bradley-Wright in this proceeding would be, for all intents and purposes, to directly or indirectly subject industrial customers to a level

of scrutiny by this Commission that is simply not authorized or even contemplated by existing North Carolina law. In fact, it is unclear how, exactly, such a recommendation could possibly be implemented in any way other than one constituting reversible error pursuant to G.S. 62-94(b)(2). If SACE et al. want to see the DSM/EE opt-out provisions changed, they should seek a statutory amendment from the North Carolina General Assembly, not attempt an end-run around the clear legislative intent through this Commission.

CONCLUSION

CIGFUR II appreciates the opportunity to file this brief. Contrary to the narrative SACE et al. would have this Commission believe, the industrial opt-out for utility-funded DSM/EE measures is an incredible win-win for all ratepayers: industrial customers pay for their own DSM/EE measures (at no cost to other ratepayers), which in turn benefit the system and all ratepayers—at no cost to other ratepayers. Instead of attacking the industrial opt-out, we should be celebrating it and encouraging more private sector, non-utility funded investments in DSM/EE measures. For all the reasons set forth herein, the Commission should decline to adopt SACE et al. witness Bradley-Wright's recommendation of an "enhanced verification or reporting" requirement on such industrial customers, who, again, are not regulated entities subject to the jurisdiction of this Commission.

WHEREFORE, CIGFUR II respectfully requests the Commission consider in its deliberations in this docket the issues raised and arguments contained in this Brief.

Respectfully submitted, this the 28th day of October, 2022.

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CERTIFICATE OF SERVICE

The undersigned attorney for CIGFUR II hereby certifies that she caused the foregoing *Brief of CIGFUR II* to be served this day upon counsel of record for all parties to this docket by electronic mail by consent.

This the 28th day of October, 2022.

/s/ Christina D. Cress
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