

September 15, 2023

**VIA ELECTRONIC FILING**

Ms. A. Shonta Dunston  
Chief Clerk  
North Carolina Utilities Commission  
430 North Salisbury Street  
Raleigh, North Carolina 27603

**Re: Duke Energy Carolinas, LLC's and Duke Energy Progress, LLC's  
Response to Southern Alliance for Clean Energy and the North  
Carolina Sustainable Energy Association's Joint Motion for a  
Technical Conference**

**Docket Nos. E-2, Sub 1314; E-7, Sub 1289; E-2, Sub 1315; and E-7, Sub  
1288**

Dear Ms. Dunston:

Enclosed for filing in the above-referenced dockets is Duke Energy Carolinas, LLC's and Duke Energy Progress, LLC's Response to Southern Alliance for Clean Energy and the North Carolina Sustainable Energy Association's Joint Motion for a Technical Conference.

If you have any questions, please do not hesitate to contact me.

Sincerely,

/s/ Nicholas A. Dantonio

NAD/sbc  
Enclosure

cc: Parties of Record

**STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH**

DOCKET NO. E-2, SUB 1314  
DOCKET NO. E-7, SUB 1289  
DOCKET NO. E-2, SUB 1315  
DOCKET NO. E-7, SUB 1288

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Petition	)	
of Duke Energy Progress, LLC,	)	DUKE ENERGY CAROLINAS,
and Duke Energy Carolinas, LLC,	)	LLC’S AND DUKE ENERGY
Requesting Approval of Green	)	PROGRESS, LLC’S RESPONSE TO
Source Advantage Choice	)	SOUTHERN ALLIANCE FOR
Program and Rider GSAC	)	CLEAN ENERGY AND THE NORTH
	)	CAROLINA SUSTAINABLE
In the Matter of Petition	)	ENERGY ASSOCIATION’S JOINT
of Duke Energy Progress, LLC,	)	MOTION FOR A TECHNICAL
and Duke Energy Carolinas, LLC,	)	CONFERENCE
Requesting Approval of Clean	)	
Energy Impact Program	)	

NOW COME Duke Energy Carolinas, LLC (“DEC”) and Duke Energy Progress, LLC (“DEP”) (collectively, “Duke Energy” or the “Companies”) and hereby respectfully file this Response to the Joint Motion for a Technical Conference (“Motion”) filed by Southern Alliance For Clean Energy (“SACE”) and the North Carolina Sustainable Energy Association (“NCSEA” and together with SACE, “Movants”) on September 5, 2023.

As further addressed herein, the Companies object to the Motion’s request for a technical conference on the grounds that (1) a technical conference focused on “regulatory surplus” is not necessary for the Commission to rule on the limited relief presented in the

Companies' Response to CIGFUR's Request for Procedural Relief<sup>1</sup> and to allow more time for discussion amongst the parties, and (2) the proposed technical conference is procedurally suspect in these rate tariff proceedings. With respect to the Motion's request for additional legal briefing on whether Section 5 of Session Law 2021-165 ("HB 951") requires regulatory surplus, the Companies leave this issue to the Commission's discretion but submit that additional briefing is unwarranted given the thoroughness of the parties' comments in these proceedings.

In support of this Response, the Companies show the Commission the following:

### **BACKGROUND**

1. On January 27, 2023, the Companies filed their Joint Petition for Approval of the proposed Green Source Advantage Choice Program in Docket Nos. E-2, Sub 1314 and E-7, Sub 1289 and their Joint Petition for Approval of the proposed Clean Energy Impact Program in Docket Nos. E-2, Sub 1315 and E-7, Sub 1288.

2. On April 25, 2023, the Public Staff, North Carolina Attorney General's Office ("AGO"), the Carolina Industrial Group for Fair Utility Rates II & III (together "CIGFUR"), the Carolina Utility Customers Association ("CUCA"), SACE, NCSEA, the Carolinas Clean Energy Business Association ("CCEBA"), the Clean Energy Buyers Association ("CEBA"), Google LLC ("Google"), and the United States Department of Defense and all other Federal Executive Agencies ("DOD") filed initial comments in the GSA Choice dockets.

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<sup>1</sup> Duke Energy Carolinas, LLC's and Duke Energy Progress LLC's Response to CIGFUR's Request for Procedural Relief, Docket Nos. E-2, Sub 1314, E-7, Sub 1289, E-2, Sub 1315, E-7, Sub 1288 (filed Aug. 1, 2023).

3. On June 23, 2023, the Companies, Public Staff, AGO, CIGFUR, CUCA, SACE, NCSEA, CCEBA, CEBA, Google, and DOD filed reply comments in the GSA Choice Dockets and the Companies, Public Staff, AGO, NCSEA, SACE, and CCEBA filed reply comments in the CEI Dockets.

4. CIGFUR also filed a Request for Procedural Relief on June 23, 2023. CIGFUR requested the Commission to temporarily stay “these dockets for a limited, time-certain period to allow the parties to continue working in good faith in hopes of resolving certain outstanding issues[.]”<sup>2</sup>

5. The Companies filed their Response to CIGFUR’s Request for Procedural Relief on August 1, 2023 (“August 1 Response and Request for Limited Program Approvals”). The Companies’ August 1 Response and Request for Limited Program Approvals requests the Commission to (1) approve the Green Source Advantage Choice (“GSAC”) Clean Energy Environmental Attributes (“CEEA”) Purchase Track, (2) issue an Order on the Companies’ Petition for Approval of the Clean Energy Impact (“CEI”) Program without stay, and (3) allow interested parties to continue engagement and file an update regarding discussions on the Regulatory Surplus Tracks on November 15, 2023.<sup>3</sup> CIGFUR and the Public Staff supported the Companies’ proposal and amended request for relief presented in the August 1 Response and Request for Limited Program Approvals.

6. Movants filed a Joint Response to CIGFUR’s Request for Procedural Relief and the Companies’ August 1 Response and Request for Limited Program Approvals on

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<sup>2</sup> Request For Procedural Relief And Reply Comments of CIGFUR II and III at 7, Docket Nos. E-2, Sub 1314, E-7, Sub 1289 (June 23, 2023).

<sup>3</sup> August 1 Response and Request for Limited Program Approvals at 6, Docket Nos. E-2, Sub 1314, E-7, Sub 1289, E-2, Sub 1315, E-7, Sub 1288.

August 9, 2023.<sup>4</sup> In their Joint Response, Movants requested the Commission to issue an order requiring that “all HB 951 voluntary programs procure clean energy that is surplus to regulatory requirements.”<sup>5</sup> CCEBA filed a responsive letter on August 11, 2023, reiterating its proposal for an expanded GSAC PPA track option to increase solar additions, requesting the Commission to grant CIGFUR’s Request for Procedural Relief as to the GSAC dockets, order the Companies to continue further discussions on additionality/regulatory surplus concerns, and allow parties to address unresolved issues through sur-replies.<sup>6</sup> The Companies filed a brief supplemental reply on August 28, 2023, explaining that (1) it is appropriate for the Commission to approve the GSAC CEEA Purchase Track and CEI Program now, and (2) the Companies will engage in good faith with the Public Staff and Intervenors in an attempt to continue to refine the GSAC Program within the statutory boundaries set by HB 951.<sup>7</sup>

7. On September 5, 2023, Movants filed the Motion. The Motion seeks (1) a technical conference, which would potentially involve presentations by unidentified third-party experts employed by the Center for Resource Solutions (“CRS”) and/or Regulatory Assistance Project (“RAP”), on issues and controversies primarily in the GSAC Docket related to regulatory surplus, and (2) an opportunity for further legal briefing on whether

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<sup>4</sup> Joint Response of The Southern Alliance For Clean Energy And The North Carolina Sustainable Energy Association at 10, Docket Nos. E-2, Sub 1314, E-7, Sub 1289, E-2, Sub 1315, E-7, Sub 1288 (Aug. 9, 2023).

<sup>5</sup> *Id.*

<sup>6</sup> CCEBA Letter at 3, Docket Nos. E-2, Sub 1314, E-7, Sub 1289, E-2, Sub 1315, E-7, Sub 1288 (Aug. 11, 2023).

<sup>7</sup> Supplemental Reply Letter, Docket Nos. E-2, Sub 1314, E-7, Sub 1289, E-2, Sub 1315, E-7, Sub 1288 (Aug. 28, 2023).

Section 5 of HB 951 requires customer programs proposed under the same to include regulatory surplus.

### **RESPONSE IN OPPOSITION TO MOTION**

8. The Companies object to the Motion because (1) it contemplates a technical conference that is unnecessary and procedurally suspect for this proceeding, and (2) the parties have had ample opportunity to thoroughly analyze whether HB 951 requires regulatory surplus in their respective initial and reply comments. Nonetheless, the Companies are not opposed to additional briefing on regulatory surplus if the Commission determines that additional analysis would be beneficial.

- I. A technical conference is not necessary for the Commission to grant the limited relief presented in the Companies' August 1 Response and Request for Limited Program Approvals and to allow more time for discussion amongst the parties regarding the issue of regulatory surplus.**

9. Movants argue that the central issue before the Commission is whether the proposed GSAC and CEI programs result in regulatory surplus.<sup>8</sup> However, from the Companies' perspective, the central issue before the Commission in these proceedings is whether the Companies' proposed GSAC and CEI programs comply with North Carolina law and meet the framework for customer-directed renewable energy procurement programs under Section 5 of HB 951. This is a legal question that would not be resolved through a technical conference, and the existing record is sufficiently robust to allow the Commission to apply its expert judgment and evaluate whether the Companies' proposed

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<sup>8</sup> Motion at 3.

programs meet the requirements of Section 5 of HB 951.<sup>9</sup> Moreover, as described in the August 1 Response and Request for Limited Program Approvals, the Companies, the Public Staff, and CIGFUR are all committed to engaging in further discussion regarding Regulatory Surplus Tracks between now and November 15 and will keep the Commission apprised of the same.<sup>10</sup> Therefore, a technical conference is not necessary for the Commission to grant the limited relief presented in the Companies' August 1 Response and Request for Limited Program Approvals and to allow more time for discussion amongst the parties regarding the issue of regulatory surplus.

**II. The proposed technical conference is unnecessary, procedurally suspect, and risks challenge to the Commission's Order for acting in excess of its statutory authority and upon unlawful procedure.**

10. As proposed, Movants request the Commission to order a technical conference to receive unsworn testimony from non-intervenor third parties that would then inform the Commission's decision-making in this proposed tariff approval proceeding. Specifically, the Motion proposes that "input" from two non-parties, CRS, a nonprofit entity that oversees the Green-e independent renewable energy certification program, and RAP, a non-governmental organization, "during a technical conference would help the Commission in its deliberation on the issue."<sup>11</sup>

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<sup>9</sup> *State ex rel. Utilities Comm'n v. Pub. Staff-N. Carolina Utilities Comm'n*, 323 N.C. 481, 491, 374 S.E.2d 361, 367 (1988) (recognizing that "the Commission is a body of experts [with] special knowledge, observation, and experience in the field of rate regulation.").

<sup>10</sup> To the extent there are unanswered questions about regulatory surplus, such questions can be discussed in further stakeholder engagement regarding the Regulatory Surplus Tracks. As noted earlier, the Companies, CIGFUR, and the Public Staff have already agreed that such stakeholder engagement is appropriate and are willing to engage in the same. Duke Energy Carolinas, LLC's and Duke Energy Progress, LLC's Response to CIGFUR's Request for Procedural Relief at 5.

<sup>11</sup> Motion at 18.

11. As an initial matter, the request for a technical conference is unnecessary and effectively serves as an asymmetric sur-rebuttal reply opportunity beyond the Commission-directed procedural schedule for intervenor comments. The current record clearly demonstrates that the topics Movants propose to address in the technical conference are not “new” issues but instead have been squarely in front of the Commission from the very beginning of this comment process, and all parties have had a fulsome opportunity to offer comments on such issues.<sup>12</sup> Movants have had the full opportunity to comment on these issues and should not be permitted to do an end-around the established comment cycle simply to present yet more comments on issues that are not new and should have already been presented. Granting the Motion would create a precedent that would essentially reward inefficiency and inject uncertainty with respect to otherwise firm comment schedules established by the Commission.

12. Putting aside the fundamental inequity of the relief requested in the Motion, there are also more formal procedural concerns with the Motion. While it is well established that procedure before the Commission is less formal than superior court, and the Commission has previously utilized technical conferences in integrated resource planning (“IRP”) dockets and other limited circumstances, this does not mean there are no

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<sup>12</sup> Initial Comments of Public Staff at 10-11, Docket Nos. E-2, Sub 1314, E-7, Sub 1289, E-2, Sub 1315, E-7, Sub 1288; CUCA Initial Comments at 4, Docket Nos. E-2, Sub 1314, E-7, Sub 1289; Joint Initial Comments of SACE, NCSEA, and CCEBA at 2-19, Docket Nos. E-2, Sub 1314, E-7, Sub 1289, E-2, Sub 1315, E-7, Sub 1288; Joint Reply Comments of SACE and NCSEA at 2-6, Docket Nos. E-2, Sub 1314, E-7, Sub 1289, E-2, Sub 1315, E-7, Sub 1288; Public Staff Reply Comments at 3-13, Docket Nos. E-2, Sub 1314, E-7, Sub 1289, E-2, Sub 1315, E-7, Sub 1288; SSDN Reply Comments at 2, Docket Nos. E-2, Sub 1314, E-7, Sub 1289, E-2, Sub 1315, E-7, Sub 1288; DOD Reply Comments at 5, Docket Nos. E-2, Sub 1314, E-7, Sub 1289; CCEBA Letter in Lieu of Reply Comments at 1-2, Docket Nos. E-2, Sub 1314, E-7, Sub 1289, E-2, Sub 1315, E-7, Sub 1288; Google Reply comments at 2, Docket Nos. E-2, Sub 1314, E-7, Sub 1289; CUCA Reply Comments at 2-5, Docket Nos. E-2, Sub 1314, E-7, Sub 1289; Duke Energy Reply Comments at 7-40; 46, Docket Nos. E-2, Sub 1314, E-7, Sub 1289, E-2, Sub 1315, E-7, Sub 1288.



procedural bounds to proceedings before the Commission. In this proceeding, the Commission is determining whether to establish a “rider” under HB 951<sup>13</sup> and to approve rate tariffs for the provision of electric service to customers.<sup>14</sup> Movants, however, have failed to provide any legal support for the Commission utilizing a technical conference in these Dockets.

13. The Commission is subject to the procedural requirements of Article 4 of the Public Utilities Act and must ensure that its process for conducting hearings, making decisions, and issuing orders adheres to those requirements<sup>15</sup> or be at risk of challenge for acting in excess of its statutory authority and upon unlawful procedure.<sup>16</sup> Indeed, when the Commission sets a rate, it is not only acting in a legislative capacity under authority delegated from the General Assembly,<sup>17</sup> but it is also subject to statutorily-prescribed procedural requirements of the Public Utilities Act, which require the Commission to “render its decisions upon questions of law and of fact in the same manner as a court of record.”<sup>18</sup>

14. As summarily explained in the Motion, Movants’ proposed technical conference would potentially involve receipt of unsworn testimony from non-intervening

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<sup>13</sup> HB 951, Section 5(iv) (stating that the Commission shall “establish a rider for a voluntary program . . .”).

<sup>14</sup> N.C.G.S. § 62-3(24) (“Rate[ ] means every . . . tariff . . . by any public utility, for any service product or commodity offered by it to the public[.]”).

<sup>15</sup> N.C.G.S. § 62-60(a).

<sup>16</sup> N.C.G.S. § 62-94 (b)(2)-(3).

<sup>17</sup> N.C.G.S. § 62-23 (“The Commission is hereby declared to be an administrative board or agency of the General Assembly created for the principal purpose of carrying out the administration and enforcement of this Chapter, and for the promulgation of rules and regulations and fixing utility rates pursuant to such administration[.]”).

<sup>18</sup> N.C.G.S. § 62-60.

third parties presented as experts<sup>19</sup> specifically for the purposes of informing the Commission’s “deliberations” and decision-making on whether to approve the Companies’ proposed GSAC and CEI rates and tariffs in these proceedings. However, the Public Utilities Act prescribes that when the Commission is making decisions in its judicial capacity, “[o]ral evidence shall be taken on oath or affirmation,” and that “[e]very party to a proceeding shall have the right to . . . to cross-examine opposing witnesses on any matter relevant to the issues, to impeach any witness regardless of which party first called such witness to testify and to rebut the evidence against him.”<sup>20</sup> Movants’ proposed technical conference would be required to comply with these statutory procedural requirements, and the Companies would have the right to cross examine experts offered on such technical issues in order for such information to support the Commission’s findings and conclusions. The Motion does not address how the proposed technical conference could comply with this statutory procedural framework, and it seems to envision unsworn testimony from third parties that are not parties to this proceeding and not subject to cross examination.<sup>21</sup> Simply put, the Motion does not provide any support for the Commission holding a technical conference in this type of proceeding or explain how it could comply with the Article 4 requirements of the Public Utilities Act.

15. The Companies recognize that the Commission has previously ordered technical conferences in limited non-rate setting circumstances pursuant to the Commission’s broad general authority to supervise and control the public utilities of the

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<sup>19</sup> See Motion at 15-18. It is unclear on the face of the Motion whether Movants intend to invite CRS and RAP to appear at the technical conference, anticipate the Companies, the Public Staff or another party doing so, or anticipate the Commission compelling their appearance.

<sup>20</sup> N.C.G.S. § 62-65.

<sup>21</sup> Motion at 15-18.

State<sup>22</sup> and to keep informed of their operations.<sup>23</sup> These prior technical conferences have appropriately been for the general purposes of gathering information in proceedings which are inherently technical, such as in IRP proceedings,<sup>24</sup> the current Winter Storm Elliot investigation,<sup>25</sup> or in the Commission's role in overseeing the Competitive Procurement of Renewable Energy Program.<sup>26</sup> Those circumstances are distinguishable from the rates and tariffs under review in these Dockets.<sup>27</sup>

16. In sum, holding a technical conference to receive unsworn testimony in these proceedings is procedurally suspect. Moreover, other procedural avenues exist for the Commission to obtain factual information about regulatory surplus if it deems such steps to be in the public interest. To the extent that the Commission finds that discrete

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<sup>22</sup> N.C.G.S. § 62-30.

<sup>23</sup> N.C.G.S. § 62-33.

<sup>24</sup> Order Scheduling Technical Conference and Requiring Responses To Commission Questions, Docket No. E-100, Sub 157 at 1 (July 23, 2019) (“The Commission recognizes that some of the most promising emerging resource solutions, such as battery storage and leading-edge intelligent grid controls, are still in the early stages and will require enhanced capabilities, such as those promoted through ISOP. As a result, the Commission concludes that it would be helpful for the Commission to receive additional information from Duke about ISOP. Therefore, the Presiding Commissioner finds good cause to schedule a Technical Conference.”); Order Scheduling Technical Conference and Requiring Filing of Report, Docket No. E-100, Sub 165 at 1-2 (Jan. 12, 2021) (“The Commission concludes that it would also be helpful for the Commission to hear the Duke Utilities summarize their ISOP work directly, with an opportunity for questions and for exploration of issues raised during the stakeholder sessions. Accordingly, as provided in this Order a technical conference will be scheduled to provide a forum for this discussion.”); *See also State ex. rel. Utilities Comm. v. N.C. Electric Membership Corp.*, 105 N.C. App. 136, 144 (N.C. Ct. App. Jan. 21, 1992) (finding that “least-cost planning proceeding should bear a much closer resemblance to a legislative hearing, wherein a legislative committee gathers facts and opinions so that informed decisions may be made at a later time. . . . [i]f an intervenor desires the Commission to issue a mandatory order which will require a utility to take or to refrain from taking some specific substantive action, it may file a complaint pursuant to G.S. 62-73[.]”).

<sup>25</sup> Order Scheduling a Technical Conference, Docket No. M-100, Sub 163 at 1 (Aug. 7, 2023) (directing a technical conference “for the purposes of receiving updated data and information from DEC and DEP as to the load reduction event that occurred on December 24, 2022.”).

<sup>26</sup> Order Postponing Tranche 2 CPRE RFP Solicitation and Scheduling Technical Conference at 2, Docket Nos. E-2 Sub 1159, E-7 Sub 1156 (May 1, 2019).

<sup>27</sup> The transmission and distribution (“T&D”) technical conference established under the Commission’s performance based ratemaking (“PBR”) regulations is also distinct as the T&D conference is required *before* the Companies file a PBR application and the General Assembly provided that, at this pre-filing technical conference phase, “no cross-examination of parties shall be permitted.” *See* N.C.G.S. § 62-133.16(J)(3).

issues such as regulatory surplus warrant further evidence from technical experts, the most appropriate procedural approach would be to schedule a limited evidentiary hearing to explore such discrete factual issues versus a technical conference, as proposed by Movants in the Motion.<sup>28</sup>

**III. Additional briefing on the discrete legal issue of whether HB 951 requires regulatory surplus is unwarranted but is squarely within the Commission's discretion.**

17. Supplemental briefing on whether HB 951 requires regulatory surplus as proposed in the Motion<sup>29</sup> is only warranted if the Commission deems it necessary to resolve *legal* questions versus exploring *factual* issues, as seemingly sought by the Movants' proposal for a technical conference. The Companies reiterate, however, that the issue of regulatory surplus has been thoroughly explored in this proceeding. All parties have had the opportunity to address regulatory surplus in their respective initial and reply comments, and only a small minority of parties have argued that HB 951 legally requires regulatory surplus.<sup>30</sup> The remaining parties raise regulatory surplus for the Commission's consideration as an important issue that impacts customers' interest in the Programs but have not asserted that it is legally required. The Companies' position that HB 951 does not require voluntary customer programs to contain regulatory surplus is also well established.<sup>31</sup> Therefore, additional briefing is unwarranted.

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<sup>28</sup> The Commission has previously ordered an evidentiary hearing on limited controverted issues after receiving comments. *See e.g.*, Order Scheduling Evidentiary Hearing and Establishing Procedural Schedule, Docket No. E-100, Sub 158 at 5 (Apr. 24, 2019).

<sup>29</sup> Motion at 19.

<sup>30</sup> The only parties that have argued that HB 951 requires regulatory surplus are SACE, NCSEA, CCEBA, and the AGO. *See* Duke Energy Reply Comments at 6-7.

<sup>31</sup> Duke Energy Reply Comments at 5-35.

## CONCLUSION

For the reasons set forth above, the Companies request the Commission to deny the Motion because (1) a technical conference on regulatory surplus is not necessary for the Commission to grant the limited relief presented in the Companies' Response to CIGFUR's Request for Procedural Relief and to allow more time for discussion amongst the parties, (2) the proposed technical conference is unnecessary, procedurally suspect and risks challenge to the Commission's Order for acting in excess of its statutory authority and acting upon unlawful procedure, and (3) additional briefing is unwarranted given the thoroughness of the parties' comments in these proceedings.

Respectfully submitted, this the 15th day of September 2023.

/s/ Nick A. Dantonio

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Response to Southern Alliance for Clean Energy and the North Carolina Sustainable Energy Association's Joint Motion for a Technical Conference*, as filed in Docket Nos. E-2, Sub 1314; E-7, Sub 1289; E-2, Sub 1315; and E-7, Sub 1288 has been served electronically upon all parties of record.

This the 15<sup>th</sup> day of September, 2023.

/s/ Nicholas A. Dantonio

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