



21 September 2015

Chief Clerk  
North Carolina Utilities Commission  
Dobbs Building  
430 North Salisbury Street  
4325 Mail Service Center  
Raleigh, NC 27699-4325

**FILED**

SEP 21 2015

Clerk's Office  
N.C. Utilities Commission

**Re: Treatment of Affidavit of Ben Johnson, Ph.D (Commission Docket No. E-100, Sub 140)**

Dear Honorable Chief Clerk and Commissioners:

On 18 September 2015, Duke Energy Carolinas, LLC (“DEC”), Duke Energy Progress, LLC (“DEP”), and Dominion North Carolina Power (“DNCP”) (collectively, the “Utilities”) filed proposed orders in this proceeding. In their respective proposed orders, the Utilities propose that the North Carolina Utilities Commission (“Commission”) disregard the affidavit of Ben Johnson, Ph.D, filed with the North Carolina Sustainable Energy Association’s (“NCSEA”) August reply comments, by finding and concluding that it was “improperly filed.” *DEC/DEP Proposed Order (Public Version)* at 10; *see DNCP Proposed Order* at 19, n 4.

NCSEA files this letter to object in a timely manner on the record<sup>1</sup> to the Utilities’ spurious proposal. The Utilities’ proposal is spurious for the three reasons explained below.

**First**, the Commission’s 8 January 2015 *Order Establishing Procedural Schedule and Scheduling Public Hearing* stated:

The Commission will attempt to resolve all remaining issues arising in this docket based on a record developed through public witness testimony, statements, exhibits and avoided cost schedules verified by persons who would otherwise be qualified to present expert testimony in a formal hearing, and on written comments on the statements, exhibits and schedules, without conducting another full evidentiary hearing for the purpose of receiving expert testimony. Non-expert public witness

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<sup>1</sup> Beyond making a timely objection for any record on appeal, this letter response is appropriate to the extent the Commission construes the Utilities’ proposal as an unmarked, embedded motion to strike. Regardless of how the Commission construes the Utilities’ proposal, it is worth noting that the Utilities never raised their apparent objection to Dr. Johnson’s affidavit with NCSEA and that, had they done so, the parties could have brought this issue to the Commission prior to the filing of proposed orders.

testimony will be received at the public hearing, as scheduled herein below.

Ben Johnson's affidavit was designed to assist the Commission in its effort to "attempt" to resolve the second phase of this proceeding via a "developed" "record[.]" "without conducting another full evidentiary hearing[.]" The affidavit is a "statement ... verified by [a] person[] who would otherwise be qualified to present expert testimony in a formal hearing" that serves to verify analytical assertions and expert opinion articulated in NCSEA's initial comments and reply comments. As such, NCSEA's submission of Ben Johnson's affidavit complied with the letter and spirit of the Commission's 8 January 2015 order and was entirely appropriate.

**Second**, the Utilities appear to base their spurious proposal on an assertion of unfair surprise/unfair advantage. DEC/DEP, for example, jointly claim that the affidavit "is outside of the Commission's procedure." *DEC/DEP Proposed Order* (Public Version) at 73. DNCP, similarly, asserts that "the late stage ... at which the affidavit was filed ... did not permit a response by the Utilities[.]" *DNCP Proposed Order* at 19 n 4. The Utilities' claims of unfair surprise/unfair advantage do not pass the straight-face test for several reasons:

*No Unfair Surprise.* When, prior to 2 March 2015, NCSEA added Ben Johnson to its non-disclosure agreements with the Utilities, the Utilities were put on notice that Ben Johnson would be serving as NCSEA's analytical expert in the second phase of this proceeding. Additional notice was provided to the Utilities when NCSEA filed a motion for extension of time on 21 May 2015 that contained the following language:

In order to ensure sufficient time for NCSEA's expert witness to analyze all responses to discovery requests, including those responses which have not yet been received, and for NCSEA's counsel to incorporate this analysis into comments, NCSEA respectfully requests that the Commission extend the current deadlines ... . NCSEA understands the press of business has necessitated longer periods for responding to discovery by the Utilities and seeks only to preserve its ability to present thorough and well-considered comments.

The Utilities reviewed said motion and did not object to the motion's language or the relief requested. To the extent the foregoing notifications were insufficient to put the Utilities on notice, NCSEA inserted the following statement into its 22 June 2015 initial comments:

For the purposes of this phase of the proceeding, NCSEA retained Ben Johnson Associates, Inc. to assist with the review of the March 2015 Filings, and Ben Johnson, Ph.D., served as consulting economist.

*NCSEA Initial Comments* at 2. Thus, there was no surprise at all, much less any unfair surprise.

*No Unfair Advantage.* Perhaps of greater importance, NCSEA has gained no unfair advantage via submission of the affidavit. Ben Johnson's affidavit is, in substance, nothing more than a verification of the portions of NCSEA's initial comments and reply comments that are based on Dr. Johnson's analytical work and expert opinion. The filing

of a separate affidavit was the most efficient means for him to verify the portions of the comments based on his analytical work and expert opinion.<sup>2</sup> Because Dr. Johnson's affidavit is, in substance, nothing more than a verification, it is patently untrue that the Utilities were unfairly denied any opportunity to respond to the substance of the affidavit: They had an opportunity to respond to NCSEA's initial comments; and whatever inability they may have had to respond to NCSEA's reply comments is no different than the inability of every party to respond to other parties' reply comments.

Thus, it bears repeating, the affidavit complied with the letter and spirit of the Commission's 8 January 2015 order and was in no way "outside of the Commission's procedure" as DEC/DEP claim.

**Third**, and finally, the spuriousness of the Utilities' proposal becomes particularly evident in the DEC/DEP attempt to justify their claim by suggesting that NCSEA could have presented Dr. Johnson's analytical work and expert opinion in May 2015. DEC/DEP assert:

Had Dr. Johnson wanted to present testimony or comments in this docket, he had the option of testifying as a public witness at the May 19, 2015 public hearing[.]

*DEC/DEP Proposed Order (Public Version)* at 73. In actuality, Ben Johnson could not have testified on 19 May 2015 to the information contained in his affidavit for several reasons.

*Public Hearing Was For Non-Experts.* Ben Johnson is an expert witness and the Commission's 8 January 2015 order clearly states that only "[n]on-expert public witness testimony will be received at the public hearing[.]"

*Utilities' Delayed Data Responses.* Even if Dr. Johnson could have surmounted the Commission order barring him from offering expert testimony on 19 May 2015, he would have encountered a very real practical bar to testifying, one DEC and DEP were intimately familiar with. As quoted above, the Utilities – including DEC/DEP – required "longer periods" to respond to NCSEA's (and, by extension, Ben Johnson's) discovery requests. By not objecting to NCSEA's motion for extension of time on 21 May 2015, the Utilities effectively acknowledged that Ben Johnson had not been supplied with the information he needed to form an expert opinion as of the date of the motion. The Commission should note this effective acknowledgment came two days after the public hearing at which, the Utilities now assert, Dr. Johnson should have been prepared to present the expert analysis contained in NCSEA's initial comments and reply comments. When contextualized thusly, the DEC/DEP proposal is exposed as absurd and nothing more than a baseless last gasp effort to undo NCSEA's contribution to development of a full, expertly-informed evidentiary record.

In sum, Ben Johnson's affidavit complied with the letter and spirit of the Commission's 8 January 2015 order and was in no way "outside of the Commission's

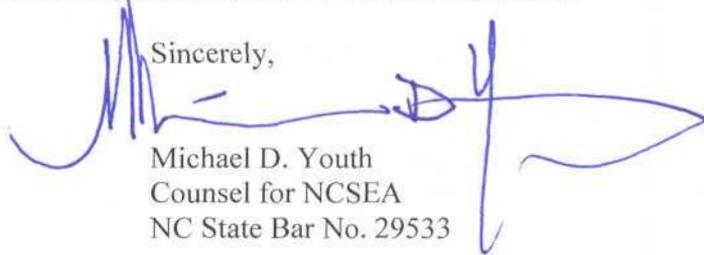
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<sup>2</sup> Mr. Johnson appropriately did not verify the entirety of NCSEA's initial comments and reply comments because there are portions of these comments that are not based on his analytical work or expert opinion (e.g., the comments pertaining to standard offer terms and the comments making PURPA-based arguments or other legal arguments).

procedure." By this letter, NCSEA objects on the record to the Utilities' proposal that the Commission find otherwise. Furthermore, to the extent the Utilities' proposal is construed as an unmarked, embedded motion to strike, NCSEA strenuously opposes grant of said motion for the reasons stated herein.

This letter will be served on parties to the proceeding on the date set out above.

Sincerely,

A handwritten signature in blue ink, appearing to read 'M. Youth', is written over the typed name and extends to the right.

Michael D. Youth  
Counsel for NCSEA  
NC State Bar No. 29533