

**STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH**

DOCKET NO. E-100, SUB 180

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	)	<b>MEMORANDUM IN</b>
	)	<b>OPPOSITION TO MOTION</b>
Investigation of Proposed Net Metering Policy	)	<b>FOR STAY PENDING</b>
Changes	)	<b>APPEAL</b>
	)	
	)	

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Justice does not support – much less require – that the North Carolina Utilities Commission (“Commission”) stay the effect of its March 23, 2023, Order Approving Revised Net Metering Tariffs (“the Order”) during the pendency of the appeal of that Order by Environmental Working Group, 350 Triangle, 350 Charlotte, the North Carolina Alliance to Protect Our People and the Places We Live, NC Warn, North Carolina Climate Solutions Coalition (“NCCSC”), and Sunrise Movement Durham Hub (“Joint Appellants”).

As a result, and for the reasons set forth below, Duke Energy Carolinas, LLC (“DEC”) and Duke Energy Progress, LLC (“DEP”) (collectively, the “Companies”) respectfully request that the Commission deny the Joint Appellants’ motion for such a stay.

1. In 2017, North Carolina’s General Assembly passed House Bill 589 (“H.B. 589”), which requires electric public utilities to file for Commission approval revised net metering (“NEM”) rates for electric customers that own a renewable energy facility for that person’s own primary use or are customer generator lessees. N.C.G.S.A. § 62-126.4.

2. H.B. 589 “requires the Commission to ‘establish net metering rates under all tariff designs that ensure that the net metering retail customer pays its full fixed cost of

service.” *Order*, at p. 5 (Citing N.C.G.S. § 62-126.4(b)). It “mak[es] clear that ‘cross-subsidization should be avoided by holding harmless . . . customers that do not participate in such arrangements.” *Id.*, at p. 4. (Citing N.C.G.S. § 62-126.2).

3. Per H.B. 589, the revised NEM “rates shall be nondiscriminatory and established only after an investigation of the costs and benefits of customer-sited generation.” N.C.G.S. § 62-126.4(b).

4. In November 2021, the Companies, pursuant to H.B. 589, filed a joint petition (“Petition”) for the Commission to approve revised NEM tariffs. In the Petition, the Companies represented that they had “fulfilled the requirements” of H.B. 589 as, among other things:

- a. They had conducted a thorough investigation of the costs and benefits of customer-sited generation through its Rate Design Study” (“Study”), which included “robust stakeholder input, feedback, and interaction.” *Order*, at p. 5. That Study estimates that, under the current NEM rate design, potential monthly subsidies exist in favor of each NEM customer that range from \$25-\$63.<sup>1</sup> *Id.*, at pp. 5, 33. Thus, under the current rate design, NEM customers “are not paying the full cost to provide them with electric service, and this cost recovery gap is currently socialized and collected from all ratepayers.” *Id.*, at p. 6.

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<sup>1</sup> The Study included a marginal cost study and an embedded cost study that applied industry-standard rate design metrics to the full output of the PV system. “The embedded cost analysis estimated a potential monthly subsidy in favor of each NEM customer between \$25 and \$30 for DEC and between \$35 and \$40 for DEP. The marginal cost framework estimated a potential monthly subsidy in favor of each NEM customer between \$30 and \$35 for DEC and between \$58 and \$63 for DEP.” *Order*, at pp. 5-6.

b. “Using the results of the study,” the Companies “created [revised NEM] rate structures that accurately capture the current costs to serve” NEM customers “while ensuring NEM customers pay their full fixed cost of service” and minimizing the risk of cross-subsidization. *Id.*, at pp. 5-6.

5. Joint Appellants opposed the Companies’ proposed revised NEM tariffs.

6. In written comments submitted to the Commission, Joint Appellants contended that the Commission should reject the Companies’ revised NEM tariffs because the Companies’ Study was insufficient to satisfy the requirements of H.B. 589. *See, e.g.*, Joint Initial Comments of NC Warn, NCCSC, and Sunrise Durham, at p. 3. They also asserted that, if implemented, the proposed tariffs would reduce the savings of rooftop solar customers. *See, e.g.*, Joint Reply Comments of NC Warn, NCCSC, and Sunrise Durham, at pp. 18-19.

7. Significantly, while Joint Appellants opposed the cost-shift of the revised NEM tariffs, H.B. 589 itself seeks such a reduction in existing cross-subsidization and aims for NEM customers to begin paying their “full fixed cost of service.” N.C.G.S. § 62-126.4(b).

8. On March 23, 2023, the Commission, after review of all submissions and a fully developed record, issued the Order, establishing revised NEM tariffs (the “NEM Tariffs”) along with a glidepath option (the “Bridge Rate”) for legacy and future NEM customers to transition to the new NEM offerings thereunder. The Commission approved the NEM Tariffs “effective July 1, 2023, for a period of four years.” *Order*, at pp. 41-42.

9. In the Order, the Commission found that the NEM Tariffs, which were “supported by a wide coalition of parties representing utility, environmental, and solar

interests,” were “reasonable” and, as modified by the Commission, “address” and are “necessary to help abate subsidization of NEM customers by non-NEM customers.” *Order*, at pp. 33, 37.

10. The Commission also specifically found that, despite Joint Appellants’ concern otherwise, the Companies, “through its comprehensive” Study and “stakeholder process, properly conducted an investigation of the costs and benefits of customer-sited generation as required by HB 589.” *See id.*, at pp. 37, 34-36 (Noting that the Commission was “not persuaded by NC Warn, et. al. EWG, and 350 Triangle, et. al’s argument that Duke has not met its statutory obligations under HB 589”).

11. On May 17, 2023, the Commission, following a request from a number of parties,<sup>2</sup> extended the effective date to implement the NEM Tariffs from July 1, 2023, until October 2, 2023. *May 17, 2023, Order*. As the Commission noted in its extension order, the parties requested the extension of time to, among other things, “provide the solar industry an opportunity to adapt its business model.” *May 17, 2023, Order*, at p. 1. Joint Appellants’ implication that the extension was to allow “adequate investigation” of the NEM Tariffs is incorrect and unsupported by the record.

12. Subsequently, on May 18, 2023, Joint Appellants filed a notice of appeal of the Order (“Appeal”).

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<sup>2</sup> Those parties requesting the extension included: North Carolina Sustainable Energy Association, Southern Environmental Law Center on behalf of Vote Solar and Southern Alliance for Clean Energy, the Solar Energy Industries Association, Sundance Power Systems, Inc., Southern Energy Management, Inc., and Yes Solar Solutions. The Companies did not object to the brief extension; because the extension was for compliance deadlines applicable to the Companies, the Companies, for clarity of the record, filed a motion noting that lack of objection.

13. Pursuant to N.C. Gen. Stat. § 62-95 and Rule 8(a) of the North Carolina Rules of Appellate Procedure,<sup>3</sup> Joint Appellants, on May 18, 2023, also moved the Commission to stay enforcement of the Order during the long pendency of the Appeal.

14. N.C. Gen. Stat. § 62-95 provides that, “[p]ending judicial review, the Commission is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it.” (Emphasis added).

15. Here, justice simply does not support or require any postponement of the effective date of the Order.<sup>4</sup> See *In Re Progress Energy Carolinas, Inc.*, No. E-2, 2005 WL 588332, at \*2 (Jan. 28, 2005) (Denying a § 62-95 motion because “justice [did] not require postponement of the effective date of” the order in question). As a result, the Commission should deny Joint Appellants’ motion.

16. Significantly, the requested stay – which would maintain the existing NEM rate structure during the pendency of the Appeal – would be contrary to the interests of justice and the public policy behind H.B. 589, which both seek to avoid continuing with the existing cross-subsidization and have NEM retail customers begin paying their full fixed cost of service. See N.C.G.S.A. § 62-126.2 and § 62-126.4(b).

17. As the Commission recognized in the Order, the Companies’ Study found a “potential for significant cross-subsidies for each NEM customer” under the existing NEM rate structure. *Order*, at p. 33. Thus, a continuation of the current NEM rates during

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<sup>3</sup> Rule 8(a) of the North Carolina Rules of Appellate Procedure permits a party to file an “application to the trial court for a stay order.

<sup>4</sup> Again, the Commission already has extended the effective date of the NEM tariffs until October 1, 2023, which sufficiently addresses any need for additional time for the solar industry to adapt its business model. It also, in its May 17, 2023, Order, extended the deadline for the Companies to develop the online bill savings calculator until July 1, 2023 – a deadline which again is sufficient to address any need for additional time for such development.

the Appeal would prolong (possibly for years) existing cross-subsidies and thus be *counter* to justice, public policy, and H.B. 589’s express instruction for the Commission and the utilities to establish NEM rates “that ensure that the net metering retail customer pays its full fixed cost of service,” N.C.G.S.A. § 62-126.4(b), and avoid cross-subsidization, N.C.G.S.A. § 62-126.2 (Declaring “as a matter of public policy” that “cross-subsidization should be avoided”). Stated differently, Joint Appellants’ requested stay essentially would result in an improper stay of H.B. 589 and its goal.

18. Additionally, any stay could have the effect of voiding and/or drastically minimizing the effect of the Commission’s Order. Per the Order, the NEM Tariffs are only in effect for a four (4) year period. Appeals often last years. By the time the Appeal of the Order has concluded, a significant portion of that period likely will have lapsed. Thus, a stay would be unjust as it would materially delay and possibly severely limit the effect of the Commission’s Order.

19. Notably, any stay of the Order also could stay the Companies’ development of a pilot program to evaluate operational impacts to the electric system, if any, of behind the meter residential solar plus energy storage – a pilot program the Commission ordered on March 23, 2023, in Docket Nos. E-2, Sub 1287, and E-7, Sub 1261 (“Pilot Program Order”). Per the Commission’s Pilot Program Order, the Companies must develop a pilot program by June 21, 2023, and the participants in the pilot program “would be served” under the rates set forth under the appealed Order in *this* docket. Specifically, the Pilot Program Order provides:

- a. One group of participants would be served under the time-of-use (TOU) rates approved by the Commission today in its Order Approving

Revised Net Metering Tariffs, *Investigation of Proposed Net Metering Policy Changes*, Docket No. E-100, Sub 180 (NEM Order). The participants in this cohort would have complete control of the use of the energy storage device.

- b. One group of participants would be served under the Bridge Rate approved by the Commission in the NEM Order. Participants in this cohort must give the utility complete control over the energy storage device.

*Pilot Program Order*, at p. 6. Thus, a stay of the NEM Order in this Docket – and the rates set forth in the Order – could be problematic for and result in a stay of the pilot program.

20. Furthermore, the Commission already has soundly considered and rejected Appellants’ apparent reasons for the requested stay.

21. Appellants contend that the Commission should stay the effect of the Order during the Appeal because: (a) the Order “will drastically reduce the savings of rooftop solar customers,” *Motion for Stay*, at pp. 3-4, and (b) the NEM Tariffs “have not been adequately investigated as required by statute,” *id.*, at p. 5. (Appellants do not allege any purported Commission error as a basis for a stay).

22. Appellants, through numerous written comments filed with the Commission, already thoroughly argued those same grounds in opposition to the NEM Tariffs. The Commission considered and rejected those arguments. *See Order*, at pp. 18-32 (Outlining Joint Appellants’ arguments regarding the supposedly insufficient investigation and the alleged reduction in economic value of rooftop solar under the NEM Tariffs).

23. The Commission should not entertain Joint Appellants' improper efforts to seek the Commission's reconsideration of those same, failed arguments through the Motion for a stay.

24. In fact, the Commission specifically found that H.B. 589 requires revising existing NEM rates to avoid continued subsidies to NEM customers, *Order*, at p. 36-37; that the NEM Tariffs are "reasonable" and "address[] the cross-subsidy issue," *Order*, at p. 37; and that the Companies, "through its comprehensive Rate Design Study and stakeholder process, properly conducted an investigation" as required by H.B. 589, *id.*, at p. 37.

25. Further, denying the motion would be consistent with the Commission's historical denial of similar motions for stay which essentially re-argue already considered and rejected arguments. *See, e.g. In Re Progress Energy Carolinas, Inc.*, No. E-2, 2005 WL 588332, at \*2 (Jan. 28, 2005) (In denying a motion for stay, noting that "[t]he Commission is not persuaded that Progress should be otherwise delayed in its efforts to acquire right-of-way for this transmission line *which the Commission previously found was required for the public convenience and necessity*") (Emphasis added); *Application of Dominion N. Carolina Power for A Certificate of Env't Compatibility & Pub. Convenience & Necessity Under N. Carolina Gen. Statutes Ss 62-101 & 62-102 Complaint of Dominion N. Carolina Power for Relief Under N. Carolina Gen. Statutes S 62-42 Complaint of Dominion N. Carolina Power Requesting Relief Under N. Carolina Gen. Statutes Ss 62-73 & 62-74 Petition of Dominion N. Carolina Power for Ord.*, No. E-22, SUB 437, 2007 WL 3145028, at \*1 (Oct. 24, 2007) (In denying a motion for stay, finding that, "based upon the Commission's weighing of the need for additional



transmission capacity in the area affected and the merits of the Town’s evidence and arguments,” “justice” did not “require a stay” of the order).

26. What’s more, the NEM Tariffs have been the subject of intense investigation and comprehensive scrutiny by the Commission and are the result of a years-long collaborative effort that began with a stakeholder process in 2021 (which involved a wide variety of interested parties, including over twenty (20) organizations representing a range of interests).

27. As the Commission has noted, the NEM Tariffs also are “supported by a wide coalition of parties representing utility, environmental, and solar interests.” *Order*, at p. 33. Justice does not require a stay of the Order and the NEM Tariffs simply because a small minority dislike H.B. 589 and aim to hinder the will of the North Carolina legislature and the Commission’s decision by prolonging existing cross-subsidies as long as possible.

28. In fact, allowing a party to obtain a stay of an Order simply because it disagrees with it does not promote justice and would set an unwarranted precedent for a stay in almost any appellate scenario.

WHEREFORE, the Companies respectfully request that the Commission deny Joint Appellants’ motion for stay of the Order during the pendency of the appeal.

**(Signature block on next page)**

Respectfully submitted this the 7th day of June 2023

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