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BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-2, Sub 1314 **DOCKET NO. E-7, Sub 1289**	
In the Matter of: Petition of Duke Energy Progress, LLC, and Duke Energy Carolinas, LLC, Requesting Approval of Green Source Advantage Choice Program and Rider GSAC	**JOINT REPLY IN SUPPORT OF MOTION FOR A TECHNICAL CONFERENCE OF THE SOUTHERN ALLIANCE FOR CLEAN ENERGY AND THE NORTH CAROLINA SUSTAINABLE ENERGY ASSOCIATION**
DOCKET NO. E-2, Sub 1315 **DOCKET NO. E-7, Sub 1288**	
In the Matter of: Petition of Duke Energy Progress, LLC, and Duke Energy Carolinas, LLC, Requesting Approval of Clean Energy Impact Program	

NOW COME the Southern Alliance for Clean Energy (SACE) and the North Carolina Sustainable Energy Association (NCSEA) and hereby submit the following Joint Reply in support of their Joint Motion for a Technical Conference, addressing the responses submitted by the Carolina Industrial Group for Utility Rates II (CIGFUR II) and III (CIGFUR III) (together with CIGFUR II, CIGFUR) on September 13, 2023 and by Duke Energy Carolinas, LLC (DEC) and Duke Energy Progress, LLC (DEP) (collectively, Duke) on September 15, 2023.

1. Holding a technical conference would be procedurally sound.

As described in the Joint Motion, the Commission properly holds technical conferences when there is good cause to do so and it would be helpful to its decision. This practice is an example of how "procedure before the Commission

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must be more or less informal and not confined by technical rules in order that regulation may be consistent with changing conditions." *State ex rel. Utilities Comm'n v. Associated Petroleum Carriers*, 13 N.C. App. 554, 563, 186 S.E.2d 612, 618–19 (1972); *see also* G.S. § 62-65(a) (when acting in judicial capacity, Commission to apply rules of evidence applicable in civil actions "insofar as practicable"); *State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 269, 148 S.E.2d 100, 109 (1966) (Commission procedure "not as formal as that in litigation conducted in the superior court").

a. The Commission properly relies on technical conferences in legislative proceedings such as this one.

The Commission is acting in a legislative capacity in these proceedings. As Duke correctly noted, House Bill 951 (H951) directs the Commission to establish a rider for a voluntary customer program, H951, Section 5(iv), and Duke has requested approval of two proposed tariffs, for the Green Source Advantage Choice (GSAC) Program and Clean Energy Impact (CEI) Program. A tariff is a form of rate, G.S. § 62-3(24), and "[i]n fixing rates to be charged by a public utility, the Commission is exercising a function of the legislative branch of the government." *State ex rel. Utilities Comm'n v. Gen. Tel. Co. of Se.*, 281 N.C. 318, 336, 189 S.E.2d 705, 717 (1972).

In setting rates, the Commission must "consider all potentially relevant facts in formulating its decision." *State ex rel. Utilities Comm'n v. Stein*, 375 N.C. 870, 930–31, 851 S.E.2d 237, 276 (2020). It must base its decisions on "competent, material, and substantial evidence in view of the entire record as submitted." G.S.

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§ 62-94(b)(5). "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, Inc.*, 351 N.C. 223, 230, 524 S.E.2d 10, 15 (2000 (citation and internal quotation marks omitted).

These requirements could be satisfied perfectly well by holding a technical conference to take testimony from neutral third-party experts.

b. A technical conference is appropriate even if the requirements for judicial proceedings apply.

It is not clear that the requirements for judicial proceedings apply. The Commission must act in a judicial capacity when it exercises judicial functions, G.S. § 62-60, but here the Commission is acting in a legislative capacity. Furthermore, the Commission must "separate its administrative or executive functions, its rule making functions, and its functions judicial in nature to such extent as it deems practical and advisable in the public interest." G.S. § 62-23. Because the Commission is acting in a legislative capacity, it is not clear that it is also acting in a judicial capacity, making the judicial-capacity requirements apply.

If the Commission determines that it is acting in a judicial capacity as well as a legislative capacity within this proceeding and it must abide by the requirements for judicial proceedings, a technical conference still poses no problem. When acting in a judicial capacity, the Commission must "render its decisions upon questions of law and of fact in the same manner as a court of record." G.S. § 62-60. The Commission is acting in a judicial capacity when it is "conducting hearings, making decisions and issuing orders, and in formal

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investigations where a record is made of testimony under oath." *Id.* When acting as a court of record, the Commission must apply rules of evidence applicable in civil actions "insofar as practicable." G.S. § 62-65(a). In all cases—as with legislative-capacity actions—the Commission's decisions must be supported by competent, material, and substantial evidence. G.S. § 62-94(b)(5); *see State ex rel. Utilities Comm'n v. Rail Common Carriers*, 42 N.C. App. 314, 318, 256 S.E.2d 508, 511 (1979).

Consistently with the procedural flexibility granted to it by statute, the Commission has routinely held technical conferences in proceedings that appear as judicial in nature as the current proceeding, according to the criteria for judicial proceedings in G.S. § 62-60. *See* Order Scheduling Technical Conference and Requiring Filing of Report, *In the Matter of 2020 Biennial Integrated Resource Plans and Related 2020 REPS Compliance Plans*, Docket No. E-100, Sub 165 (N.C.U.C. Jan. 12, 2021) [2020 IRP Order]; Order Scheduling Technical Conference and Requiring Responses to Commission Questions, *In the Matter of 2018 Integrated Resource Plan Reports and Related 2018 REPS Compliance Plans*, Docket No. E-100, Sub 157 (N.C.U.C. July 23, 2019); Order Postponing Tranche 2 CPRE RFP Solicitation and Scheduling Technical Conference, *In the Matter of Joint Petition of Duke Energy Carolinas, LLC, & Duke Energy Progress, LLC, for Approval of Competitive Procurement of Renewable Energy Program*, Docket Nos. E-2, Sub 1159 and E-7, Sub 1156, 2019 WL 1981146 (N.C.U.C. May 1, 2019).

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As cited above, one type of proceeding in which technical conferences are relatively common is integrated resources plan (IRP) proceedings. The Commission has been held to be operating in a legislative capacity in rate proceedings such as this one, and IRP proceedings similarly "should bear a much closer resemblance to a legislative hearing" than to a proceeding in which the Commission would "issue directives which fundamentally alter a given utility's operations." *State ex rel. Utilities Comm'n v. N. Carolina Elec. Membership Corp.*, 105 N.C. App. 136, 144, 412 S.E.2d 166, 170 (1992). However, in IRP proceedings as much as in this proceeding, the Commission will conduct hearings, make decisions and issue orders, and carry out formal investigations where a record is made of testimony under oath. *See* G.S. § 62-60. Similarly, the Competitive Procurement of Renewable Energy (CPRE) Program proceedings commenced with a petition for approval of a proposed CPRE Program and contained many of the same hallmarks.

Accordingly, even assuming that the Commission is operating in a judicial capacity in this proceeding, Duke's argument that a technical conference would cause evidentiary problems is inconsistent with the Commission's decisions to hold technical conferences in similar proceedings. Those technical conferences are proper and so too would this one be.

2. A technical conference would be helpful.

SACE and NCSEA requested that the Commission hold a technical conference because it would help the Commission to resolve the central issue in this proceeding, whether the clean energy procured under the H951 voluntary

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customer programs will be surplus to regulatory requirements.[1] As discussed in the Joint Motion, the Center for Resource Solutions (CRS) and Regulatory Assistance Project (RAP) have deep expertise in regulatory surplus and related issues, have nation-wide experience that would allow them to identify best practices and common problems, and are involved in a stakeholder process convened by RAP to develop a model carbon-free electricity (CFE) tariff. SACE and NCSEA Joint Motion 15-16.

A technical conference is justified by comparison to situations in which the Commission has ordered technical conferences in the past. For example, in the 2020 IRP proceeding the Commission noted the stakeholder sessions that Duke held concerning its Integrated System and Operations Planning (ISOP) project and that it had found the information on Duke's ISOP website helpful, but found it would also be helpful to hear Duke representatives summarize their ISOP work directly, with an opportunity for questions and exploration of issues raised during stakeholder sessions. 2020 IRP Order 1-2.

Here, although both CIGFUR and Duke reiterate their commitment to continuing to discuss the issue of regulatory surplus with the Public Staff and intervenors, CIGFUR Response 1; Duke Response 4, since February any stakeholder discussions have included only Duke, CIGFUR, and the Public Staff, and any true stakeholder discussions involving all interested stakeholders appear to have reached an impasse. *See* SACE and NCSEA Joint Response 8-10. Duke

[1] Duke quibbled that the central issue is whether its proposed programs comply with North Carolina law. But the central reason that they do not is that they do not provide regulatory surplus.

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has defended its decision to propose voluntary customer programs that do not achieve regulatory surplus across multiple filings, but perhaps because it incorrectly believes it is not legally required, it has not seriously engaged with the possible pathways to achieving regulatory surplus in voluntary customer programs. Accordingly, it would be most helpful for the Commission to hear from disinterested third parties with expertise on the subject. If the Commission deems it appropriate, it could be helpful to hear from Duke representatives on the subject as well, but again, in that case SACE and NCSEA would request the opportunity to put forth testimony in support of their proposals for achieving regulatory surplus.[2]

A technical conference would in no way offer any party an opportunity for surreply. SACE and NCSEA proposed inviting CRS and RAP because of their expertise. They are not parties to the proceeding and would not be speaking for SACE, NCSEA, or any other party.[3]

3. Conclusion

For the foregoing reasons, the Commission should GRANT the Joint Motion and hold a Commission-directed technical conference on regulatory surplus and any related issues it deems proper before rendering decisions on Duke's proposed

[2] This testimony would concern factual issues; as discussed in the Joint Motion, the legal question whether regulatory surplus is required under H951 could be the subject of further dedicated briefing, if the Commission deems it appropriate.

[3] CIGFUR quibbled that there is no such thing as a neutral third party to this proceeding besides the Commission. CIGFUR provided no basis for its suggestion that CRS and RAP are not neutral except to allude to CRS's consumer statement of position filed in the proceeding, filed on June 27, 2023 in Docket Nos. E-7, Sub 1288CS and E-2, Sub 1315CS; and E-7, Sub 1289CS and E-2, Sub 1314CS. But CRS's consumer statement merely described the legal and regulatory landscape in North Carolina following the passage of H951 and distinguished double-counting and regulatory surplus; it did not advocate for any position or request anything of the Commission. SACE and NCSEA continue to consider CRS and RAP "neutral third parties" to this proceeding, but "disinterested" would also fit.

GSAC and CEI programs or any other H951 voluntary customer programs Duke might propose, and it should invite CRS, RAP, and any other neutral third-party experts it deems appropriate to make presentations at the technical conference. If the Commission determines that parties that addressed the issue in comments should have the opportunity to present as well, or instead of neutral third parties, then SACE and NCSEA request that opportunity.

In the alternative, SACE and NCSEA would not oppose a limited evidentiary hearing on the topic of regulatory surplus, as intimated in their Joint Motion—requesting the opportunity to present at a technical conference if the Commission decides to allow parties to address issues on which they commented—and later suggested by Duke in response.

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Respectfully submitted this 4th day of October, 2023.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing filing has been served on all parties of record by electronic mail or by deposit in the U.S. Mail, first-class, postage prepaid.

This 4th day of October, 2023.

/s/ Nick Jimenez