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September 10, 2020

VIA ELECTRONIC FILING

Ms. Kimberley A. Campbell
Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4300

**Re: Duke Energy Carolinas, LLC and Duke Energy Progress, LLC and
Motion to Dismiss Appeal
Docket No. E-100, Sub 158**

Dear Ms. Campbell:

Enclosed for filing in the above-referenced docket is Duke Energy Carolinas, LLC's and Duke Energy Progress, LLC's Motion to Dismiss Appeal.

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

Sincerely,

A handwritten signature in black ink that reads "Kendrick C. Fentress".

Kendrick C. Fentress

cc: Parties of Record

Enclosure

OFFICIAL COPY

Sep 10 2020

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-100, SUB 158

In the Matter of
Biennial Determination of Avoided)
Cost Rates for Electric Utility) **MOTION TO DISMISS APPEAL**
Purchases from Qualifying Facilities –)
2018

NOW COME Duke Energy Carolinas, LLC (“DEC”) and Duke Energy Progress, LLC (“DEP,” and together with DEC, “Duke”) pursuant to Rule R1-7 of the rules and regulations of the North Carolina Utilities Commission (“NCUC” or “Commission”), and respectfully move the Commission to issue an Order dismissing the appeal of intervenors North Carolina Sustainable Energy Association’s (“NCSEA”) and the North Carolina Clean Energy Business Alliance’s (“NCCEBA” and together with NCSEA, “Intervenor Appellants”) because it is untimely.

BACKGROUND

On June 26, 2018, the Commission issued its *Order Establishing Biennial Proceeding, Requiring Data, and Scheduling Public Hearing* initiating this proceeding. Intervenor Appellants were both granted intervention in the proceeding by Orders issued August 9, 2018.

On April 15, 2020, the Commission issued its *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities*, deciding all contested issues in this proceeding and, amongst other things, approving the Companies’ current avoided cost rates, standard offer tariffs and terms and conditions (“Final Order”).

On May 8, 2020, Intervenor Appellants petitioned the Commission for an extension of time to file a notice of appeal and exceptions. Intervenor Appellants’ Motion recognized

that the current deadline for noticing appeal of the Final Order was May 15, 2020, and Intervenor Appellants moved the Commission for an additional thirty (30) days extension of time to consider whether to appeal the Final Order, as is allowed under N.C. Gen.Stat. § 62-90(a). The Commission granted Intervenor Appellants' motion by Order issued May 13, 2020.

On June 15, 2020, Intervenor Appellants' filed a joint motion for reconsideration of the Final Order.

On July 21, 2020, the Commission issued its *Order Denying Motion for Reconsideration* ("Order Denying Reconsideration").

On August 20, 2020, Intervenor Appellants filed a notice of appeal of the Final Order.

ARGUMENT

Intervenor Appellants' notice of appeal is untimely and should be dismissed. The right to appeal an administrative agency ruling is statutory, and compliance with statutory provisions is necessary. *Lewis v. N.C. Dept. of Human Resources*, 92 N.C. App. 737, 739, 375 S.E.2d 712, 714 (1989). The Public Utilities Act provides that parties before the Commission must file a notice of appeal from an order of the Commission within 30 days after entry of the order, unless such period is extended by the Commission. N.C. Gen. Stat. 62-90(a). *Bald Head Island Utilities, Inc. v. Village of Bald Head Island*, 165 N.C. App. 701, 702, 599 S.E.2d 98, 101 (Aug. 3, 2004) ("If an appeal from a North Carolina Utilities Commission Order is not made within 30 days, then the right of appeal is waived and this Court has no jurisdiction.") (internal citations omitted).

The Public Utilities Act authorizes the Commission to grant parties additional time up to an additional 30 days to file a notice of appeal. N.C. Gen. Stat. 62-90(a). The Commission's May 13, 2020 Order provided that Intervenor Appellants and "all parties shall have an additional 30 days pursuant to N.C. Gen. Stat. § 62-90(a) within which to file Notice of Appeal and Exceptions in this proceeding." However, when a party files a motion for reconsideration of a Commission Order, the time for filing a notice of appeal is tolled only from the date of filing the motion for reconsideration until the date the Commission enters an order of the motion. *See State ex rel. Utilities Comm'n v. MCI Telecommunications Corp.*, 132 N.C. App. 625, 630, 514 S.E.2d 276, 280 (1999) ("An appeal does not lie from the *denial* of a petition to rehear, as the appeal is from the original order, and the time for appealing the original order is tolled from the date of the filing of the petition for rehearing to the date of the denial of that petition"); *see also Order Denying Smithfield's Motion for Reconsideration and Petitioner's Motion to Dismiss Appeal*, Docket No. ES-160, Sub 0 (May 2, 2013) (citing *MCI* as "holding that a motion for reconsideration tolls the time for appeal of the original order to the date of the denial of that petition").

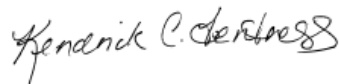
The Commission has jurisdiction to dismiss Intervenor Appellants' appeal until the appeal has been docketed in the appellate court, *Dodd v. Steele*, 114 N.C. App. 632, 442 S.E.2d 363 (1994), and has previously dismissed appeals as untimely. *See e.g., Order Dismissing Appeal*, Docket No. E-2, Sub 839 (March 15, 2005); *Order on Filing of July 16, 2002*, Docket No. E-2, Sub 790 (July 24, 2002).

Applying the statutory requirements of N.C. Gen. Stat. § 62-90(a) and the Court of Appeals' holding in *MCI* here, the total time elapsed between the Commission's

Final Order, issued on April 15, 2020, and Intervenor Appellants' filing of the notice of appeal on August 20, 2020 was 127 days. Under *MCI*, the 37 days from Intervenor Appellants' filing of their motion for reconsideration (June 15, 2020) to the Commission's issuance of its Order Denying Reconsideration (July 21, 2020) are not considered when determining whether the notice of appeal was timely. Therefore, the time elapsed, accounting for the tolling period, was 90 days. By grant of extension of time, Intervenor Appellants were allowed the maximum 60-day period of time after the Final Order was issued to file its notice of appeal. By waiting 90 days to file the notice of appeal after the Order was issued, the notice of appeal is untimely and should be dismissed.

For these reasons, and for whatever additional reasons the Commission may find persuasive, Duke respectfully requests that the Commission enter an order dismissing the Intervenor Appellants' appeal.

Respectfully Submitted, this the 10th day of September, 2020.



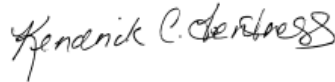
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*Counsel for Duke Energy Carolinas, LLC
and Duke Energy Progress, LLC*

CERTIFICATE OF SERVICE

I certify that a copy of Duke Energy Carolinas, LLC's and Duke Energy Progress, LLC's Motion to Dismiss Appeal, in Docket No. E-100, Sub 158, has been served by electronic mail, hand delivery, or by depositing a copy in the United States Mail, 1st Class Postage Prepaid, properly addressed to parties of record.

This the 10th day of September, 2020.



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