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February 15, 2021

**VIA ELECTRONIC FILING**

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

**RE: Duke Energy Carolinas, LLC's Response in Opposition to  
Motion to Strike  
Docket No. SP-13695, Sub 1**

Dear Ms. Campbell:

Enclosed for filing is Duke Energy Carolinas, LLC's Response in Opposition to Motion to Strike.

Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Jack Jirak". The signature is written in a cursive, slightly slanted style.

Jack E. Jirak

Enclosure

cc: Parties of Record

OFFICIAL COPY

Feb 15 2021

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. SP-13695, SUB 1

In the Matter of	)	DUKE ENERGY CAROLINAS, LLC'S
	)	RESPONSE IN OPPOSITION TO MOTION
	)	TO STRIKE, OR IN THE ALTERNATIVE
Petition for Relief of Orion Renewable	)	TO REOPEN HEARING OF ORION
Resources LLC	)	RENEWABLE RESOURCES LLC
	)	

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NOW COMES Duke Energy Carolinas, LLC (“DEC”, the “Company” or “Duke”), pursuant to N.C. Gen. Stat. § 62-65 and Commission Rule R1-7, by and through the undersigned counsel, and hereby files the Company’s response in opposition to the Motion to Strike or in the Alternative to Reopen Hearing (the “Motion”) of Orion Renewable Resources LLC (“Orion”).

In its Motion, Orion asks the Commission to strike portions of DEC’s Late-Filed Exhibit (the “LFE”) and post-hearing brief or, in the alternative, to reopen the record for further discovery and testimony. Not only is Orion’s Motion untimely—filed more than sixty days after the LFE and three weeks after the deadline to submit post-hearing briefs—but the relief it requests, including wholesale deletion of significant portions of the LFE and certain legal arguments from DEC’s brief, is not supported by law or Commission rules or prior decisions.

DEC’s LFE was responsive to the Commission’s request for information and squarely within the latitude expressly authorized by the Commission in order to provide additional information to better inform the Commission’s understanding of the complex issues raised by the Commission during the hearing. Orion offers no persuasive legal support for its arguments that the LFE is not competent evidence under the Public Utilities

Act. Moreover, Orion’s Motion fails to mention that DEC provided Orion with an opportunity to review and comment on the LFE *before filing*, and that Orion offered suggestions concerning the LFE (which were incorporated) but did not communicate any objections to the LFE at that time. For Orion to now stridently argue—two months after its filing and on the eve of a final Commission Order—that the proceeding must be reopened if the Commission will not strike portions of the LFE and arguments contained in DEC’s post-hearing brief to afford Orion an opportunity to address facts in evidence since late November is misguided and disingenuous at best.

Orion’s arguments that the Commission should strike “new legal argument” in DEC’s post-hearing brief are also unsupported by law. Legal arguments are not evidence, and parties to Commission proceedings may present their legal positions for the first time in their post-hearing briefing. The Commission should similarly reject Orion’s argument that Duke’s legal arguments and briefing based on the LFE should be stricken, because, for reasons explained above and further addressed herein, the LFE is competent evidence of record properly requested by the Commission and appropriately relied upon by both Duke in its brief and the Commission if it elects to do so.

Finally, while the Commission could reopen the record and allow Orion a do-over of its case, the central issue for the Commission’s determination in this proceeding is a purely legal question regarding interpretation of the Competitive Procurement of Renewable Energy (“CPRE”) Program statute, N.C. Gen. Stat. § 62-110.8(b)(2), and the regulatory framework mandating cost-effectiveness of CPRE proposals below avoided costs. The information DEC provided in the LFE was responsive to the Commission’s directive and provides additional contextual information relating to the issues raised by

Orion's Petition for relief; however, DEC recognizes that the Commission can fully resolve the primary legal question raised in the Petition *without* relying on information contained in the LFE.

For all of these reasons, DEC respectfully requests that the Commission deny Orion's Motion and proceed, without striking any part of DEC's LFE or post-hearing brief, to issue an Order denying the relief requested in Orion's Petition.

### **BACKGROUND**

Orion initiated the instant proceeding on March 9, 2020, when it filed a Verified Petition asking the Commission to remedy what it argued to be an "impermissible disqualification" of Orion's Proposal 129-01 (the "Proposal") in Tranche 1 of the CPRE Program. In April and May 2020, CPRE Independent Administrator ("IA") Accion Group, LLC ("Accion") responded to Orion's Petition and subsequent reply brief, and the Public Staff submitted formal Comments addressing the same.

By contrast, DEC did not request intervention and was not a formal party to this proceeding until October 21, 2020, when the Commission, in its *Order Scheduling Hearing* (the "Order"), directed DEC to tender a witness "knowledgeable concerning the Step 2 review procedures followed in Tranche 1 and, specifically, with the application of those procedures to review of the Proposal during Step 2."<sup>1</sup> Accordingly, DEC presented Mr. Orvane Piper to offer testimony at the November 2, 2020 hearing to comply with the Commission's request.

During the hearing, the Commission panel extensively questioned Accion witnesses regarding consideration of Orion's bid, two other potentially similarly situated

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<sup>1</sup> Order Scheduling Hearing, at 2.

bids, and the broader practical implications of the relief requested in the Petition. Presiding Commissioner Clodfelter initially requested a confidential LFE from Accion. [Tr. p. 81.] As a result of further questioning, however, the Commission modified its request, directing DEC to work with Accion to produce a LFE to (1) address the confidential cost/benefit analyses of two other proposals; and (2) provide “other information that we should perhaps consider included in that such as whether there was additional bids participating in Tranche 2, whether they were selected and how the selections would’ve changed our current CPRE procurement target goals.” [*Id.* at 91.]

Importantly, the Commission granted DEC and Accion broad latitude to develop a LFE to best address the issues raised by Presiding Commissioner Clodfelter’s questions during the hearing. Counsel for DEC pointed out that additional information beyond the narrow issues identified by the Commission’s questions may provide helpful context and ensure the LFE would be “most informative” for the Commission. [*Id.* at 91.] Presiding Commissioner Clodfelter agreed to DEC’s recommended approach. [*Id.* at 92, 106.]

In keeping with the post-hearing schedule set by the Commission, DEC filed the completed LFE on November 24, 2020, followed by a corrected version on November 25, 2020. Prior to filing, DEC collaborated with the IA in development of the LFE, as well as received input from and specifically incorporated topics identified by Orion. In addition, DEC shared a near-final draft of the LFE with Orion prior to filing. Orion’s counsel indicated in writing that it had no additional feedback to give on the version of the LFE that was to be filed. After the LFE was filed, Orion took no action whatsoever in response to the LFE; it did not ask the Commission to re-open the record for additional testimony, it did not request an opportunity to propound discovery questions, it did not challenge the

factual assertions of the LFE in any way. Nevertheless, two months later, on January 25, 2021—61 days after the corrected LFE was filed and 21 days after the parties filed post-hearing briefs—Orion filed the instant Motion asking the Commission to “strike Items 3, 4, 5, and 6 (pages 2-7) of the Late-Filed Exhibit” and to “strike or disregard” certain factual contentions and legal arguments presented in DEC’s Post-Hearing Brief. In the alternative, Orion asks this Commission to re-open the proceeding altogether to allow Orion an opportunity to “conduct discovery on these issues, supplement the record, and submit additional briefing.”<sup>2</sup>

## **ARGUMENT**

### **I. There is No Legal or Equitable Basis to Strike Portions of DEC’s LFE and Orion Has Failed to Timely Request the Commission Reopen the Proceeding**

It is well settled that the North Carolina Rules of Evidence are not strictly applicable and controlling in proceedings before the Commission.<sup>3</sup> Furthermore, “[t]he procedure before the Commission is . . . not as formal as that in litigation conducted in the superior court[.]”<sup>4</sup> as aptly demonstrated by procedure in this proceeding where comments (Public Staff) and response and reply briefs (Accion) were accepted into the record in lieu of pre-filed testimony.<sup>5</sup> Indeed, the Commission routinely requires parties to file LFEs to expound upon issues and introduce facts not in evidence at the time of the hearing and there

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<sup>2</sup> Motion, at 12.

<sup>3</sup> See N.C. Gen. Stat § 62-65 (stating that the Commission should apply the North Carolina Rules of Evidence “insofar as practicable.”). The Commission has also recently explained that it is not strictly required to adhere to the North Carolina Rules of Civil Procedure. See *Order Denying Motion to Compel*, Docket No. E-100, Sub 101 (April 1, 2020).

<sup>4</sup> *State ex rel. Utilities Com. v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 269 (1966), citing N.C. Gen. Stat. 62-65(a).

<sup>5</sup> See IA Response to Verified Petition for Relief; Public Staff’s Motion for Leave to File Comments and Comments; IA Response to Additional Reply by Orion.

is ample precedent that parties have not, and the Commission has not required, that LFEs be verified. While there is no dispute that it is within the Commission's discretion to both request and rely upon information presented in an LFE,<sup>6</sup> Orion suggests that the Commission should either strike portions of the LFE or reopen the record. Seemingly in response to the fact that Duke has taken an adverse legal position to Orion after filing the LFE, Orion advances two main arguments to support its position: (1) that certain facts presented in the LFE are "not competent evidence" and overstepped the intended scope of the exhibit; and (2) that Orion has not had an opportunity to challenge the facts presented therein.<sup>7</sup> Neither argument, however, presents a cognizable legal or equitable basis to strike any part of DEC's LFE, and the Commission should deny Orion's request to reopen the proceeding.

a. LFE is competent evidence responsive to the Commission's request

Orion initially argues that DEC "overstepped the bounds" of the Commission's directive to file the LFE and the latitude it gave to provide needed contextual information.<sup>8</sup> Arguing that the LFE introduced "factual considerations never raised in this docket"<sup>9</sup> and that such evidence is "not competent" because the LFE was not verified by a Duke witness,<sup>10</sup> Orion asks the Commission to "strike Items 3, 4, 5, and 6"<sup>11</sup> of the LFE.

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<sup>6</sup> *See id.* ("The statutes prescribing the procedure for hearings before the Commission do not forbid it to make a finding, as to the Applicant's capacity and ability to serve, upon the basis of facts arising between the conclusion of the hearing and the entry of the order when those facts are shown by "late" exhibits, otherwise competent, and when the adverse party has had adequate notice that such exhibits have been filed with the Commission for inclusion in the record.").

<sup>7</sup> Motion, at 5.

<sup>8</sup> Motion, at 5.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*, at 6.

<sup>11</sup> *Id.*, at 5.

However, Orion fails to provide any persuasive legal or equitable grounds upon which the Commission should strike information from the LFE it requested.

Orion's sole legal argument—that the LFE is unauthenticated hearsay that is not competent evidence because it was not formally verified by DEC when filed—is not credible or legally supported. As Orion recognizes in its Motion, the Commission is obligated to adhere to the Rules of Evidence applicable in civil actions only “insofar as practicable.”<sup>12</sup>

While it is true that the Commission has the discretion to exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence,<sup>13</sup> the Commission also has the discretion to request and rely upon LFEs.<sup>14</sup> Orion's assertion that portions of the LFE should be stricken on the grounds that it contains new “factual issues” simply cannot be squared with the Commission's well-established precedent requiring and relying upon LFEs generally. That is, the very purpose of an LFE prepared at the direction of the Commission is for the requested party to file additional evidence concerning a subject matter raised before (or requested to be addressed by) the Commission at hearing. As a matter of logic, there would be no purpose for an LFE if it were not introducing “new factual issues” into the proceeding (*i.e.*, if the factual issues in the LFE were already in the record, there would be no need for the LFE). Orion's argument in this respect should be rejected.

Next, Orion argues that the LFE is outside of the scope of the hearing and not relevant to issues raised by the Commission. This argument should similarly be rejected.

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<sup>12</sup> See N.C. Gen. Stat. 62-65(a).

<sup>13</sup> See *id.*

<sup>14</sup> *Order Granting BellSouth's Motion to Continue Hearing*, at 2-3 Docket No. P-55, Sub 1543 (June 10, 2005).

The initial issue giving rise to the need for the LFE was the expressed desire of the Commission to understand the way in which the IA's evaluation process being challenged by Orion had impacted other CPRE bidders. [Tr. 81.] That is, in requesting the LFE, the Commission was expressly seeking to understand how *other bidders* were impacted by the evaluation methodology in question. And the Commission's request about how *other bidders* were impacted was very open-ended—"I need to find out what else I need to know about them." [Tr. 81.] In framing the initial request for the LFE in such an open-ended manner, it is clear that the Commission desired to be informed regarding the impacts on other bidders and all other relevant information.

As the testimony progressed at the hearing after the Commission's initial request for an LFE from Accion [Tr. 81-82,], further testimony on the topic identified for the Commission that other bidders were also impacted by the evaluation methodology in question. [Tr. 88-89.]<sup>15</sup> Thus, in light of the fact that the Commission had requested an LFE regarding the impact of the evaluation methodology on other bidders, including any other information that was relevant to the issue, it is logical that the LFE should be expanded to address all impacted bidders. In other words, the very premise of the LFE was to address the ways in which a decision on Orion's challenge to the evaluation methodology would impact other bidders in Tranche 1, which is precisely what is accomplished in the LFE.

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<sup>15</sup> [Tr. at 88 ("When I talked about the – there were the two other that had negative net benefits which did not do Step 2 analysis, so we would have to evaluate them. And then the other projects that were failed based on their Net Energy Benefits being positive, let's see if there are additional Step 2 system upgrade costs making them negative, we would have to look at all of those to see if any of those would've passed under this alternate method.").]

Further, the Commission also granted DEC broad latitude to develop an LFE that would be most helpful to the Commission. During the discussion concerning proposed contents of the LFE, counsel for DEC asserted “there’s a lot of other information that we should perhaps consider included in [the LFE] such as whether there was additional bids participating in Tranche 2, whether they were selected and how the selections would’ve changed our current CPRE procurement target goals. I mean, there’s a lot of threads one needs to pull if you start to go down this path.” [*Id.*, at 91.] Counsel for DEC then specifically requested “latitude to work with the IA to make it the most informative late-filed exhibit.” [*Id.*] In response to this express request, the Commission granted such “latitude.” Orion did not express any concerns with this latitude or the appropriateness of DEC and Accion working together to provide the Commission-requested LFE. [*Id.*]

In summary, the Commission specifically identified a desire to understand how the questions posed by Orion would impact other CPRE bidders and counsel for DEC indicated that providing such information would require substantial additional information and not once did Orion object to this direction.<sup>16</sup> The LFE therefore addresses issues that were clearly within the scope of both the hearing and the directive of the Commission.

Finally, as an equitable matter, it is worth noting that DEC agreed to include in the LFE those items identified by counsel for Orion and also shared the LFE with Orion in advance of its filing. Orion did not object to the scope of the LFE after having been provided an opportunity to review. In other words, Orion was given two opportunities to

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<sup>16</sup> It is also notable that the Accion witnesses at the hearing specifically testified concerning the impact of these issues on other potentially similarly-situated Tranche 1 bidders, and, therefore, counsel for Orion had an opportunity to cross examine such witnesses concerning those impacts and failed to do so.

object to the scope of the LFE—at the hearing and prior to the LFE filing—and yet did not raise any objection until the pending Motion.

Orion also raises a specific procedural issue, arguing that the LFE should be rejected because it was not separately verified. Simply stated, this position has no support in well-established Commission practice. DEC (along with Duke Energy Progress, LLC) has, in just the recent past, filed scores of LFEs at the request of the Commission in various proceedings and has yet to identify any instance in which the LFE was separately verified or in which the Commission required the Company to do so. So, there is no basis in established Commission practice to require that the LFE requested by the Commission in this proceeding to have been separately verified or risk being deemed incompetent “unauthenticated hearsay,” as Orion now argues.<sup>17</sup>

Furthermore, as a general matter, the scope of information presented in LFEs can be characterized as expounding upon sworn testimony offered at the hearing. That is also true in this case. While Orion contends that the LFE “is not supported by the testimony of any Duke witness, and . . . substantially exceeds the scope of the testimony presented by Duke’s witness at the hearing[;]”<sup>18</sup> in fact, the LFE is an extension of issues discussed during Mr. Piper’s testimony as well as the Commission’s questioning of Mr. Piper and Accion witnesses during the hearing.<sup>19</sup>

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<sup>17</sup> Motion, at 6.

<sup>18</sup> Motion, at 6.

<sup>19</sup> In the event that the Commission determines that verification of the LFE is appropriate in this case, Mr. Piper is “acquainted with the facts” and DEC could provide verification, if requested by the Commission. *See* NCUC Rule R1-5(d) (providing that pleadings shall be verified by a person acquainted with the facts presented to the Commission).

For all of these reasons, there is no legal basis to argue the Commission should reject Orion's argument that DEC's LFE is not competent evidence and that the Commission should strike portions of the LFE because it was not verified.

b. Orion had adequate notice of the LFE and failed to timely request the Commission reopen the record

In further support of its request to strike Items 3-6 of the LFE or, in the alternative, to re-open the hearing, Orion claims that it did not have adequate opportunity to "develop evidence" in response to facts presented in the LFE.<sup>20</sup> This alternative justification for the requested relief is likewise flawed. The Commission has previously recognized that it "can consider information contained in late-filed exhibits in reaching a decision only if the party against whom the exhibit is sought to be used has been provided with adequate notice and given an adequate opportunity to assert its right of cross-examination with respect to the information contained in that exhibit."<sup>21</sup> Accordingly, the question before the Commission—if it determines the need to rely upon the evidence provided in the LFE to decide the Petition—is whether Orion had "notice" and an "adequate opportunity to assert its rights" to reopen the record and whether it was reasonable for Orion to delay making these arguments until after post-hearing briefs were filed.

As a threshold matter and as discussed above, Orion had notice of (1) the Commission's request for the LFE; (2) the general purpose of the LFE; and (3) the latitude the Commission granted to DEC and Accion in developing the LFE. Moreover, DEC received and agreed to input from Orion on the contents of the LFE and shared a near-final draft of the exhibit prior to filing. Upon reviewing the near-final draft of the exhibit, Orion

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<sup>20</sup> Motion, at 6.

<sup>21</sup> *Order Granting BellSouth's Motion to Continue Hearing*, at 2-3 Docket No. P-55, Sub 1543 (June 10, 2005).

indicated in writing that it had no additional feedback to give on the version that was to be filed, and indeed did not raise any objection to the exhibit for two months after its filing. In other words, Orion had ample opportunity to assert its right of cross-examination, whether by requesting that the Commission allow it an opportunity to pursue additional discovery and offer further examination on the information contained in the LFE or to otherwise reopen the record. It could have done so at any time during the forty days that elapsed between the filing of the LFE and the deadline for post-hearing briefs, but it did not. In an attempt to gloss over the untimeliness of its objection, Orion claims that “Duke did not disclose its position on the merits of Orion’s underlying claims, or the relief requested by Orion, in the Late Filed Exhibit.”<sup>22</sup> But Orion cannot rehabilitate its failure to timely exercise its rights with respect to the LFE because it did not then know Duke’s legal position. DEC had no duty to forecast its legal theories in advance of briefing—particularly given that it was not a formal participant in the proceeding until the Commission issued its *Order* less than two weeks before the November 2, 2020 hearing. That Orion failed, through either discovery or live cross-examination of DEC’s witness to adequately assess DEC’s position is not the fault of DEC. Under any interpretation of these facts, Orion was given more than adequate notice and opportunity to assert its need for additional discovery or for cross-examination with respect to the LFE well before post-hearing briefing was filed.

The factual issues Orion now contends require rebuttal evidence have also not changed since the date the LFE was filed. That Orion waited nearly three weeks after the filing of post-hearing briefs (and 61 days after filing of the LFE, itself) to call for reopening

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<sup>22</sup> Motion, at 4.

the proceeding for additional discovery and testimony on the LFE—and by extension, necessitating that the parties engage in supplemental briefing—asks the Commission to afford Orion far more than an adequate opportunity to assert its rights to be heard. It would also set a problematic precedent for future proceedings if the Commission allows parties to wait until after post-hearing briefing is filed to raise evidentiary concerns. For this reason, the Commission should not exercise its discretion to re-open the hearing and/or require additional briefing to expound upon what, at its core, is a purely legal question regarding the IA’s authority under the CPRE statute to reject Orion’s bid as not cost effective and not in the best interest of customers. Orion should not be allowed a do-over to correct its own failure to discover and identify key facts and positions during the hearing or to remedy its untimely request for leave to respond to the LFE, which could have been made at any time before post-hearing briefs were filed.

**II. There is No Legal Basis to Strike Portions of DEC’s Post-Hearing Brief**

Under the Public Utilities Act, parties to proceedings before the Commission<sup>23</sup> have a statutory right to make post-hearing filings—including proposed findings of fact, conclusions or law, and/or briefs—before the Commission renders a decision.<sup>24</sup> While Orion does not dispute DEC’s right to file a post-hearing brief in this Docket, it complains that “[m]uch of Duke’s Post-Hearing Brief is devoted to . . . legal arguments that Duke has never before presented in this docket[.]” Contrary to Orion’s assertion, however, there is no legal requirement in the Commission Rules or the Public Utilities Act, for parties to forecast legal arguments—whether through pre-filed testimony, in comments, etc.—in

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<sup>23</sup> Although DEC was not an intervenor in the proceeding, the Commission granted DEC the opportunity to file a post-hearing brief after presenting a witness for questioning at the hearing. [Tr. at 113-114, 160.]

<sup>24</sup> N.C. Gen. Stat. § 62-78(a).

advance of briefing.<sup>25</sup> Duke—like all other participants in this proceeding—has the right to make legal arguments regarding the appropriate interpretation of the CPRE Statute, and to argue against legal interpretations presented in testimony or documents entered into the record by other parties.

For example, Orion takes particular issue with DEC’s discussion of the February 28, 2020 CPRE Tranche 2 Memorandum prepared by Accion and discussed in Orion’s Petition (the “Tranche 2 Memo”). The Tranche 2 Memo was drafted in the first instance by the IA with review and comment by the Public Staff and Duke to explain a change in methodology between Tranche 1 and Tranche 2, but was not intended to serve as a memorialization of Duke’s or the Public Staff’s legal opinion. However, as DEC explained in its post-hearing brief, it agreed to the altered approach in a good faith attempt “to avoid further costly disputes and avoid a delay in Tranche 2[,]” and stated, factually, that the Tranche 2 Memo “did not accurately capture the nuance” of DEC’s legal position.<sup>26</sup> Nothing in the Accion-written Tranche 2 Memo binds DEC to a particular legal position, nor could it. Accordingly, while Orion speculates that “it hardly seems credible that Accion misstated Duke’s position in the Tranche 2 Memorandum[,]”<sup>27</sup> there is no basis to strike portions of DEC’s brief presenting the Company’s actual legal position on this issue.

In addition, Orion appears to conflate legal argument with evidence, suggesting that it requires further discovery “to determine whether [DEC’s legal position] accurately reflect[s] the facts.”<sup>28</sup> This position is misguided and not credible. As Orion admits in its

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<sup>25</sup> See e.g., *Order Granting General Rate Increase*, Docket No. E-2, Sub 1023 at 29-30 (May 30, 2013) (considering Attorney General’s new legal arguments on utility’s return on equity that were not introduced through pre-filed testimony and were raised for the first time through post-hearing briefing).

<sup>26</sup> DEC Post-Hearing Br., at 12.

<sup>27</sup> Motion, at 9.

<sup>28</sup> *Id.*

Motion, the Tranche 2 Memo has been a central piece of evidence in the proceeding since Orion filed its Petition in March 2020, and Orion has had more than ample time to seek discovery regarding the Memo during the pendency of the Docket. DEC’s brief has presented no new evidence for the Commission to consider on this topic—as the North Carolina Court of Appeals has acknowledged, “legal argument . . . is not evidence[.]”<sup>29</sup> Thus, Orion’s contention that DEC’s interpretation of *the CPRE statute’s requirements* is not supported by “competent evidence” defies logic. While two parties may disagree on interpretation, as DEC and Orion do here, no outside evidence is needed for the Commission to construe the statutory language of the CPRE statute at issue in this proceeding.

Orion’s argument that the Commission should strike Duke’s briefing that relies upon information presented in Duke’s LFE should also be rejected. Orion’s sole basis offered for striking these arguments is that they rely upon the LFE, which Orion wrongly claims “is not competent evidence.”<sup>30</sup> However, as DEC explains above, the LFE is clearly competent evidence, responsive to the Commission’s request during the hearing, and the Commission is well qualified to assess the credibility of the facts and legal arguments presented by the parties and to assign appropriate weight to each.<sup>31</sup>

Indeed, if anything, it should be portions of Orion’s Motion that should be stricken for improperly attempting to provide new and unsolicited substantive argument to the Commission in an attempt to rebut DEC’s (and Accion’s) interpretation of the CPRE statute. Orion argues that “Duke’s legal arguments . . . suffer from the same fundamental

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<sup>29</sup> *Neier v. State*, 151 N.C. App. 228, 233 (2002).

<sup>30</sup> Motion, at 10.

<sup>31</sup> *Dennis v. Duke Power Co.*, 114 N.C. App. 272, 296 (1994) (“[T]he weight to be accorded to the testimony lies within the Commission's sound discretion.”).

flaw as those advanced by Accion[,]" suggesting that DEC's views are "erroneous[]" and "ignore . . . the General Assembly's and the Commission's determinations that the 'cost effectiveness' of CPRE projects is to be judged by reference to published avoided cost rates[.]"<sup>32</sup> That Orion disagrees with DEC's statutory interpretation is certainly not grounds to strike those arguments from DEC's brief. Orion's thinly-veiled preemptive attempt at a do-over in the Motion should not be persuasive to the Commission and certainly does not support striking DEC's legal arguments presented in the Company's brief.

In sum, there is no legal basis upon which to strike portions of DEC's post-hearing brief. The Commission is well qualified to assess the credibility of the facts and to decide the legal arguments presented by the parties in ruling on the Petition. This is true with respect to DEC's legal position regarding issues presented in the Tranche 2 Memorandum, the facts set forth in DEC's LFE, as well as the "other legal arguments" Orion contends DEC should have been expected to raise before it was a participant in the proceeding. For all of these reasons, the Commission should reject Orion's request to strike portions of DEC's post-hearing brief.

**III. The Commission Can Render a Decision on the Issues Presented in the Petition Without Relying Upon the LFE**

Even if the Commission were to agree that Orion is entitled to further exploration of the information contained in the LFE, which it is not, the core issue for the Commission's determination in this proceeding is a legal one: whether the CPRE statute and CPRE regulatory framework mandating cost-effectiveness of CPRE proposals below avoided costs require the IA to approve Orion's bid as a matter of law, even though Accion

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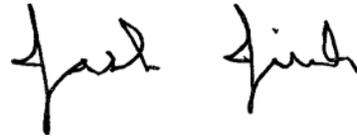
<sup>32</sup> Motion, at 11.

determined the Proposal not to be in the best interest of customers. Because resolution of this purely legal question does not necessarily turn on any facts contained in the LFE, should the Commission side with Duke and the IA on this legal question, the information contained in the LFE would seemingly no longer be relevant. Moreover, in this circumstance, Orion's demand in the Motion to reopen the record would also effectively be moot as Commission can render a final decision denying the relief requested in the Petition without relying upon the LFE. However, Duke nevertheless maintains that the information DEC provided in the LFE was responsive to the Commission's directive and provides additional contextual information relating to the issues raised by Orion's Petition for relief and, should the Commission disagree with Duke and the IA's legal interpretation of the CPRE statute, then the LFE should be utilized to guide the Commission's decision concerning an equitable outcome in this proceeding, particularly in light of the now acknowledged fact that Orion has executed a Tranche 2 power purchase agreement and the need to ensure that any outcome in this proceeding appropriately considers the immense complexity of "unscrambling the egg" that would be required under certain scenarios. [Tr. at 88.]

### **CONCLUSION**

For all of the foregoing reasons, DEC respectfully requests that the Commission enter an Order denying the relief requested in Orion's Motion.

Respectfully submitted, this the 15<sup>th</sup> day of February, 2021.



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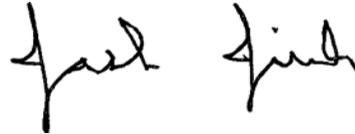
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*Counsel for Duke Energy Carolinas, LLC*

**CERTIFICATE OF SERVICE**

I certify that a copy of Duke Energy Carolinas, LLC's Response in Opposition to Motion to Strike, in Docket No. SP-13695, Sub 1, has been served by electronic mail, hand delivery or by depositing a copy in the United States mail, postage prepaid to parties of record.

This the 15<sup>th</sup> day of February, 2021.

A handwritten signature in black ink, appearing to read "Jack Jirak". The signature is written in a cursive style with a large initial "J" and "J".

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