STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. M-100, SUB 218

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Amendment to Commission Rule R1-19	)	ORDER GRANTING
Regarding Intervention	)	PETITIONS TO INTERVENE
	)	AND AMENDING RULE R1-19

BY THE COMMISSION: On February 2, 2024, the Commission issued an Order Requesting Comments in the above-captioned docket. In that order, the Commission proposed amending Commission Rule R1-19 regarding intervention to require a petitioner to include in the petition a clear, concise statement explaining why petitioner's interest is not adequately represented by existing parties. The Commission explained that although the North Carolina Rules of Civil Procedure do not specifically apply to Commission proceedings, this language was proposed to be borrowed from Rule 24 of the North Carolina Rules of Civil Procedure to promote administrative efficiency and regulatory economy, which are critical to the Commission's ability to carry out its duties.

Petitions to intervene were filed by Duke Energy Carolinas, LLC, and Duke Energy Progress, LLC (collectively, Duke); Virginia Electric and Power Company d/b/a Dominion Energy North Carolina and Public Service Company of North Carolina, Inc. d/b/a Dominion Energy North Carolina (collectively, DENC); Carolina Industrial Group for Fair Utility Rates I, II, and III (CIGFUR); Carolina Utility Customers Association, Inc. (CUCA); North Carolina Sustainable Energy Association (NCSEA); Nucor Steel-Hertford (Nucor); Southern Alliance for Clean Energy, Natural Resources Defense Council, and Sierra Club (collectively, SACE, et al.); Nancy LaPlaca; and Cathy A. Buckley.

On or before February 28, 2024, comments were filed by DENC; CUCA and CIGFUR; NCSEA; SACE, et al.; Ms. LaPlaca; Ms. Buckley; and the Attorney General's Office (AGO). Letters in lieu of comments were filed by Duke and the Public Staff.

SUMMARY OF THE COMMENTS

Duke, DENC, and the Public Staff

In its comments DENC supports the proposed amendment, agreeing that it "will serve to promote administrative efficiency and regulatory economy in Commission proceedings," both of which "are necessary as a result of recently enacted legislation." Similarly, in its letter in lieu of comments, Duke agrees that the proposed amendment "will promote efficiency in Commission proceedings while ensuring that all parties are adequately represented." Duke states that the proposed amendment "will reduce

redundancy or duplication of evidence and procedures, particularly in witness cross-examination and filings that will save the Commission valuable time and resources." In addition, Duke states that the proposed amendment "is consistent with the North Carolina Rules of Civil Procedure and is a reasonable and necessary procedural safeguard to ensure that the Commission's proceedings are efficiently carried out." In its letter the Public Staff states that it "has no objection to the proposed revisions to Rule R1-19."

AGO

In its comments the AGO notes that the proposed amendment would have no effect on its statutory right to participate in Commission proceedings. However, it opposes the proposed amendment, which it argues "seems unnecessary, raises a number of complicated questions regarding how it would work in practice, and sets up a new hurdle that intervenors would have to meet." The AGO suggests that the Commission not move forward "without significantly more detailed study and consideration of" the issues raised in the AGO's comments.

The AGO argues that the proposed amendment is unnecessary because the Commission "has aptly handled petitions from a variety of proposed intervenors," and it questions "how requiring an additional explanation from potential intervenors necessarily serves the Commission's stated purposes of administrative efficiency and regulatory economy." The AGO notes that the Commission "regularly implements other procedural requirements on a docket-by-docket basis that ensure administrative efficiency and regulatory economy" and that the Commission can already consider a statement explaining why the petitioner's interest is not adequately represented by existing parties "if one is provided." The AGO argues that "there are a variety of other tools at the Commission's disposal for controlling proceedings and addressing efficiency without silencing certain voices entirely by imposing a new prerequisite to intervention."

The AGO further notes that Rule 24 of the North Carolina Rules of Civil Procedure applies to interventions of right as well as to permissive interventions. The AGO states that the Commission proposed only to include language from Rule 24(a)(2) regarding whether the petitioner's interest is adequately represented by another party when it has the *right* to intervene, but that the Commission did not propose to include language from Rule 24(b)(2) allowing a court to consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties when it is seeking *permission* to intervene. The AGO questions (1) whether "the Commission intends to adopt and follow precisely Rule 24(a), which addresses 'intervention of right' and would *require* the Commission to allow intervention if such a showing is made," and (2) whether "the Commission intends to remove any discretion it currently has or whether it *also* means to adopt and follow Rule 24(b) — which addresses 'permissive intervention,' allowing intervention even were a petitioner unable to explain how its interest is not adequately represented by the existing parties to the proceeding." In addition, argues the AGO, the proposed amendment simply requires additional information to be filed with a petition to intervene — information specific to the petitioner — and does not cut off the right of any

party to object on the grounds of undue delay or prejudice or for the Commission to deny intervention on that ground.

The AGO further argues that the proposed amendment may cause unforeseen consequences that limit public participation and harm cooperation among intervenors. The AGO states, for example, that the proposed amendment seems counterproductive to the Commission's policy of encouraging active intervenor participation and its desire to hear from several stakeholder viewpoints, noting that the Commission has in some dockets implemented working groups to allow stakeholder input. Also, states the AGO, "the Commission hears and considers thoughtfully the testimony of public witnesses despite that the comments or testimony of these witnesses may often materially overlap." In addition, "the proposed amendment is counterproductive insofar as it may impact the behavior of the Commission's regular intervenors and instead lead to an *increase* in procedural filings or the length of certain proceedings." The AGO posits, for example, that the proposed amendment might prevent various intervenors from being represented by common counsel or race to be first to file a petition to intervene. Lastly, the AGO notes that the limitations on participation under Rule 24 are too narrow in that proceedings for which the Rules of Civil Procedure ordinarily apply "have a very different dynamic," "involve narrower questions," and "do not have the same statewide-ranging impacts" as those before the Commission.

SACE, et al.

SACE, et al. argue similar to the AGO that the proposed amendment, which tracks the language of Rule 24 of the North Carolina Rules of Civil Procedure, "is unsuitable to . . . Commission proceedings" and that "the Commission already has a range of tools to effectively manage intervention." Stating that the proposed amendment "is ill suited to the policymaking and legislative functions of the Commission," SACE, et al. distinguish between the purposes of Rule 24 in civil litigation between private parties before Superior Court and the public interest proceedings before the Commission. Thus, argues SACE, et al., the proposed amendment "sets too high a bar for intervenors given how courts have excluded parties from private litigation," stating, "Apart from intervention, which the proposed amendment would severely curtail, utility customers have less options than private parties to a breach of contract action to effectively dispute the proposed prices or terms of services that they will receive or influence utility decision-making."

SACE, et al. express concern that "an appellate court reviewing this proposed amendment could find that intervention in Commission proceedings that broadly affect utility customers should be limited to just the Public Staff and [the AGO]." SACE, et al. argue that while they may share the same ultimate goals as the AGO, the Public Staff, and many organizational intervenors in electric utility general rate cases — that of ensuring adequate, reliable electric service and affordable rates — "[l]imiting intervention to the Public Staff and AGO would deprive the Commission of the critical expertise SACE et al. and other intervenors have provided in past proceedings." Again, similar to the AGO's comments, SACE, et al. argue that the proposed amendment might disincentivize parties from cooperating altogether and discourage settlements.

SACE, et al. recommend that the Commission utilize its existing authority to control cases, specifically suggesting "prehearing conferences to help narrow discovery, identify issues that will be litigated, and facilitate partial or complete settlement between some or all of the parties." SACE, et al. also suggest that the Commission "could specifically limit the length of expert witness hearings or limit the length of cross-examination," noting, however, that "any limits on the length or duration of hearings or cross-examination would have to be balanced with due process requirements and 'the need for a full presentation of the case.'"

CUCA and CIGFUR

Similar to the comments of others, CUCA and CIGFUR state in their joint comments that the proposed amendment "is unnecessary and, taken to its extreme, could discourage and diminish public participation in important matters of widespread public interest." They further state that they "believe that [the Commission's] existing authority is sufficiently robust to permit it both to ensure that entities with a direct interest in the proceeding are permitted to intervene and that proceedings are conducted as expeditiously as possible." CUCA and CIGFUR suggest that "[h]earing from more voices rather than fewer should help provide the Commission with a robust and sufficient basis for its determinations," and that "[i]n situations where an individual is seeking to intervene in a case based on claimed individualized specialized knowledge rather than a representational capacity, the Commission could consider permitting such a party to submit an amicus brief to ensure that those views are represented."

Like the AGO, CUCA and CIGFUR highlight that "there are meaningful differences between the adjudication of disputes in the General Court of Justice and before administrative agencies" such that "the necessity of demonstrating a personal interest that is not already being represented by existing parties is both stronger and more susceptible to objective assessment in District or Superior Court proceedings as opposed to Commission proceedings." CUCA and CIGFUR argue that the Public Staff and AGO, "whose participation is assured by statute[,] . . . could be argued to represent all, or most, potential intervenors." They "envision the Commission being required to repeatedly adjudicate, as each new cases arises, whether a particular party's interests are being 'adequately' represented by the Public Staff or the Attorney General — an assessment which requires an evaluation of a party's discrete interests, policy positions and priorities, and litigation strategy — i.e., matters which are highly individualized and often highly confidential." CUCA and CIGFUR further argue that Rule 24 allows an entity to intervene, "even where an intervenor cannot satisfy the 'adequate representation' showing for intervention of right, . . . where intervention will not unduly delay the proceeding or comprise the rights of the other parties."

NCSEA

Similar to the position taken by other commenters, NCSEA states that the proposed rule change is "unnecessary [and] overly prescriptive to achieve the Commission's stated objectives of administrative efficiency and regulatory economy."

NCSEA argues that the proposed revision is unnecessary because the Commission "already possesses the authority it needs to achieve its stated objectives of administrative efficiency and regulatory economy," including broadly interpreting the existing rule on interventions, as it believes the Commission appropriately did in denying petitions to intervene in the current Carbon Plan proceeding. Moreover, notes NCSEA, the Commission previously highlighted other avenues of participation available to the public, such as submitting public comments and testifying at public witness hearings. NCSEA further argues that the proposed revision is overly prescriptive and "unreasonably far-reaching" because most Commission proceedings are not as complex as those cited in the February 2, 2024 order supporting the proposed change. NCSEA argues that "[t]o address a narrow, albeit serious concern, the proposed rule change recommends a comprehensive solution." NCSEA believes the proposed changes, though appropriate for complex proceedings, "may complicate many simpler proceedings." NCSEA believes that alternate channels for participation are particularly important if the standard for intervention is changed, noting that the Commission does not "convene a separate docket for the sole purpose of collecting consumer statements of position for each proceeding."

LaPlaca and Buckley

After detailing her experience and qualifications as a subject matter expert, Ms. LaPlaca argues that the proposed amendment "seriously affects the due process rights of at least 6 million (or more) North Carolinians" and that "allowing monopoly utilities to force millions of captive customers without an opportunity to participate meaningfully . . . [is] a violation of my constitutional due process rights." Ms. Buckley argues that adoption of the proposed amendment "would corral the concerns of millions of North Carolina ratepayers into the hands of a few," that "[b]eing an intervenor is the only substantive avenue available to ratepayers," that "there is little interaction, with no avenue to ask questions of the utilities or the [C]ommissioners" at public witness hearings, and that "public comments are summarized by the Public Staff, sometimes accurately, sometimes not." In addition, Ms. LaPlaca and Ms. Buckley request an evidentiary hearing on the proposed amendment.

PETITIONS TO INTERVENE

The intervention of the AGO and the Public Staff are recognized by statute pursuant to N.C.G.S. § 62-20 and § 62-15. The remaining petitions to intervene filed by Duke; DENC; CIGFUR; CUCA; NCSEA; Nucor; SACE, et al.; Ms. LaPlaca; and Ms. Buckley shall also be allowed. If this were a more complex proceeding or one that required an evidentiary hearing, additional scrutiny might be applied to certain of the petitions. Some petitioners, despite the subject of this rulemaking, failed to even allege an interest not represented by other potential intervenors. Some petitioners digressed into subjects not relevant to a petition to intervene or even this docket, and such statements have been disregarded. As noted below, intervention as a party is not required for interested persons and entities to communicate their views to the Commission. However, the Commission will grant each of the petitions to intervene filed herein and appreciates hearing from all commenters in this proceeding.

DISCUSSION AND CONCLUSIONS

As indicated above, the Commission appreciates the thoughtful comments submitted in this docket. After having carefully considered such comments, the Commission herein adopts the modified amendment to Rule R1-19 detailed below to address the concerns raised and points made by the commenters.

As several commenters note, Rule 24 of the North Carolina Rules of Civil Procedure addresses both intervention as of right, in subsection (a), and permissive intervention, in subsection (b). Rule 24, therefore, reads as follows:

> (a) Intervention of right. — Upon timely application anyone shall be permitted to intervene in an action:
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> (1) When a statute confers an unconditional right to intervene; or
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> (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
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> (b) Permissive intervention. — Upon timely application anyone may be permitted to intervene in an action.
>
> (1) When a statute confers a conditional right to intervene; or
>
> (2) When an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or State governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, such officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.
>
> (c) Procedure. — A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene, except when the statute prescribes a different procedure. Intervention as of right by both the Speaker of the House of Representatives and the President Pro Tempore of the Senate pursuant to G.S. 1-72.2 shall be effected upon the filing of a notice of intervention of right in the trial or appellate court in which the matter is pending regardless of the stage of the proceeding.

In Commission proceedings, intervention as of right is generally limited to the AGO and Public Staff. All other intervenors must petition for permissive intervention. Thus, undue delay or prejudice to other parties are certainly also valid grounds for the Commission to deny a petition to intervene. However, equally so is the recognition that a petitioner's interests are already adequately represented in the proceedings. The AGO states that the Commission can already consider a statement explaining why the petitioner's interest is not adequately represented by existing parties *if one is provided*. One important aspect of the proposed amendment is to put petitioners on notice that such information may be considered and should be provided in the petition. The Commission, however, cannot consider what is not provided, and petitioners cannot be expected to provide the information unless notice is provided in the rule. The Commission, therefore, finds good cause to amend Rule R1-19 by adding the following sentence after the list of information required to be included in a petition to intervene: "The Commission may limit intervention where a petitioner's interests are adequately represented by existing parties or where such intervention will cause undue delay or prejudice, while continuing to provide for public participation through other means." In so doing, the Commission is crafting its own rule, separate and distinct from Rule 24, to avoid the unintended consequences envisioned by some commenters.

To clarify, the Commission is not by this amendment intending to limit public participation or "silencing certain voices entirely." Pursuant to N.C.G.S. § 62-72, "the Commission is authorized to make and promulgate rules of practice and procedure for the Commission hearings." By amending its rule on intervention the Commission is not affecting the due process or constitutional rights of any North Carolina citizens. Intervention is not the only substantive avenue available to customers. Members of the public, particularly individuals claiming specialized knowledge applicable to one or more issues in a case, continue to have the opportunity to testify at public witness hearings which are scheduled in rate cases and other major proceedings. In fact, such knowledgeable witnesses may be qualified to testify as expert witnesses on behalf of other intervenors in a case, as Ms. LaPlaca notes she has done in numerous cases before the Commission. In addition, members of the public continue to have the opportunity to file written comments with the Commission, AGO, or Public Staff. In certain proceedings, such as has been the practice in recent rate cases, these comments are collected in a subdocket labeled "CS" simply as a convenience for those searching the Commission's docket system for testimony, motions, orders, and the public comments themselves, but they are part of the whole record of the proceeding, considered by the Commission in reaching its decision, and summarized by the Commission in its order. Such subdockets are not "separate," as NCSEA states, but neither are they created in less voluminous dockets.

Nor does the Commission intend this amendment to limit intervention to the AGO and Public Staff, or to affect cooperation among parties to a proceeding or the opportunity for joint representation. For example, in rate cases, different types of customers often seek and are allowed to intervene, often as customer groups or jointly with other customer groups. The Commission values the diverse input and critical expertise brought by these groups and finds that such joint representation generally facilitates administrative

efficiency and increases the likelihood of settlements among some or all of the parties in a case. Thus, the Commission does not envision this amendment causing parties to race to be first to file a petition to intervene.

Moreover, this amendment will have no impact on the formation or work of stakeholder groups. Participation in stakeholder groups is not limited to formal parties that have been allowed to intervene in a Commission proceeding. This is particularly evident, for example, from the hundreds of participants in the various stakeholder meetings convened in relation to Duke's recent rate cases. The Commission appreciates and takes very seriously commenters' suggestions of additional procedural options that it might utilize, such as prehearing conferences and limits on cross-examination and questions on Commissioners' questions, and may do so in appropriate cases while respecting parties' rights to fully present their case.

Lastly, to reiterate, the Commission welcomes participation by members of the public and provides multiple opportunities to do so. The Commission values the input it has received in the past from diverse interests and experts sponsored by those parties. As the Commission stated in its initial order, the proposed amendment is being driven by the need to manage complex dockets before it, and the Commission is not intending to overly complicate simpler proceedings. To that end, the Commission has allowed all petitions to intervene and carefully considered and responded to all comments filed in this proceeding. The Commission, however, does not find that an evidentiary hearing or more detailed study is necessary in this rulemaking proceeding. No commenter has set forth any factual disputes to be resolved by the Commission before amending its intervention rule.

IT IS, THEREFORE, ORDERED as follows:

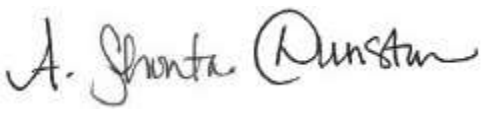
1. That Commission Rule R1-19, as amended and attached as Appendix A, is approved and effective as of the date of this Order; and

2. That the Chief Clerk shall serve a copy of this Order by electronic mail on all entities regulated by the Commission.

ISSUED BY ORDER OF THE COMMISSION.

This the 24th day of July, 2024.

NORTH CAROLINA UTILITIES COMMISSION



A. Shonta Dunston, Chief Clerk

Commissioner Floyd B. McKissick, Jr., did not participate in this decision.

Rule R1-19. INTERVENTION.

(a) Contents of Petition. — Any person having an interest in the subject matter of any hearing or investigation pending before the Commission may become a party thereto and have the right to call and examine witnesses, cross-examine opposing witnesses, and be heard on all matters relative to the issues involved, by filing a verified petition with the Commission giving the docket number and title of the proceeding and the following information in separately numbered paragraphs:

(1) The correct name, post-office address and electronic mailing address of the petitioner.

(2) The name, post office address and electronic mailing address of counsel representing the petitioner, if any.

(3) A clear, concise statement of the nature of the petitioner's interest in the subject matter of the proceeding, and the way and manner in which such interest is affected by the issues involved in the proceeding.

(4) A statement of the exact relief desired.

<u>The Commission may limit intervention where a petitioner’s interests are adequately represented by existing parties or where such intervention will cause undue delay or prejudice, while continuing to provide for public participation through other means.</u>

(b) When Filed. — Petitions under this rule shall be filed with the Commission not less than ten (10) days prior to the time the proceeding is called for hearing, unless the notice of hearing fixes the time for filing such petitions, in which case such notice shall govern. A petition, which for good cause shown was not filed within the time herein limited, and which neither broadens the issues nor seeks affirmative relief, may be presented to and allowed or denied by the presiding official, in his discretion, at the time the cause is called for hearing.

(c) Copies Required. — *See* Rule R1-5, subsection (g).

(d) Leave. — Leave to intervene filed within the time herein provided, in compliance with this rule and showing a real interest in the subject matter of the proceeding, will be granted as a matter of course, but granting such leave does not constitute a finding by the Commission that such party will or may be affected by any order or rule made in the proceeding. Failure of any party to file answer or reply to such petition for leave to intervene does not constitute an admission of the facts stated in such petition, nor a waiver of the right to move to dismiss said petition at the time the cause is called for hearing for failure to comply with this rule.

(e) Notices of Intervention by the Public Staff. — Notices of Intervention by the Public Staff shall be deemed recognized without the issuance of any order. As a general rule, Notices of Intervention by the Public Staff need not be filed in advance of any hearing and appearances may be made and noted at the hearing. If the Public Staff elects to do so, Notices of Intervention may be filed in certain cases. The filing of testimony and exhibits and otherwise complying with all other Rules and Regulations of the Commission are not affected by this provision.