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December 29, 2021

**VIA ELECTRONIC FILING**

Ms. A. Shonta Dunston, 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's Motion for Leave**
**Docket No. E-100, Sub 178**

Dear Ms. Dunston:

In light of certain Reply Comments filed by various parties on December 17, 2021 pursuant to the Commission's October 14, 2021 *Order Requesting Comments and Proposed Rules* and its November 24, 2021 *Order Granting Extension,* enclosed for filing in the above-referenced docket is Duke Energy Carolinas, LLC and Duke Energy Progress, LLC's Motion for Leave to File Supplemental Reply Comments Regarding Commission Rules to Implement Performance-Based Regulation of Electric Utilities.

If you have any questions, please do not hesitate to contact me. Thank you for your assistance with this matter.

Sincerely,

Jack E. Jirak

Enclosure

cc: Parties of Record

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-100, SUB 178

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

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| In the Matter of<br>Rulemaking Proceeding to Implement<br>Performance-Based Regulation of Electric<br>Utilities | ) | **DUKE ENERGY CAROLINAS, LLC AND DUKE ENERGY PROGRESS, LLC'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL REPLY COMMENTS** |

NOW COME Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (collectively, the "Companies"), by and through their legal counsel and pursuant to Rule R1-7 of the Rules and Regulations of the North Carolina Utilities Commission ("Commission"), to hereby request leave to file supplemental reply comments to respond to the specific new issues contained in the reply comments and revised proposed rules submitted by certain parties as specifically identified in Paragraphs 13-15 of this Motion. As further grounds for the Motion, the Companies state as follows:

1. On October 14, 2021, the Commission issued an order initiating a rulemaking proceeding to implement performance-based regulation ("PBR") as authorized by House Bill 951 (S.L. 2021-165) ("PBR Rulemaking Order"). The Companies, along with Dominion Energy North Carolina ("Dominion") (collectively, the "Electric Utilities"), were made parties to the docket in the PBR Rulemaking Order.

2. The PBR Rulemaking Order specified that parties may "file comments and proposed rules on or before November 9, 2021" and may "file reply comments on or before

December 7, 2021." The PBR Rulemaking did not contemplate the filing of proposed rules during the reply comment cycle.

3. On November 9, 2021, the Companies submitted initial comments and their proposed rule in accordance with the PBR Rulemaking Order. In addition, the following parties submitted initial comments and/or proposed rules: the Public Staff; Carolina Industrial Group for Fair Utility Rates I, II, and III ("CIGFUR"); Carolina Utility Customers Association, Inc. ("CUCA"); City of Charlotte; North Carolina Retail Merchants Association; North Carolina Sustainable Energy Association ("NCSEA"); North Carolina Justice Center, North Carolina Housing Coalition, Sierra Club, and Southern Alliance for Clean Energy (collectively, "NCJC et al."); and Apple Inc., Meta Platforms, Inc., and Google LLC (collectively, "Tech Customers"). Dominion filed a letter in lieu of initial comments. The Attorney General's Office ("AGO") petitioned to intervene in the docket but elected not to file initial comments or any proposed rules by the November 9, 2021 deadline.

4. On November 19, 2021, the Companies moved for an extension of time for the parties to file reply comments. On November 24, 2021, the Commission issued an order granting the Companies' motion and extending the deadline for the parties to file reply comments to December 17, 2021 ("Order Granting Extension").

5. On December 17, 2021, the Companies, Dominion, and North Carolina Electric Membership Corporation filed reply comments in accordance with the PBR Rulemaking Order and the Order Granting Extension. Also on December 17, 2021, the Public Staff filed reply comments along with an Appendix detailing extensive "revisions" to its proposed rule; the AGO submitted reply comments and a proposed rule; and

CIGFUR, CUCA, NCSEA, and NCJC et al. (collectively, "Joint Intervenors") filed Joint Reply Comments along with a new Joint Proposed Rule.[1]

6. Similar to the concerns raised by the Companies in their Motion for Leave to File Supplemental Reply Comments filed on June 16, 2021 in Docket No. E-100, Sub 165 and in the Companies' Motion for Leave to File Supplemental Reply Comments in Docket Nos. E-2, Sub 1169 and E-7, Sub 1156, substantial equitable and fairness concerns are raised where parties wait until reply comments to introduce new legal arguments or policy positions that could have been raised during initial comments. This approach unfairly deprives the Companies (and other parties) of the opportunity to respond to such new legal arguments and policy positions and undermines the efficiency of the regulatory process by necessitating motions such as this one. These concerns are particularly heightened where a party does not file initial comments, but instead waits to reveal its positions and recommendations for the first time in reply comments, as is the case with the AGO.

7. In those cases where parties have taken new positions in reply comments that could have been raised in initial comments—positions that could adversely impact the Electric Utilities but regarding which they have had no opportunity to respond—the Companies believe that it would be equitable to allow the Electric Utilities to submit supplemental reply comments.

8. Furthermore, the Commission's PBR Rulemaking Order expressly requested "comments and proposed rules" during the initial comment cycle and only "reply

[1] Each of the Joint Intervenors also filed individual reply comments which primarily adopt, in full or in part, the Joint Reply Comments and the Joint Proposed Rule and reiterate issues and positions which they already addressed in detail during the initial comment phase. The Tech Customers also filed reply comments which were supportive of the Joint Reply Comments and Joint Proposed Rule.

comments" during the reply comment cycle. In other words, the PBR Rulemaking Order did not contemplate that proposed rules would be filed during the reply comment cycle, presumably in light of these equity concerns. Such equity concerns are also rooted in common sense—to allow parties the opportunity to submit entirely new recommendations and rules during the reply comment phase would actually create an incentive to do just that, given that such a strategy deprives other parties of the opportunity to respond.

9. Ignoring the PBR Rulemaking Order, numerous parties filed proposed rules as part of the reply comment cycle. Furthermore, the proposed rules filed by parties, while styled as proposed "modifications" to the Public Staff's initial proposed rule that had been properly filed during initial comments, actually included entirely new and material provisions (*e.g.*, additions of entirely new paragraphs and sections) that are more accurately characterized in parts as entirely new rules. Perhaps most egregiously, the AGO, which did not submit initial comments, submitted proposed rules on reply comments, ignoring both the letter and spirit of the PBR Rulemaking Order and effectively prohibiting the Companies from having an opportunity to respond to the AGO's positions.

10. In many cases, the substance of the parties' reply comments introduce entirely new concepts or positions that are at odds with those taken in their initial comments and original proposed rules—positions and concepts that could have been raised in initial comments and that cannot reasonably be characterized as responsive (*i.e.*, a *reply*) to issues identified in initial comments.[2] As a result, the Companies were foreclosed from

[2] One of the most stark examples of this approach is the recommendation of the AGO and NCSEA, raised for the first time in "reply" comments, that the fuel cost recovery construct established under N.C. Gen. Stat. § 62-133.2 should be essentially discarded. This recommendation—wholly unsupported by North Carolina law—could have been raised on initial comments and was not (thereby depriving the Companies of the opportunity to respond) and is not in any meaningful sense a "reply" to an issue identified in initial comments.

addressing these new rules, concepts, and positions in their reply comments. In contrast, the Companies' reply comments (including the report prepared by the Pacific Economics Group Research, LLC) were focused on responding to issues raised by other parties and did not introduce any material new proposals that substantially differed from the proposals made by the Companies during initial comments and did not include any new proposed rules. Stated simply, the Companies' reply comments did not materially alter their initial recommendations or introduce new proposals and therefore, no parties were deprived of an opportunity to respond to the Companies' proposals. The same is true of Dominion – its reply comments complied with the letter and the spirit of reply comments and the Commission's PBR Rulemaking Order.

11. Given that the new recommendations and proposed rules submitted in the Public Staff and intervenors' reply comments and identified in this Motion are inconsistent with the PBR Rulemaking Order, it might have been reasonable for such recommendations and proposed rules to be stricken. However, the Companies recognize that the such a procedural outcome would potentially be in conflict with the Commission's desire to provide an opportunity for parties to provide input on the PBR rules. Therefore, the Companies do not move to strike but instead respectfully request the opportunity for the Electric Utilities to respond to the narrow set of new intervenor recommendations and proposed rules identified in Paragraphs 13-15 of this Motion. Absent such opportunity, the Electric Utilities will be disadvantaged by being denied the opportunity to respond, parties that chose to withhold material recommendations and rules until reply comments (contrary to the spirit and letter of the PBR Rulemaking Order) will be advantaged, and the Commission will be deprived of a full record for the decisions it must make.

12. In light these equity and fairness concerns, the Companies have identified the following items from reply comments regarding which the Companies request leave for the Electric Utilities to file supplemental reply comments.

13. First, the Public Staff "revisions" to its original proposed rule are not just minor tweaks, but instead are a substantive rewrite of several rules that introduce entirely new issues and, in some cases, amount to a complete change in position to which the Companies have not had an opportunity to respond. The Companies request leave for the Electric Utilities to address the following:

a. The Public Staff's revised proposed rule requires a utility to file a new depreciation study with every PBR application.[3] This is a brand-new proposed filing requirement that was not included in the Public Staff's original proposed rule nor raised by any party in initial comments.

b. The Public Staff's initial comments and original proposed rule included a recommended refund procedure for cancelled or postponed Commission-authorized capital spending projects, which the Companies opposed in their reply comments. In its reply comments and revised proposed rule,[4] the Public Staff completely overhauls and reworks this provision to the further detriment of utilities. Whereas its original proposed rule addressed cancellation, postponement, and substitution of projects, the Public Staff's revised rule has morphed into a comprehensive, asymmetrical true-

[3] *See* Public Staff Reply Comments, at 8; Appendix B to Public Staff Reply Comments, at 11.
[4] *See* Public Staff Reply Comments, at 9-10; Appendix B to Public Staff Reply Comments, at 16-19.

up for capital spending projects. Under this new proposal, a utility would have to recalculate the revenue requirement each year of the multi-year rate plan ("MYRP") to reflect actual costs of capital spending projects and issue a refund if the newly calculated revenue requirement for any individual project is lower than was projected (even if the utility has not exceeded the earnings cap or is earning below the Commission-authorized return on equity). However, if the new revenue requirement based on actuals for any individual project is greater than the projected revenue requirement, the utility would not get to collect any additional revenue from customers. This provision is inconsistent with N.C. Gen. Stat. § 62-133.16, unfairly places all the risk on the utility, and is a new and different recommendation by the Public Staff that the Companies should have the opportunity to rebut.

c. The Public Staff adds an entirely new provision which appears to allow reasonableness and prudence to be reviewed twice – once during the annual review process under the MYRP and then again in the utility's next rate case.[5] This is a substantive change to the annual review process initially recommended by the Public Staff and the Companies have not had an opportunity to respond accordingly.

[5] *See* Appendix B to Public Staff Reply Comments, at 24.

d. The Public Staff recommends new, substantive changes to the PBR application and earnings review processes that were not initially recommended by the Public Staff and that the Companies' have not had an opportunity to address. For example, by changing "actual changes" to "actual or estimated changes" for purposes of the evaluating future rate years, the Public Staff is essentially attempting to rewrite N.C. Gen. Stat. § 62-133(c) to allow a projected test year based on "estimates" instead of actuals.[6]

e. In its initial proposed rule, the Public Staff proposed that a utility request a technical conference no later than 90 days before it intends to file its notice of intent to file a general rate case that includes a PBR Application, or 120 days before a utility files its PBR Application. The Companies noted in their reply comments that they had no objection to this timeline. However, the Public Staff's revised proposed rule increases its recommendation to 120 days prior to a utility filing a notice of intent;[7] this would result in a utility being required to file its technical conference request 150 days prior to submitting a rate case application. The Public Staff also newly recommends that the Commission prohibit utilities from requesting

[6] *See* Appendix B to Public Staff Reply Comments, at 16 (redlining in original):

> (7) The Commission shall consider such relevant, material, and competent evidence as may be offered by any party to the proceeding tending to show actual or estimated changes in costs, revenues, or the cost of the electric public utility's property used and useful expected to be experienced in the MYRP rate years, in providing the service rendered to the public within this State~~, including its construction work in progress, which is based upon circumstances and events occurring up to the time the hearing is closed~~.

[7] *Id.* at 4.

a technical conference until the Carbon Plan has been finalized. If the Commission accepts both Public Staff recommendations, the earliest a utility could file a PBR application would be June 1, 2023. The Companies certainly would have opposed this delayed timeline in their reply comments had they been given the chance.

f. The Public Staff revised its proposed rule to *require* the Commission to initiate a review of rates under N.C. Gen. Stat. § 62-133.16(e) if the utility does not intend to file a rate case at the end of the MYRP, and to establish new base rates effective upon expiration of the MYRP.[8] This is, in essence, a new requirement for a mandatory rate case during the final year of the MYRP. This is a radical departure – in fact, a complete 180-degree change – from the Public Staff's previous position, which was to allow the base rates in effect during the final year of a MYRP to continue until a utility files a new rate case.

14. As noted above, the AGO did not file initial comments and proposed rules, but instead waited until the reply comment phase to propose new rules and raise new issues, thereby completely denying the Companies an opportunity to respond to the AGO's positions absent the relief sought in this Motion. Similar to other intervenors, the AGO frames its proposed rules as "modifications" of the Public Staff's initial proposed rules, but a cursory review reveals that AGO has substantially rewritten the rules, adding extensive new paragraphs and sections. While the Electric Utilities should arguably have the right

[8] *Id.* at 26-27.

to respond to nearly the entirety of the AGO's reply comments, the Companies request leave to address only the following:

a. The AGO recommends adding specific provisions in the PBR rules to prioritize PBR proposals that are optimal in timing and generation and resource mix for advancement of the carbon plan and effective for integrated resource planning ("IRP") purposes.[9]

b. The AGO contends that the statutorily prescribed 300-day timeline governing PBR application review and approval is too short, and recommends additional proceedings and rules which would prolong this timeline.[10] For example:

   i. The AGO recommends a separate policy goals proceeding in which the Commission would establish a "goal-outcome hierarchy";

   ii. The AGO recommends that the Commission utilize yet another separate docketed proceeding to "further outline and articulate guiding principles and criteria to inform alternative regulatory mechanism design within a utility's PBR application"; and

   iii. The AGO recommends that the Commission direct utilities to submit, in conjunction with their IRP and Carbon Plan filings, a detailed capital investment plan for those projects that would be eligible and

[9] *See* AGO Reply Comments, at 4, 27; Appendix to AGO Reply Comments, at 1-3, 5.
[10] *See* AGO Reply Comments, at 6-20.

authorized for inclusion in a subsequent PBR application and proposed MYRP.

c. The AGO's argument that the statutory cap on overall annual rate increases should be applied so the rate increase for each individual customer class cannot exceed 4% is also new, not responsive to initial comments and proposed rules, and outside of the statute.[11]

d. The AGO makes several recommendations relating to decoupling that are new, not made in response to any party's initial comments or rules, and that are not permitted by North Carolina law.[12] For example, the AGO argues that decoupling shifts risk from the utility to residential customers, and the Commission should shift some risk back to the utility by fixing the fuel costs over the three-year period. This recommendation – that the Companies be prohibited from utilizing their fuel riders for the duration of a MYRP – directly contravenes N.C. Gen. Stat. § 62-133.2 and certainly warrants a response from the Companies.

e. The AGO adds new mandatory criteria to guide the Commission's evaluation of a PBR application that are inconsistent with N.C. Gen. Stat. § 62-133 and § 62-133.16 and, in some cases, conflict with the established framework for the determination of just and reasonable rates.[13]

[11] *Id*. at 21.
[12] *Id*. at 22-24.
[13] Appendix to AGO Reply Comments, at 7.

15. Joint Intervenors also submit a new proposed rule that was not filed in the initial comment phase. While some of the Joint Proposed Rule provisions are simply a merger of the rules and recommendations these intervenors previously submitted during the initial comment phase, the Joint Intervenors improperly used the reply comment phase as an opportunity to convert some of their initial recommendations into proposed rules, to substantially modify and intensify their previously proposed rules, and to support or duplicate brand-new provisions introduced by the Public Staff in its revised proposed rule. As discussed above, the Companies do not believe that these actions are consistent with the *reply* comment phase established by the Commission in the PBR Rulemaking Order. Therefore, the Companies request leave for the Electric Utilities to address the following entirely new proposals and requirements:

a. The addition of a two-phase technical conference process that was not previously proposed;[14]

b. A substantial expansion beyond that proposed in the initial comments of the information the utility would be required to provide in connection with the technical conference;[15]

c. Additional PBR filing requirements beyond those included in initial comments, including:[16]

    i. granular forecasting data relating to T&D investments, including asking for projected investments to be identified by specific geographic locations;

[14] Appendix A to Joint Intervenors Reply Comments, at R8-__(d)(1).
[15] *Id.* at (d)(2).
[16] *Id.* at (e).

ii. detailed justifications for capital spending projects, including the rationale for selecting each of the proposed projects;

iii. a requirement that the utility state that inclusion of a project in a MYRP by the Commission does not constitute a prudence determination; and

iv. comparisons showing how operational benefits of capital spending projects are factored into the proposed revenue requirement.

d. A completely revamped annual review process, which includes the filing of testimony and exhibits by the utility and intervenors;[17]

e. A provision requiring that "any interested party" be granted "full intervention status and rights" during the annual review process[18] (which is at odds with the typical petition to intervene process and standard); and

f. A cut-and-paste of several new provisions also recommended by the Public Staff (*e.g.*, the extension of the timeframe for filing a request for a technical conference, the requirement of filing a new depreciation study, and the double-prudence review provision).[19]

[17] *Id*. at (j)(2).
[18] *Id*. at (j)(5)d.
[19] *See, e.g., id*. at (d)(1), (e)(8), and (j)(6).

16. Accordingly, the Companies request leave for the Electric Utilities to file supplemental reply comments for the limited purpose of responding to the discrete issues detailed in paragraphs 13-15, above.

Based on the foregoing, the Companies respectfully request that the Commission issue an order granting the Electric Utilities leave to file supplemental reply comments by the later of (1) January 12, 2022 or (2) seven days after the date on which the Commission grants the request.

This the 29th day of December, 2021.

*/s/ Jack Jirak*
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ATTORNEYS FOR DUKE ENERGY CAROLINAS, LLC AND DUKE ENERGY PROGRESS, LLC

**CERTIFICATE OF SERVICE**

Docket No. E-100, Sub 178

I hereby certify that a copy of the foregoing Motion for Leave to File Supplemental Reply Comments was served electronically or by depositing a copy in the United States Mail, first class postage prepaid, properly addressed to the parties of record.

This the 29th day of December 2021.

*/s/ Jack Jirak*
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