BEFORE THE NORTH CAROLINA UTILITIES COMMISSION
DOCKET NO. E-2, SUB 1170
DOCKET NO. E-7, SUB 1169

In the Matter of:	)	**NCSEA'S RESPONSE TO**
Petition for Approval of Green Source	)	**DUKE ENERGY**
Advantage Program and Rider GSA to	)	**CAROLINAS, LLC AND**
Implement N.C. Gen. Stat. § 62-159.2	)	**DUKE ENERGY**
	)	**PROGRESS, LLC'S**
	)	**MOTION TO STRIKE**
	)	**COMMENTS**

NCSEA'S RESPONSE TO DUKE ENERGY CAROLINAS, LLC AND DUKE ENERGY PROGRESS, LLC'S MOTION TO STRIKE COMMENTS

NOW COMES the North Carolina Sustainable Energy Association ("NCSEA"), by and through the undersigned counsel, and responds to Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC's ("DEP") (DEC and DEP collectively "Duke" or "Movants") Motion to Strike Comments ("Motion to Strike") filed on September 26, 2018 and following the oral arguments in the above-captioned proceeding which took place on September 4, 2018 before the North Carolina Utilities Commission ("Commission").

I. BACKGROUND.

On January 23, 2018, pursuant to N.C. Gen. Stat. § 62-159.2, Duke filed its Petition for Approval of Green Source Advantage Program and Rider GSA to Implement N.C. Gen. Stat. § 62-159.2 ("Petition") wherein Duke set forth a two-pronged program[1] to implement the Green Source Advantage ("GSA") program. Thereafter, parties (including NCSEA) petitioned to intervene and were granted those petitions. NCSEA filed its initial comments

[1] "The Companies have accomplished these objectives in accordance with the GSA Program statutory requirements by developing two separate Program participation opportunities for Eligible GSA Customers." *Petition*, p. 4.

in this docket along with Apple Inc. and Google LLC (collectively, "Google and Apple"), the North Carolina Clean Energy Business Alliance ("NCCEBA"), the Public Staff – North Carolina Utilities Commission ("Public Staff"), the Southern Alliance for Clean Energy ("SACE"), the United States Department of Defense and all other Federal Executive Agencies (collectively, "DoD/FEA"), the University of North Carolina at Chapel Hill ("UNC-Chapel Hill"), and Walmart Stores East, LP and Sam's East, Inc. (collectively, "Walmart"). The North Carolina Electric Membership Corporation ("NCEMC"), the Public Staff, NCSEA, UNC-Chapel Hill, SACE, NCCEBA, the North Carolina Attorney General's Office ("AGO"), and Duke filed reply comments with the Commission.

On May 4, 2018, NCCEBA, NCSEA, SACE, UNC-Chapel Hill, and DoD/FEA filed a Joint Motion for Leave to File Sur-Reply Comments ("Motion for Sur-Reply"). In the Motion for Sur-Reply, the moving parties sought the Commission to allow them the opportunity to file sur-reply comments responsive to Duke's Reply Comments and, also, to comment for the first time on the proposed standard terms and conditions for certain GSA Comments, which Duke filed on April 20, 2018 with its Reply Comments. On May 15, 2018, Duke filed the Response to Joint Motion for Leave to File Sur-Reply Comments ("Response to Motion for Sur-Reply"), wherein it opposed the Motion for Sur-Reply.[2]

On July 16, 2018, the Commission issued the Order Scheduling Oral Argument in this docket. In this order, the Commission scheduled an oral argument for September 4, 2018, and specifically stated:

> The Chairman has completed a preliminary review of Duke's petition, proposed GSA Program and corresponding riders, and the comments of all of the parties. Based upon this review, the Chairman finds good cause to schedule an oral argument in this proceeding to consider the merits of the competing proposals for the GSA Program in light of the requirements of

[2] See generally *Motion for Sur-Reply* and *Response to Motion for Sur-Reply*.

> N.C. Gen. Stat. § 62-159.2. Given the present disagreement regarding the overall program structure, the Chairman finds that it is premature to allow comments addressing the proposed contracts filed in this proceeding at this time.[3]

The Commission also encouraged the parties to meet to "continue discussions among themselves to reach agreement on aspects of the proposed GSA Program" and "narrow the issues in controversy in this proceeding." *Order Scheduling Oral Argument*, p.2. To that end, Duke scheduled a meeting for interested stakeholders to take place on Tuesday, August 21, 2018, at Duke's office in downtown Raleigh, North Carolina.

On Thursday, August 16, 2018, Duke and Wal-Mart filed the Agreement and Stipulation of Partial Settlement by and between Duke Energy Carolinas, LLC, Duke Energy Progress, LLC, and Wal-Mart Stores East, LP and Sam's East, Inc. ("Wal-Mart Settlement"). The Wal-Mart Settlement included a bill credit mechanism completely different than those previously presented by Duke in its Petition or as modified in its Reply Comments.[4] At the August 21, 2018 meeting at Duke's Raleigh office, the Wal-Mart Settlement was discussed extensively and was directly compared to the Georgia Power commercial and industrial green tariff ("Georgia Power Green Tariff") by Duke representatives. Also, at that meeting, certain parties requested that Duke file a proposed GSA power purchase agreement and, on August 29, 2018, Duke filed the Green Source Advantage Self-Supply Power Purchase Agreement. The oral arguments took place on September 4, 2018 and NCSEA and NCCEBA filed post-hearing comments on September

[3] See *Order Scheduling Oral Argument*, p.1.
[4] See generally *Wal-Mart Settlement*; also, specifically: "The [Wal-Mart Settlement] memorializes one such agreement with a GSA customer and provides for an *alternative* Self-Supply Bill Credit mechanism that is based on [Duke's] marginal energy costs. If approved by the Commission, this Bill Credit option would be available to participating customers *in addition to* the Bill Credit options proposed in [Duke's] initial filing and reply comments." *Wal-Mart Settlement* filing cover page, p. 1.

19, 2018.[5] On September 26, 2018, Duke filed the Motion to Strike to which NCSEA responds herein.

II. NCSEA'S POST HEARING COMMENTS ARE RESPONSIVE TO COMMISSION QUESTIONS AND DUKE'S "HYPOTHETICAL ILLUSTRATION" PRESENTED DURING REBUTTAL ARGUMENT.

In the Motion to Strike, Duke objects to NCSEA and NCCEBA filing post-hearing comments stating: [t]he Commission's Order Scheduling Oral Argument did not authorize the filing of post-hearing comments nor did the Commission solicit such comments during the September 4, 2018 oral arguments."[6] Duke goes on to claim that the "Commission's procedural rules do not support" the filing of post-hearing comments despite the regular practice of filing post-hearing materials by parties in Commission proceedings. Further, Duke has a bizarre misunderstanding or misconstruing of Chairman Finley's statement at the end of the hearing, claiming that Chairman Finley ruled that "'surrebuttal' was '" not appropriate'" and that the statement by Chairman Finley somehow applies to the post-hearing comments filed by NCCEBA and NCSEA.[7]

Under Commission Rule 1-7 (a)(2), a motion to strike may be addressed to the Commission "to strike irrelevant or immaterial allegations in pleadings[.]" Under the North Carolina Rules of Civil procedure, a judge "may order stricken from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter." N.C. Gen. Stat. § 1A-1, Rule 12.

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[5] NCCEBA also filed Amended Post Hearing Comments on September 21, 2018.

[6] *Motion to Strike*, p. 1.

[7] At the oral argument hearing, Gary Styers, counsel for UNC-Chapel Hill, requested one-minute following Duke's rebuttal to clarify his argument. After approximately one minute of clarifying remarks, Chairman Finley stated: "Mr. Styers, your time is up. […] You're sort of – you're sort of surrebuttal, and I don't […] – think that's not appropriate -- […] not appropriate." *Transcript*, pp. 168-169. For Duke to ascribe this limitation, specific to the content and structure of the oral arguments, by the Chairman to NCSEA and NCCEBA is either disingenuous or a complete misunderstanding of the "ruling" made by Chairman Finley.

NCSEA's Post-Hearing Comments are neither irrelevant or immaterial to the underlying proceeding and, even under the scrutiny of the broader North Carolina civil procedural viewpoint, the Post-Hearing Comments are not redundant, impertinent, or scandalous. Duke's Motion to Strike is baseless and inappropriate. NCSEA answered Commission questions in its post-hearing comments, and, in fact and as set forth below, verified with the Commissioners during the oral arguments that a post-hearing filing may be the appropriate venue to address said questions. Furthermore, Duke introduced a document for the first time during their rebuttal comments which they referred to then as a "hypothetical illustration of how the Intervenor recommendation would work if you were to fix the bill credit at the 20-year avoided cost"[8] (herein the "Hypothetical Illustration"). NCSEA's post-hearing comments regarding the newly-introduced Hypothetical Illustration (and attaching the Hypothetical Illustration which had not otherwise been filed into the evidentiary file in this docket) are neither irrelevant nor immaterial and are not subject to being stricken under Commission Rule 1-7 or any other rule of procedure.

a. <u>The Georgia Power Green Tariff "in-depth comparison" was responsive to Commissioner Mitchell's Question Directed to Counsel for NCSEA.</u>

Duke claims that NCSEA's Post-Hearing Comments (the "Post-Hearing Comments") include "irrelevant information" and, specifically in footnote 6 in their Motion to Strike, appear to allege that NCSEA's Post-Hearing Comments comparing the Georgia Power Green Tariff with the proposed Wal-Mart Settlement are not relevant and subject to strike. However, NCSEA's comments and comparison of the Wal-Mart Settlement and the Georgia Power Green Tariff were filed in response to Commissioner

[8] *Transcript*, pp. 162-163.

Mitchell's question on the topic during the oral argument. Specifically, Commissioner Mitchell asked counsel for NCSEA:

> COMMISSIONER MITCHELL: The Georgia Power Program, the information that's been provided to us is that it's -- it is or it was fully subscribed. Can you tell us why that program worked, and it involved a credit mechanism based on actual incremental costs? You know, why did that -- why was that program successful or why did customers choose to participate in that program, and your sort of a similar mechanism that's been proposed here has been described as being not feasible or not appropriate or not likely to induce participation?[9]

Counsel for NCSEA provided a response to this question, admitting not having full knowledge of the Georgia program, and, at the end of his response, stated, "I can provide you that information after the hearing if you need it," to which Commissioner Mitchell replied: "Okay. Nothing further."[10]

Based upon this exchange with Commissioner Mitchell, NCSEA elected to file in its Post-Hearing Comments an explanation of the Georgia Power Green Tariff (and including a copy of the order which caused the Georgia Power Green Tariff to be implemented), along with a comparison to the proposed Wal-Mart Settlement. Commissioner Mitchell's question clearly contemplates a comparison between the Wal-Mart Settlement and the Georgia Power Green Tariff and, to that end, counsel for NCSEA requested that it be able to provide further explanation of its position and the differences between the two programs as proposed.

Furthermore, while Duke claims in its Motion to Strike that it "has never asserted that the Walmart settlement was intended to fully mirror" the Georgia Power Green Tariff,[11] their language during the oral argument contradicts this assertion:

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[9] *Id*. at 138-139.
[10] *Id*.
[11] *Motion to Strike*, footnote 6, p. 4.

> A GSA Program structured around hourly marginal cost was an idea that was noted by the Public Staff as a potential program design. And, in fact, the Georgia Public Service Commission recently implemented a marginal cost-based program *nearly identical* in structure to the Wal-Mart Settlement for – in the case of Georgia for large commercial industrial customers, and that program was fully subscribed.[12]

Whatever Duke's reasoning to bring up the Georgia Power Green Tariff program during their oral arguments, it is indisputable that Commissioner Mitchell directed a question at NCSEA about the Georgia Power Green Tariff and assented to NCSEA's request to provide further information following the oral argument. NCSEA elected to provide that information via filed post-hearing comments which is an accepted practice in front of the Commission, and such a filing does not fall outside the procedures and processes established by this Commission and the General Assembly.

b. NCSEA's Post-Hearing Comments on Avoided Cost are Responsive to Commissioner Brown-Bland's Questions to NCSEA.

Duke described NCSEA's Post-Hearing Comments on avoided cost as containing "inaccuracies"[13] in their Motion to Strike. As set forth more fully below, a Motion to Strike is an inappropriate means for a party to ask the Commission to decide on the merits of a matter. However, in this specific instance, NCSEA was again attempting to answer questions posed by a Commissioner. Following NCSEA's oral argument, Commissioner Brown-Bland asked counsel for NCSEA several questions (or, more specifically, a number of restatements of the same question) regarding NCSEA's position on the calculation of avoided cost and what bearing, if any, the market price of energy should have on that amount.[14] In response, after some attempts at clarifying the question, counsel for NCSEA

[12] *Id*. at 23 (emphasis added).
[13] *Motion to Strike*, p. 2; see also *Motion to Strike*, Footnote 2, p. 3.
[14] See *Transcript*, pp. 135-137.

stated: "I'm not sure. I think I would have to go back and review and to give you – I can give you something after this hearing."[15] In response to this request, Commissioner Brown-Bland simply stated, "All right. Thank you."[16]

Again, like Commissioner Mitchell's question on the Georgia Power Green Tariff, Commissioner Brown-Bland asked a question of NCSEA that NCSEA's attorney could not answer at that time. Counsel for NCSEA stated that he would provide further substance in the form of a post-hearing filing and Commissioner Brown-Bland assented. For the same reasons set forth above, NCSEA's Post-Hearing Comments responsive to Commissioner Brown-Bland's questions were relevant, material, and properly made after assent from Commissioner Brown-Bland.

c. <u>The Hypothetical Illustration Presented Completely New Material Regarding the Cost Recovery in this Matter During Rebuttal and NCSEA's Post-Hearing Comments are Appropriate</u>.

In paragraph 3 of Footnote 2 of Duke's Motion to Strike, Duke states:

> NCSEA alleges that Duke is seeking to 'receive payment, recovered from ratepayers in the fuel rider, for its generation that is replaced by the power generated by the independent power producer pursuant to a GSA agreement with a GSA customer.' […] This is blatantly incorrect *and not what is reflected on Duke Energy's exhibit* that is presented in NCSEA Exhibit 2.[17]

Duke also refers to the Hypothetical Illustration as a "hearing exhibit" in Footnote 7.[18] It is important to note that Duke's Hypothetical Illustration was not an "exhibit" at the oral arguments in any accepted procedural sense despite their assertion in Footnotes 2 and 7 of the Motion to Strike. The Hypothetical Illustration was not marked, verified or

[15] *Id*. at 137.
[16] *Id*.
[17] *Motion to Strike*, Footnote 2, p. 3 (emphasis added).
[18] *Id*., Footnote 7, p. 4.

reviewed by a witness, reviewed by the parties, made specifically subject to evidentiary rules including objections, or formally requested to be entered into the record of the proceeding[19]. The Hypothetical Illustration is not attached to the transcript of the oral argument. The Hypothetical Illustration is just that – an illustrative example of what Duke contends will happen if the bill credit is made equal to the administratively determined avoided cost amount. NCSEA does not generally object to the use of illustrative documents presented to the Commission during oral argument. However, in their Motion to Strike, Duke derides NCSEA (and NCCEBA) stating that have an "altered view of the appropriate procedural process", the post-hearing comments are a "procedural irregularity [that] should not be tolerated", and are an attempt to "circumvent the Commission's procedural authority."[20] NCSEA finds it ironic that Duke is mocking NCSEA's understanding of procedural rules in the very same motion wherein they refer to the Hypothetical Illustration an "exhibit"[21] despite the above-described procedural deficiencies.

NCSEA attached the Hypothetical Illustration as an exhibit to their Post-Hearing Comments to allow for the Commission (and anyone else) to be able to review the complete document within the record. NCSEA included the complete document to allow the document to speak for itself as best evidence of its contents. Moreover, the substance of the Hypothetical Illustration contains assertions not previously made to the Commission by Duke. In fact, in their Motion to Strike, Duke asserts that NCSEA is "blatantly incorrect" about NCSEA's conclusions about lost revenue cost recovery but fails to point to any previous Duke filing which supports, explains, or contradicts the statement made in the

[19] See *Transcript*, pp. 162-167.
[20] *Motion to Strike*, p. 2.
[21] *Id*, Footnote 2, p. 3 and Footnote 7, p. 4.

Hypothetical Illustration or NCSEA's conclusions related thereto.[22] Instead, Duke provides further new arguments in their footnotes regarding cost recovery.

NCSEA's inclusion of the Hypothetical Illustration is neither immaterial nor irrelevant. The document is at the heart of the disagreement between many of the parties as to Duke's involvement in the North Carolina statutory green tariff program, and NCSEA inclusion of it (and their discussion related thereto) is valid and allowed under the Commission rules and the North Carolina Rules of Civil Procedure. Duke's Motion to Strike does not sufficiently allege that the contents of NCSEA's Post-Hearing Comments are immaterial or irrelevant and, instead, improperly uses a Motion to Strike to attack relevant, substantive responses to Commission questions and NCSEA's position on newly-introduced material.

III. DUKE'S MOTION TO STRIKE IS AN IMPROPER ATTEMPT TO ATTACK THE SUBSTANCE OF NCSEA'S POST-HEARING COMMENTS.

Duke does not attack NCSEA and NCCEBA's post-hearing comments as immaterial and the term "irrelevant" is only used once to describe NCSEA's comparison of the Wal-Mart Settlement with the Georgia Power Green Tariff, which was specifically questioned by Commissioner Mitchell and is not irrelevant for all the reasons stated above. In fact, Duke even goes so far as to state that from "a substantive perspective, [Duke objects] to all of the arguments made in the respective Post-Hearing Comments."[23] Duke's statement and the subsequent arguments (many of which are contained in lengthy footnotes) show that Duke is not inclined to argue the Post-Hearing Comments are either irrelevant or immaterial but rather attack the substance of the comments. Moreover, from

[22] *Id*.
[23] *Id*, p. 2.

the broader perspective of the North Carolina Rules of Civil Procedure, Duke does not make cogent or meaningful arguments that the Post-Hearing Comments are redundant, impertinent, or scandalous. Instead, Duke uses the Motion to Strike to attack the substance of the Post-Hearing Comments as they relate to the underlying argument. This attempt to convince the Commission to strike relevant, substance arguments and materials from the record is improper under North Carolina law.

"Matter should not be stricken unless it has no possible bearing upon the litigation. If there is any question as to whether an issue may arise, the motion [to strike] should be denied." *Reese v. City of Charlotte*, 196 N.C. App. 557, 567, 676 S.E.2d 493, 499, 2009 N.C. App. LEXIS 506, *17 (internal citations omitted). Duke is also required under North Carolina law to indicate with particularity the portions of the Post-Hearing Comments which it deemed to be irrelevant or immaterial but failed to do so. See *Holley v. Burroughs Wellcome Co.*, 74 N.C. App. 736, 748, 330 S.E.2d 228, 236, 1985 N.C. App. LEXIS 3574, *26, CCH Prod. Liab. Rep. P10,742. Duke has simply failed to provide a basis that the materials contained in the Post-Hearing Comments are irrelevant, immaterial, or otherwise sufficiently objectionable to trigger the Commission's authority to strike the material from the record.

IV. CONCLUSION.

Duke failed to provide a basis for the Commission to strike NCSEA's Post-Hearing Comments. The Comments were made, in part, in permitted responses to questions directed to NCSEA by Commissioners during the oral arguments. The remainder of the Post-Hearing Comments dealt with substantive materials provided during Duke's rebuttal argument and which were not previously provided by Duke to the intervenors or the

Commission, and which had not yet been subject to proper scrutiny given the considerable ramifications. Finally, Duke has failed in its Motion to Strike to sufficiently allege that any of the Post-Hearing Comments made by NCSEA were irrelevant, immaterial, or otherwise subject to being stricken by the Commission under the Commission Rules and the North Carolina Rules of Civil Procedure. For all these reasons, the Motion to Strike should be denied by the Commission.

Respectfully submitted, this the 28th day of September, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that all persons on the docket service list have been served true and accurate copies of the foregoing document by hand delivery, first class mail deposited in the U.S. mail, postage pre-paid, or by email transmission with the party's consent.

This the 28th day of September, 2018.

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