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September 30, 2020

VIA ELECTRONIC FILING

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

Re: Duke Energy Carolinas, LLC and Duke Energy Progress, LLC's Reply in Support of Motion to Dismiss Appeal
Docket No. E-100, Sub 158

Dear Ms. Campbell:

Enclosed please find Duke Energy Carolinas, LLC and Duke Energy Progress, LLC's Reply in Support of Motion to Dismiss Appeal for filing in the above-referenced docket.

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

Sincerely,

Kendrick C. Fentress

Kendrick C. Fentress

Enclosure

cc: Parties of Record

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-100, SUB 158

In the Matter of		
Biennial Determination of Avoided Cost Rates for Electric Utility Purchases from Qualifying Facilities – 2018	)	**DUKE ENERGY CAROLINAS, LLC'S AND DUKE ENERGY PROGRESS, LLC'S REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL**

NOW COME Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP," and together with DEC, "Duke"), pursuant to Rule R1-7 of the Rules and Regulations of the North Carolina Utilities Commission ("Commission"), and respectfully submit this reply to the North Carolina Sustainable Energy Association's ("NCSEA") and the North Carolina Clean Energy Business Alliance's ("NCCEBA" and together with NCSEA, "Intervenor Appellants") September 21, 2020 Joint Response to Motion to Dismiss Appeal ("Response").

Intervenor Appellants have failed to show that their Notice of Appeal was timely filed because their Response misapplies and misinterprets clear legal precedent and mischaracterizes the Commission's denial of their joint Motion for Reconsideration. Accordingly, as explained in more detail herein, the Intervenor Appellants' appeal should be dismissed.

ARGUMENT

I. N.C. Gen. Stat. § 62-90(a), as interpreted by *MCI*, clearly requires dismissal of Intervenor Appellants' appeal.

The question to be decided by the Commission in determining whether Intervenor Appellants' appeal should be dismissed is one of timing under N.C. Gen.

Stat. § 62-90(a). N.C. Gen. Stat. § 62-90(a) outlines a straightforward timing requirement for filing notices of appeal.

As determined in *State ex rel. Utilities Comm'n v. MCI Telecomms., Corp.*, 132 N.C. App. 625, 514 S.E.2d 276 (1999) ("MCI"), N.C. Gen. Stat. § 62-90(a) affords a party to a Commission proceeding a maximum of 60 days (setting aside any period when a motion for reconsideration is pending) to appeal a final Order of the Commission. As noted in the Motion to Dismiss, Duke recognizes that a motion filed under N.C. Gen. Stat. § 62-80 tolls the period for appealing a final Order issued by the Commission "from the date of the filing of the petition for rehearing to the date of the denial of that petition." *MCI*, 132 N.C. App. at 630, 514 S.E.2d at 280.

Intervenor Appellants' position, however, is that a party to a Commission proceeding can wait until the 60th day (assuming the maximum 30-day period of extension is allowed by the Commission) to request the Commission rescind, alter or amend its final Order pursuant to N.C. Gen. Stat. § 62-80 and then tack on an additional 30 days to file a notice of appeal once an order denying reconsideration is issued.

The Intervenor Appellants' position is incorrect as a matter of law, yet that is precisely how they proceeded in this case. The Commission issued its *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities* on April 15, 2020 ("Final Order"). At Intervenor Appellants' request, the Commission granted all parties the maximum additional 30 days to file a notice of appeal, through and including June 15, 2020. On the 60th day after the Final Order was issued, Intervenor Appellants petitioned the Commission to reconsider the Final Order, but they did not file a notice of appeal. On July 21, 2020, the Commission denied Intervenor

Appellants' requests to rescind, alter or amend its Final Order, and Intervenor Appellants waited an additional 30 days before filing their notice of appeal. In total, setting aside the period during which Intervenor Appellants' Motion for Reconsideration was pending, 90 days elapsed between the Commission's issuance of the Final Order and the date that Intervenor Appellants noticed their appeal. *See* Motion to Dismiss, at 4.

The Intervenor-Appellants argue that "MCI did not rule that an appellant does not have the full thirty-day appeal period once a reconsideration order is entered . . ."; however, on the contrary, that is precisely how Court of Appeals ruled in *MCI*. The Court of Appeals explained that "[a]n appeal from an order of the Commission must be made "within 30 days after [its] entry." N.C. Gen. Stat. § 62-90(a) (1989) (listing some exceptions to general rule)." *MCI*, 132 N.C. App. at 630, 514 S.E.2d at 280. Applying this same statute to a similar procedural situation in *MCI*, the Court calculated the number of days between the entry of the "Original Order" and the appellants' respective notices of appeal, finding that one notice of appeal was timely filed "twenty-eight days after the entry of the Original Order" and the other, while not timely as an initial appeal from the date of the Original Order, was entitled to the benefit of additional time for noticing a cross-appeal under the statute. *Id.*, 132 N.C. App. at 630-631, 514 S.E.2d at 280. The Court of Appeals in *MCI* found that the time for appeal was only "tolled *during* that period" (*i.e.*, the period between the filing of a petition for reconsideration and the order denying the motion) and the timeframe for appeal should run from "the entry of the Original Order." *Id.* (emphasis added.) Duke's calculation in the Motion to Dismiss of the 60-day period afforded to Intervenor Appellants to timely file their appeal is wholly consistent with the Court of Appeal's calculations in *MCI*.

Duke's reading of *MCI* is also consistent with the plain language of N.C. Gen. Stat. § 62-90(a), which provides for appeals "within 30 days after the entry of such final order or decision" being appealed and only allows the Commission to extend the period for appeal for a period "not to exceed 30 additional days . . ." It would make little sense for the General Assembly to prescriptively provide that the period for appeal is "not to exceed" 60 days, while allowing parties to seek reconsideration on the 60th day, as Intervenor Appellants have done here, and then gain an additional 30 days to appeal the Order after the reconsideration is issued. In contrast to Duke's logical and straightforward reading of the statute, NCSEA argues that the timeframe for appeal under N.C. Gen. Stat. § 62-90(a) should "start over" after the order denying reconsideration is issued. Response, at 9. However, "[a]n appeal does not lie from the *denial* of a petition to rehear, as the appeal is from the original order," *MCI*, 132 N.C. App. at 630, 514 S.E.2d at 280, and nothing in the current statute supports Intervenor Appellants' position.

Instead of reconciling their argument with the plain language of the current statute, Intervenor Appellants argue that a 1944 North Carolina Supreme Court case, *North Carolina Utilities Com. v. Norfolk S. R. Co.*, 224 N.C. 762, 32 S.E.2d 346, (1944) ("Norfolk R.R."), interpreting a prior, fundamentally different statute is "controlling." Response, at 5, 9.

Prior to 1949, N.C. Gen. Stat. § 62-20 governed appeals of Commission Orders. Under that statute, "the General Assembly, in lieu of giving the North Carolina Utilities Commission the authority to grant rehearing, expressly provided for a rehearing upon exceptions" meaning that "a party desiring to appeal cannot do so unless such party shall, within ten days after notice of the decision or determination,

file with the Commission exceptions to the decision or determination of the Commission, which exceptions shall state the grounds of objection to the decision or determination." *Norfolk R. R.*, 224 N.C. at 764, 32 S.E.2d at 347. This prior statute—mandating exceptions be filed prior to an appeal and where the Commission lacked authority to grant rehearing—is fundamentally different than the current statutory procedure allowing for appeals under N.C. Gen. Stat. § 62-90(a) and separately providing for rehearing under N.C. Gen. Stat. § 62-80. While Duke does not dispute Intervenor Appellants' interpretation of "tolling" under the prior statute, the General Assembly's rewriting of the Public Utilities Act subsequent to 1949 fundamentally changed the procedure for parties to seek rehearing and to appeal Orders of the Commission such that the holding in *Norfolk R. R.* is inapplicable today. Indeed, Intervenor Appellants have not pointed to a single case in the 70 years since the Public Utilities Act was amended that has applied the tolling concept in the manner they suggest is "controlling."

In sum, there is no basis to read N.C. Gen. Stat. § 62-90(a) as providing that the statutory 30-day period (or maximum 60 days, if extended by the Commission) should "start over" after the Commission issues an order denying reconsideration and the Court of Appeals in *MCI* appropriately applied the plain language of the current statute to count the number of days for timely noticing appeal from the "Original Order" just as Duke has done here. Therefore, Intervenor Appellants' appeal is untimely and should be dismissed.[1]

[1] In addition to being untimely, there is also no information on the face of Intervenor Appellants' Notice of Appeal or Certificate of Service to discern whether Intervenor Appellants timely paid the filing fee to perfect their appeal. *See Order Dismissing Appeal*, Docket No. E-2, Sub 839 (March 15, 2005) (dismissing appeal as untimely where intervenor appellant failed to timely file its filing fee with the Commission as required by N.C. Gen. Stat. § 62-300).

II. Intervenor Appellants' attempt to analogize to North Carolina Appellate Rule 3(c)(3) should be disregarded, as that Rule does not apply.

Intervenor Appellants spend a good deal of time attempting to buttress the applicability of the North Carolina Supreme Court's 1944 holding in *Norfolk R. R.* by pointing to analogous procedures for appeals of civil actions under North Carolina Appellate Rule 3(c). This rule prescribes the process for appealing a trial court's decision after certain post-judgement motions have been filed:

> [I]f a timely motion is made by any party for relief under Rules 50(b), 52(b), or 59 of the Rules of Civil Procedure, **the thirty-day period for taking appeal is tolled as to all parties** until entry of an order disposing of the motion **and then runs** as to each party from the date of entry of the order or its untimely service upon the party, as provided in subsections (1) and (2) of this subsection (c).

N.C. R. App. P. 3(c)(3) (emphasis added). However, the words used in this rule are quite different from the controlling language for appealing Commission Orders under N.C. Gen. Stat. § 62-90(a).

Appellate Rule 3(c)(3) shows a clear intent in civil trials after certain post-hearing motions have been made to allow the full 30-day period for parties to appeal to "then run" after entry of an order disposing of the motion.[2] Put another way, the time period for appeal does not run under this rule from the date of the original order of the Court, but, instead, from the date of entry of an order ruling on these post hearing motions. This is a key distinction from N.C. Gen. Stat. § 62-90(a), which does not use

[2] Intervenor Appellants cite to Scherer & Leerberg, *North Carolina Appellate Practice and Procedure* § 5.04[4][a] (2019) for guidance. *See* Response, at 9, fn. 15. Notably, this section also provides that "[t]he additional time for appeal contemplated by Appellate Rule 3(c)(2) does not apply to all post-judgment motions. Instead, it only applies to a limited number of post-trial motions. Notably, a Civil Rule 60(b) motion for relief from a judgment—which can be filed well after entry of judgment—*will not* toll the time for appealing" (internal citations omitted; emphasis in original).

similar language and clearly has been interpreted in *MCI* to run from the date of the original Order.

Intervenor Appellants also fail to recognize that Appellate Rule 3(c) has no applicability or relevance to the question at issue here. Instead, Appellate Rule 18(b) provides that "[t]he times and methods for taking appeals from an administrative tribunal shall be as provided in this Rule 18 *unless the General Statutes provide otherwise, in which case the General Statutes shall control*." (emphasis added). In fact, the same treatise on North Carolina Appellate Practice cited by Intervenor Appellants explains that "[w]hen a requirement for noticing an appeal is set by the General Assembly, noncompliance may be a true jurisdictional defect that requires dismissal of the appeal." *See* Scherer & Leerberg, *North Carolina Appellate Practice and Procedure* § 1-28[2][d] (2019).

Thus, the specific procedure established by the General Assembly in N.C. Gen. Stat. § 62-90(a) controls under these circumstances, and the provisions of Appellate Rule 3(c) are not relevant to the Commission's review.

III. Intervenor Appellants' policy argument that applying N.C. Gen. Stat. § 62-90(a), as drafted, is unworkable should be disregarded.

Intervenor Appellants argue that "[n]ot allowing the full thirty-day appeal period after entry of a reconsideration order would be completely unworkable and in conflict with important policy objectives." Response, at 9. Specifically, they allege that "Duke's position would mean that the Appellants would have had to file their Notice of Appeal and detailed exceptions the day after they received the Commission's nineteen-page Reconsideration Order," which they contend would not have allowed reasonable time to evaluate whether or not to file a notice of appeal. Response, at 10.

As an initial matter, if Intervenor Appellants wanted more time to consider the Commission's Order on their request for reconsideration, it was incumbent upon them to more timely submit their petition for reconsideration. Intervenor Appellants have failed to explain why they waited until the 60th day to submit their request for reconsideration or why they waited until 90 days after the Final Order was issued to submit a notice of appeal. The statutory timeframe for appeal is clearly set forth in N.C. Gen. Stat. § 62-90(a), and the Commission cannot disregard these statutory requirements due to purported hardships. Other appellants have been able to overcome the challenges of timely filing a notice of appeal within 60 days of a final Order and within a single day of a Commission Order ruling on a request for reconsideration. *See e.g., Order Deciding Motions for Reconsideration and Clarification, and Requiring Implementation of New Rates,* Docket No. E-22, Sub 562 (July 28, 2020); Dominion Energy North Carolina's Notice of Appeal and Exceptions, Docket No. E-2, Sub 562 (filed July 29, 2020).

IV. Intervenor Appellants' commentary on the discussion in the Commission's Order Denying Motion for Reconsideration should also be disregarded.

Intervenor Appellants' Response attempts to conjure up a theory that the Commission's Discussion and Conclusions presented in its *Order Denying Motion for Reconsideration* "altered and amended its original decision by changing the scope and legal impact of its original decision." Response, at 10-11. The Commission's good faith effort to explain its Final Order in greater detail in the *Order Denying Motion for Reconsideration* cannot now be used against the Commission to end-run the statutory period for appeal. *See e.g., State ex rel. Utilities Com. v. Services Unlimited, Inc.,* 9 N.C. App. 590, 591, 176 S.E.2d 870, 871 (1970) ("An application for rehearing is

addressed to and rests in the discretion of the administrative agency. . . . [and] an appeal does not lie from the denial of a petition to rehear.") (internal citations omitted). The *Order Denying Motion for Reconsideration* does not alter or amend the Final Order, and Intervenor Appellants attempt to introduce such novel arguments (notably, for the first time) in their Response to Duke's Motion to Dismiss should be rejected.

V. Intervenor Appellants do not dispute that the Commission has the procedural authority to dismiss their appeal as untimely.

Finally, Intervenor Appellants do not dispute (or even address) the Commission's authority to dismiss their appeal as untimely. Duke's September 10, 2020 Motion to Dismiss explained that the Commission has jurisdiction to dismiss Intervenor Appellants' appeal until the appeal has been docketed in the appellate court and highlighted that the Commission has previously exercised this authority to dismiss noticed appeals as untimely. Motion to Dismiss, at 3 (citations omitted); *see also* N.C. R. App. P. 25; *In re Investigation of Duke Energy Corp. & Progress Energy, Inc.*, 234 N.C. App. 20, 25-28 760 S.E.2d 740, 744-745 (2014) (affirming that a trial tribunal may dismiss an appeal under the circumstances provided for in Rule 25 of the Rules of Appellate Procedure prior to the appeal being docketed with the appellate court, including where appeal was not timely filed). Appellate courts have no jurisdiction to hear an appeal of a final Commission Order where the notice of appeal has not been timely filed. *See Strezinski v. City of Greensboro*, 187 N.C. App. 703, 710, 654 S.E.2d 263, 268 (2007) ("Because defendant's notice of appeal was not timely filed, this Court did not obtain jurisdiction, therefore, defendant's assignment of error must be dismissed"); *State v. Dobson*, 51 N.C. App. 445, 447, 276 S.E.2d 480, 482 (1981).

For the foregoing reasons, Duke Energy Carolinas, LLC and Duke Energy Progress, LLC respectfully request that the Commission enter an order dismissing the Intervenor Appellants' appeal.

Respectfully submitted, this the 30th day of September, 2020.

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CERTIFICATE OF SERVICE

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

This the 30th day of September, 2020.

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