

August 28, 2023

VIA Electronic Filing

Ms. A. Shonta Dunston, Chief Clerk
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
Raleigh, North Carolina 27603

Re: *Supplemental Reply Letter*
Docket Nos. E-2, Sub 1314 & Sub 1315; E-7, Sub 1288 & 1289

Duke Energy Carolinas, LLC (“DEC”) and Duke Energy Progress, LLC (“DEP”) (collectively, “Duke Energy” or the “Companies”) hereby respectfully file this letter in brief reply to the Joint Response of the Southern Alliance for Clean Energy (“SACE”) and the North Carolina Sustainable Energy Association (“NCSEA”) on August 9, 2023, and the Letter in Lieu of Supplemental Comments filed by Carolinas Clean Energy Business Association (“CCEBA”) on August 11, 2023, responding to the Companies’ August 1, 2023, Response to Carolina Industrial Group for Fair Utility Rates II and III (collectively, “CIGFUR”) Request for Procedural Relief.¹

Background

On January 27, 2023, the Companies filed their Joint Petition for Approval of the proposed Green Source Advantage Choice Program in Docket Nos. E-2, Sub 1314 and E-7, Sub 1289 (“Petition for Approval of GSA Choice”) and their Joint Petition for Approval of the proposed Clean Energy Impact Program in Docket Nos. E-2, Sub 1315 and E-7, Sub 1288 (“Petition for Approval of CEI” and together with the Petition for Approval of GSA Choice, the “Petitions”). Ten parties intervened in the above captioned GSA Choice

¹ The Companies recognize that the Commission has requested neither the Joint Response filed by SACE and NSCSA and the CCEBA letter nor this further sur-reply, and has previously recognized that “accepting [] late-filed supplemental comments would lead to additional requests from parties to reply to those comments or even to file “supplemental” comments on other issues.” *Order Denying Motion for Leave to File Supplemental Comments*, Docket Nos. E-2, Sub 1159 & Sub 1297; Docket Nos. E-7, Sub 1156 & Sub 1268 (Oct. 26, 2022). To the extent the Commission deems it appropriate and in the public interest to consider the SACE/NCSEA Joint Response and CCEBA letter in considering the CIGFUR Request for Procedural Relief, the Companies respectfully request the Commission to consider this brief reply to the new issues and arguments presented therein.

dockets and five parties intervened in the above-captioned CEI dockets. These parties filed their respective initial comments on April 25, 2023 and reply comments on June 23, 2023.²

In its Reply Comments in the GSA Choice Dockets, the Public Staff recommended approval of the Companies' proposed Clean Energy Environmental Attributes ("CEEA") Purchase Track subject to the Public Staff's recommendation that the Companies include a disclaimer in the program's marketing materials and tariffs indicating that the CEEAs procured through the GSA Choice Program are not certified by any third party and do not represent additional renewable energy procured above and beyond what is required to comply with Section 5 of Session Law 2021-165 ("HB 951"). In their GSA Choice Reply Comments, the Companies agreed to the Public Staff's recommendation.³

In its Reply Comments on the Petition for Approval of GSA Choice, the CIGFUR made a Request for Procedural Relief, requesting the Commission temporarily stay the GSA Choice dockets for a yet-to-be-defined period to allow the parties to continue engagement efforts designed to reach consensus on outstanding issues. CIGFUR signaled that the primary outstanding issue in need for further discussion was the concept of "additionality" or "regulatory surplus,"⁴ which was a significant focus of numerous parties' Initial and Reply Comments.

On August 1, 2023, the Companies filed a Response to CIGFUR's Request for Procedural Relief (the "Companies' Response").⁵ The Companies partially objected to CIGFUR's request for a temporary stay. Specifically, the Companies requested the Commission approve the GSAC CEEA Purchase Track with a total program capacity of 4,000 MW as initially proposed by the Companies and as generally recommended by the Public Staff in its Reply Comments. The Companies requested that the Commission grant CIGFUR's requested stay only to the extent necessary for the parties to continue discussions on the Companies' proposed GSAC Power Purchase Agreement Track ("PPA Track") and the Public Staff's proposed GSAC Request for Proposals Track ("RFP Track" and, together with the PPA Track, the "Regulatory Surplus Tracks") only. The Companies also recommended the Commission issue an Order on the Companies' Petition for Approval of the CEI Program pending in Docket Nos. E-2, Sub 1315 and E-7, Sub 1288. Notably, both the Public Staff and CIGFUR supported the Companies' Response.⁶

² This procedural history is presented as a summary. The Companies hereby incorporate the full procedural history presented in their August 1, 2023 Response to CIGFUR's Request for Procedural Relief filed in these dockets.

³ Duke Energy Reply Comments at 46.

⁴ CIGFUR Reply Comments at 2 ("In particular, one significant outstanding issue is the additionality or 'regulatory surplus' issue raised by environmental advocates and the Public Staff.").

⁵ *Duke Energy Carolinas, LLC's and Duke Energy Progress, LLC's Response to CIGFUR's Request for Procedural Relief*, Docket Nos. E-2, Sub 1314 and 1315, and E-7, Sub 1289 and 1288.

⁶ Companies' Response at 6.

On August 9, 2023, the SACE and NCSEA filed a Joint Response that responded to CIGFUR's Request for Procedural Relief as well as the Companies' Response. On August 11, 2023, CCEBA filed its Letter in Lieu of Supplemental Comments.

SACE, NCSEA, and CCEBA oppose the relief jointly sought by the Companies, CIGFUR, and the Public Staff in the Companies' Response. Instead, CCEBA requests the Commission grant CIGFUR's initial Request for Procedural Relief (which has now been modified through CIGFUR's support for the modified requests for relief set forth in the Companies' Response).⁷ SACE and NCSEA request the Commission issue an Order requiring that all voluntary customer programs under HB 951 procure clean energy that is surplus to regulatory requirements.⁸ SACE and NCSEA oppose the relief sought in the Companies' Response and seem to oppose further stakeholder discussions with the Companies on the issue of regulatory surplus unless those conversations apply to the entirety of the Petition for Approval of GSA Choice.⁹ If, however, the Commission determines that further stakeholder discussion is appropriate, SACE and NCSEA state that they wish to participate.¹⁰

More specifically, SACE and NCSEA explain that they do not support approval of the GSAC CEEA Purchase Track as proposed in the Companies' Response because it will not create regulatory surplus. SACE and NCSEA are not satisfied with the Companies' proposed disclaimer supported by CIGFUR and the Public Staff because "[a] disclaimer cannot bring a non-regulatory surplus program into compliance with the requirements of H[B]951."¹¹ SACE and NCSEA also take the position that disclaimers related to regulatory surplus are of questionable efficacy, arguing that "[c]ustomers do not always read disclaimers."¹² Then, SACE and NCSEA argue that if the Commission decides to approve the CEEA Purchase Track as set forth in the Companies' Response, it should require the Companies to "publish an additional notice advising non-participating customers that Duke is attributing greater emissions to them as a result of the CEEA Purchase Track."¹³ In other words, SACE and NCSEA argue that if the Commission grants the relief sought in the Companies' Response, the Commission should also require the Companies to publish a disclaimer setting forth certain of SACE and NCSEA's position.

⁷ CCEBA Letter in Lieu of Supplemental Comments at 3.

⁸ SACE and NCSEA's Joint Response at 10.

⁹ *See id.* at 4, 7 ("the primary reason SACE and NCSEA oppose Duke's second request for relief is not because they are unwilling to continue discussing regulatory surplus, but because the discussion of achieving regulatory surplus should apply to all H[B] 951 voluntary customer programs, not just a subset of them.").

¹⁰ *Id.* at 11.

¹¹ *Id.* at 5.

¹² *Id.*

¹³ *Id.* at 6.

SACE and NCSEA do not support the stay sought in the Companies' Response to continue to discuss refinements to the Regulatory Surplus Tracks.¹⁴ They are willing to discuss whether regulatory surplus can be added to the Companies' voluntary programs only if all voluntary programs are discussed at the same time.¹⁵ CCEBA takes a similar position.¹⁶

Reply

Whether HB 951 requires regulatory surplus has been thoroughly discussed by the parties in their respective comments in these dockets and the Companies' argument that HB 951 does not require the voluntary customer programs to contain regulatory surplus is well established.¹⁷ Only a small minority of parties have argued that it does.¹⁸ Because regulatory surplus is not required by HB 951, for reasons fully stated in the Companies' Reply Comments, it is appropriate for the Commission to approve the GSAC CEEA Purchase Track as proposed in the Companies' Response.

SACE's and NCSEA's argument that customers may not read, or will be confused by, the Companies' proposed disclaimer should also be rejected. First, it was the Public Staff (who represent the using and consuming public) that initially suggested and now concur with its inclusion. CIGFUR, who represents prospective GSA Choice customers, supports use of the Companies' disclaimer. The position of the representatives of potential customers should alleviate SACE's and NCSEA's concerns about customers' ability to comprehend the Companies' proposed disclaimer.

Finally, SACE and NCSEA imply that the relief sought in the Companies' Response represented unilateral action designed to "divert the central issue in the proceeding into a secondary process in order to let it pass away out of the Commission's sight," but this misguided subterfuge is inaccurate and certainly was not the Companies' intent.¹⁹ If it was, the Companies would have requested that the Commission rule on separate tracks in their initial Reply Comments. Instead, the relief sought in the Companies' Response is intended to accommodate a request by an important customer stakeholder—CIGFUR—to continue to discuss what SACE and NCSEA describe as the "central issue in this proceeding,"²⁰ while also making available now a program that many customers supported, through letters of support, as originally proposed.²¹

¹⁴ *Id.* at 7.

¹⁵ *Id.*

¹⁶ CCEBA Letter in Lieu of Supplemental Comments at 3-4.

¹⁷ See the Companies' Reply Comments at 5-35.

¹⁸ The only parties that have argued that HB 951 requires regulatory surplus are SACE, NCSEA, CCEBA, and the AGO. See *id.* at 6-7.

¹⁹ SACE and NCSEA's Joint Response at 10.

²⁰ *Id.*

²¹ See Attachment B to the Companies' Reply Comments.

The Companies' amended relief, which is supported by Public Staff and CIGFUR, balances the regulatory objectives of allowing the parties additional time to discuss the concept of regulatory surplus with the Companies, while enabling Commission approval of customer program options under HB 951 that customers have expressed an interest in participating. Simply put, the GSAC CEEA Purchase Track, which customers want now, need not be delayed pending discussions regarding regulatory surplus. The Public Staff and CIGFUR support the Companies' request. If the relief sought in the Companies' Response is granted, the Companies will, as committed in the August 1 Response, "engage in good faith with the Public Staff and [i]ntervenors in an attempt to continue to refine the GSA Choice Program within the statutory boundaries set by HB951."²² This would include a focused discussion on how such a regulatory surplus program would necessarily hold non-participating customers harmless. From the Companies' perspective, the primary issue that has not been addressed by advocates for regulatory surplus is how to structure the bill credit to ensure the requirements of HB 951 are met.

Conclusion

For the reasons set forth above, the Companies respectfully request the Commission consider this supplemental reply and deny the relief sought by SACE, NCSEA, and CCEBA in their most recent filings, and award the relief sought in the Companies' Response.

Sincerely,

/s/ Nick A. Dantonio

NAD:sbc

Enclosure

²² Companies' Response at 5.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplemental Reply Letter, as filed in *Docket Nos. E-2, Sub 1314 & Sub 1315; E-7, Sub 1288 & 1289*, was served electronically or via U.S. Mail, first-class postage prepaid, upon all parties of record.

This the 28th day of August, 2023.

/s/ Nick A. Dantonio

Nick A. Dantonio
McGuireWoods LLP
501 Fayetteville Street, Suite 500 (27601)
P.O. Box 27507
Raleigh, North Carolina 27611
Phone: (919) 755-6605
Fax: (919) 755-6612
ndantonio@mcguirewoods.com

*Attorney for Duke Energy Carolinas, LLC
and Duke Energy Progress, LLC*

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