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February 18, 2021

VIA ELECTRONIC FILING

Ms. Kimberley A. Campbell
Office of the Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4335

Re: Duke Energy Carolinas, LLC and Duke Energy Progress, LLC's Joint Petition for Financing Orders
Docket Nos. E-2, Sub 1262 and E-7, Sub 1243

Dear Ms. Campbell:

Enclosed for filing in the above-referenced proceedings on behalf of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (the "Companies") please find the Companies' *Post-Hearing Brief*.

Please feel free to contact me with any questions or concerns, and thank you for your assistance in this matter.

Sincerely,

Camal O. Robinson

COR:sjg

Enclosure

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-7, SUB 1243
DOCKET NO. E-2, SUB 1262

In the Matter of Joint Petition of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC for Issuance of Storm Recovery Financing Orders	)))))	**DUKE ENERGY CAROLINAS, LLC AND DUKE ENERGY PROGRESS, LLC'S POST-HEARING BRIEF**

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BRIEF SUPPORTING JOINT PETITION FOR FINANCING ORDERS

Duke Energy Carolinas, LLC (DEC) and Duke Energy Progress, LLC (DEP) (each a Company and, collectively, the Companies) hereby respectfully submit this Post-Hearing Brief Supporting Joint Petition for Financing Orders (Brief) to the North Carolina Utilities Commission (Commission).

INTRODUCTION

The Companies seek in these cases authorization for the financing of the Companies' storm recovery costs through Special Purpose Entities (SPEs) pursuant to North Carolina General Statute § 62-172 (the Securitization Statute) due to storm recovery activities required as a result of Hurricanes Florence, Michael, Dorian, and Winter Storm Diego (the Storms) as a cost-saving measure for the benefit of the Companies' customers when compared to the traditional method of cost recovery. The Companies estimate that securitization of the respective storm recovery costs will result in more than 30 percent in expected customer savings for DEC and DEP customers. Further, the Companies request the Commission find that their storm recovery costs and related financing costs are appropriately financed by debt secured by storm recovery property, and that the Commission issue Financing Orders for DEC and DEP containing the assurances by the Commission and awarding the flexibility to the Companies needed to successfully accomplish such financing using a securitization structure appropriate under current market conditions.

At the time of pricing, the Companies have volunteered to go beyond the standards set forth in section (b)(3)b.2. and 3. of the Securitization Statute

(collectively the Statutory Cost Objectives) and certify that the financing of the Companies' storm recovery costs through the issuance of storm recovery bonds and the imposition and collection of storm recovery charges will provide quantifiable benefits to customers when compared to the costs that would be incurred absent the issuance of storm recovery bonds and the structuring, *marketing*[1], and pricing of storm recovery bonds results in the lowest storm recovery charges consistent with market conditions[2] at the time the storm recovery bonds are priced and the terms set forth in the applicable Financing Order.

Notwithstanding the provisions of the Securitization Statute, the Companies' willingness to certify to a standard beyond the provisions in the Securitization Statute, and Duke Energy Corp.'s (Duke Energy) wealth of experience in debt markets, the Public Staff has made the unprecedented request in these cases to inject themselves into the management of the Companies' property and business decisions and restrict or control the Companies' discretion through the grant of joint decision-making authority during the structuring, marketing, and pricing phases of the bond issuance process. No provisions of the General Statutes, no decision of the North Carolina Supreme Court or the Court of Appeals, and no decision of the Commission has ever granted the Public Staff such extraordinary powers and to do so here would be contrary to the well-

[1] Section (b)(3) b.3 of the Securitization Statute only requires a finding that the structuring and pricing of the bonds meet the Statutory Cost Objectives.

[2] As discussed in more detail herein, Section (b)(3)b.3 of the Securitization Statute only requires that the financing be *reasonably expected* to result in the lowest storm recovery charges consistent with market conditions.

established regulatory construct between the Commission, regulated utilities, and intervening parties in North Carolina.

The relief requested by the Companies in these cases is designed to allow the Companies to recover their storm recovery costs at significantly lower costs to customers. DEC and DEP hereby submit this Brief, focusing on (1) the alignment of the Companies' and customers' interests in the proposed securitization; (2) the unprecedented nature and impact of the Public Staff's requested involvement in the post-Financing Order activities; and (3) the importance of the Commission's grant of flexibility to the Companies during the structuring, marketing, and pricing process.

ARGUMENT

I. UTILITY AND CUSTOMER INTERESTS ARE ALIGNED IN THE PROPOSED SECURITIZATION AND THE COMMISSION IS CAPABLE OF PERFORMING ITS STATUTORY DUTIES.

As an initial matter, for decades the Companies have provided their North Carolina customers with safe and reliable electric service all while keeping costs low. Through operational efficiency and performance, the Companies have maintained rates that are well below the national average and at or below the regional average. For the Consultants to the Public Staff, none of whom are Duke Energy customers in North Carolina, to suggest that the Companies would compromise the interests of their customers without their direct supervision, is without merit. The Companies' intended approach to securitize their storm recovery costs, which were incurred to restore electric service to customers as quickly as possible, at a cost to customers as low as possible, will be no different.

Regardless, the evidence before the Commission strongly supports the conclusion that the interests of DEC and DEP customers are protected in this securitization proceeding and that this Commission is fully capable of ensuring achievement of the Statutory Cost Objectives[3] under G. S. § 62-172 without the need to take the extraordinary step of granting the Public Staff, an intervenor, co-equal decision-making authority over the bond issuance process. This is true for a number of substantive reasons supported by record evidence, each of which is discussed below, against which the Public Staff and its Consultants offer only conjecture and, at best presumptions of utility carelessness and lack of alignment with customer interests and, at worst improper utility behavior that have no support in the record.

A. DEC/DEP Have Extensive Experience in the Long-Term Debt Markets and Consider Customer Interests when Operating in Those Markets.

In its written and oral testimony, the Public Staff attempted to portray the Companies as unwilling and unable to issue securities that result in the lowest storm recovery charges consistent with market conditions at the time of pricing. Nothing could be further from the truth. Duke Energy has significant experience in issuing long-term debt, both public and private, in the capital markets. According to witness Thomas J. Heath, Jr., Duke Energy has more than $50 billion in currently outstanding debt placed in the capital markets and has issued an average $6 billion

[3] As required by G.S. § 62-172 the financing of the Companies' storm recovery costs through the issuance of storm recovery bonds and the imposition and collection of storm recovery charges are expected to provide quantifiable benefits to customers as compared to the costs that would be incurred absent the issuance of storm recovery bonds and the structuring and pricing of storm recovery bonds is reasonably expected to result in the lowest storm recovery charges consistent with market conditions at the time the storm recovery bonds are priced and the terms set forth in the applicable financing order (the Statutory Cost Objectives).

per year in such markets since 2016. (Tr. vol. 1, 71.) Witness Heath testified that these outstanding securities were "authorized, marketed, and issued by Duke Energy with the assistance of their advisors and underwriters utilizing practices that are standard for the issuance of such instruments in recognized markets for long-term debt." (Id.) He also testified that none of these issuances, except for the 2016 Duke Energy Florida, LLC (DEF) securitization transaction, involved direct Commission oversight, and none of them involved oversight/participation by a third-party intervenor, as is proposed by the Public Staff and its Consultants in this case. (Id.) These issuances comprise part of the capitalization for the underlying Duke Energy utilities, and therefore the costs of this debt is routinely included in the revenue requirement for these utilities and also ultimately reflected in customer rates through the ratemaking process. (Id. at 71-72.) According to witness Heath, "no state utility commission has ever denied recovery of carrying costs and charges associated with Duke Energy's long-term debt nor has any party ever even suggested to a state utility commission that Duke Energy's [carrying] costs [and charges associated with long term debt] were imprudent or not otherwise eligible for recovery from customers." (Id. at 72.) In short, Duke Energy (including DEC and DEP) has substantial experience in issuing long-term debt of the type that will be issued in these transactions and has done so largely without direct supervision by state commissions and without any prior contention or regulatory findings that its efforts were imprudent. This is significant and material evidence that DEC and DEP will be able to issue long-term storm recovery bonds competently and effectively.

Not only are Duke Energy and its family of companies experienced and sophisticated issuers of debt, issuing many billions over the years, but, additionally, these transactions will not be the first securitization for Duke Energy. The 2016 $1.29 billion securitization sponsored by DEF is the largest recent utility securitization and the first utility securitization to be included in the Bloomberg Barclays Corporate Utility Index. Witness Heath was directly involved in that transaction as were other members of Duke Energy's Treasury Department and several of the same counsel and advisors for DEF in that transaction (who were originally recommended by the Public Staff Consultants) are also participants to this transaction. (Tr. vol. 1, 97.)

In his rebuttal testimony, witness Heath also testified that the Companies have taken customer interests into account in prior debt issuances and will do the same for the pending storm recovery bond transaction:

> The Companies are keenly aware that the costs of their debt issuances are subject to ultimate recovery from customers and it is not in the Companies' best interests to do anything that unnecessarily adds to the cumulative costs of electric service that their customers must pay. This is as true of their past issuances as it is of the current pending bond transactions. (Tr. vol. 1, 99.)

In sum, the Companies are well-situated by tradition, experience, and disposition to conduct the securitization transactions contemplated in these dockets in a manner that is consistent with both statutory standards and their longstanding commitment to their customers.

B. The Process That will be Utilized to Place Storm Recovery Bonds is Designed to be Efficient and Result in Lowest Cost.

Witnesses for the Companies and the Public Staff testified that the long-term capital markets and the standard process used to access those markets is designed to be efficient and produce debt placement at the lowest market clearing price that will result in the lowest storm recovery charges.[4] First, witness Heath testified that Duke Energy's normal practice in issuing long-term debt in the capital markets is to utilize "their best efforts to minimize the costs inherent in these borrowings, which are ultimately paid for by its utility customers." (Tr. vol. 1, 72.) This testimony is consistent with statements of Public Staff Consultant witness Moore who testified that he agreed that the process used to market, price and sell long-term bonds was well developed (Tr. vol. 3, 393.), and of Public Staff Consultant witness Maher who testified that the goal of this process was to achieve the lowest possible costs. (Tr. vol. 3, 405 & 409.)

In his rebuttal testimony, witness Heath testified that "the Companies are proposing a structuring and marketing process that is designed to achieve the lowest storm recovery charges consistent with market conditions at the time the storm recovery bonds are priced and the terms of the Financing Order." (Id. at 75.) In this regard, witness Charles N. Atkins II describes a process in his direct and rebuttal testimony that involves the issuers (DEC and DEP), advisors (Atkins), and one or more underwriters, as well as their respective counsel, pursuing the process of structuring, marketing and pricing the storm recovery bonds. (Tr. vol. 2, 149,

[4] Witness Heath defined market-clearing price as a price at which 100% of the storm recovery bonds are sold. (Tr. vol. 2, 14.)

157-66, 182-86.) This approach is standard for Duke when issuing its long-term bonds. It is also the normal approach when issuing utility securitization bonds, and was in fact used by DEF in 2016. It is also the process that Public Staff Consultant witness Moore indicated was standard practice in the long-term debt markets. (Tr. vol. 3, 391-97).

And this is the process DEC and DEP will use in this case:

> As shown in witness Atkins' testimony, since 2010, all utility asset securitization transactions of a similar nature have been offered for sale to investors through a group of underwriters, and of the transactions since 1997, all but one of the utility securitizations have been offered to sale to investors through a negotiated sales process. Therefore, based on this history of utility securitization transactions, DEC and DEP's primary plan is to pursue a negotiated sales process for the issuance of the bonds, . . . (Tr. vol. 1, 46)
>
> So what we're proposing is a fully negotiated publicly registered and marketed deal to all investors that are out in the public market and to the institutional investors. (Tr. vol. 1, 190)

According to Mr. Heath, the process for issuing storm recovery bonds will be pursued with the same ultimate goal in mind as regular corporate bond issuances, and with the additional statutory requirement to achieve the lowest storm recovery costs. Mr. Heath expressly rejected the notion that DEC and DEP will apply some lesser standard to the issuance of storm recovery bonds than it does to normal corporate bonds:

> What I am doing is rejecting the fabricated concerns over potential utility carelessness and lack of customer interest expressed in the recommendations of the Public Staff Consultants and noting the fact that the Companies have a long history of accessing debt markets efficiently, at favorable rates, and of recovering the costs of such transactions from our

> customers with Commission approval. The notion that the Companies would suddenly alter its very-well established business practices and somehow begin applying a less stringent standard while structuring, marketing, and pricing these bonds simply because of the change in cash flows involved in issuing storm recovery bonds is completely unsupported by any evidence. (Tr. vol. 1, 73.)

There is no evidence in the record that refutes Mr. Heath's testimony in this regard.

C. The Storm Recovery Bonds are not Fundamentally Different Than Traditional Long-Term Debt Issued by Duke Energy.

While the Public Staff Consultants argue that the storm recovery bonds will be materially different from normal long-term debt issued by the Companies, the reality is that they are not as different as the Public Staff would like this Commission to believe. When witness Heath was asked the question whether the storm recovery bonds were materially different from other long-term debt issuances by the Companies, his response was as follows:

> In my opinion they are not. While I acknowledge that the structures used and the flow of cash are different than a more customary long-term bond issuance, I do not believe those differences necessitate an entirely different process for approval and issuance of those bonds. (Id. at 71)

Mr. Heath repeated this conclusion in his rebuttal testimony where he rejected the notion that securitization transactions were significantly more complex than typical long-term corporate debt issuances and noted that relative complexity was a subjective evaluation and concluded that "at its most fundamental level [securitization is] the issuance of publicly issued debt to institutional investors." (Tr. vol. 1, 96.)

Public Staff Consultant witness Moore also agreed at the hearing that the process used generally to market, price and sell long-term corporate bonds is well developed, and did not state that the process to market, price and sell the storm recovery bonds would be any different:

> Q. Okay. Thank you. Would you agree with me that the process used to market, price, and sell long-term corporate bonds is a well developed one?
>
> A. I would agree with that. (Tr. vol. 3, 392-3.)

Mr. Moore did not clarify or further expand on why the marketing, pricing, and issuance of the storm recovery bonds would be materially different than the marketing, pricing, and issuance of other bonds. Similarly, Public Staff Consultant Maher agreed that the purpose of the process he himself used to issue long-term debt while working for ExxonMobil, a company that was not a regulated utility but rather a public company, was to minimize the cost to ExxonMobil, *i.e.,* the same process the Public Staff Consultant's argue DEC and DEP will not implement in this securitization debt transaction without the Public Staff having joint decision-making authority:

> Q. … But to return to the question I was getting to, the process you described that you used with underwriters at ExxonMobil, I mean, the entire purpose of that was to minimize the cost to ExxonMobil of that debt, correct?
>
> A. Correct. (Tr. vol. 3, 409.)

If a public company's goal is to achieve lowest cost in a debt issuance, there is no reason why a regulated utility's goal would be any different for a securitized debt issuance that a government authority is overseeing.

What most undermines the Public Staff Consultants' arguments that this transaction and the resulting securitization debt is materially different from traditional utility debt is the fact that under the traditional ratemaking process, customers are also ultimately responsible for paying all of the utility's debt—just as they are in this transaction. Despite this fact, Public Staff Consultants' testimony repeatedly states that "ratepayers alone will bear all costs [as compared to other utility debt]," and terms the storm recovery bonds "ratepayer backed bonds" to support the argument that they be granted decision-making authority to somehow protect customers. (Tr. vol. 3, 212). Mr. Heath plainly dispels the notion that this securitization debt is in any way different from traditional utility debt:

> Q. And of course, it's the ratepayers who pay back these bonds, which is why you've heard them referred to as ratepayer-back[ef] bonds, correct?
>
> A. That is correct, but I would also clarify, as I mentioned in my testimony summary, that customers are ultimately responsible for paying back principal and interest on all of our debt, whether it's securitization debt or our first mortgage bonds. (Tr. vol. 1, 121-22.)

As explained by witness Heath, the Companies' customers are responsible for paying all utility debt, as is the case under the traditional ratemaking process and this transaction.[5] Any arguments made by the Public Staff that this transaction somehow materially differs from any other utility debt transaction, or that the Companies would not seek to achieve the lowest cost should therefore be rejected.

[5] DEC and DEP are aware that the ultimate bond structures and cash-flows associated with securitization will be different than traditional corporate debt but the processes for securing the debt are not different and it is those processes that ultimately determine customer liabilities under the storm recovery bonds.

D. There are Substantial Protections in Place to Ensure That the Storm Recovery Bonds will be Issued to Achieve the Lowest Storm Recovery Charges and no Material Evidence to the Contrary is Contained in the Record.

In numerous places throughout their testimony, the Public Staff Consultants allege that DEC and DEP are incentivized to undertake the storm recovery bond issuance without obtaining the lowest overall cost of funds:

> [t]he Companies' main motivation is to receive the debt proceeds in a timely, efficient manner. Therefore, the Companies do not share the same incentives to achieve the lowest overall cost of funds. (Tr. vol. 3, 286.)
>
> When a utility decides to issue a traditional bond, the utility has a strong incentive to negotiate hard with underwriters for the lowest possible interest rates as well as the lowest possible underwriting fees. Utilities also have a strong incentive to minimize other issuance costs. These same incentives do not come into play in connection with ratepayer-backed bonds. (Tr. vol. 3, 209.)
>
> …[T]his very strong incentive [to obtain lowest-cost] is not present with regard to ratepayer-backed bonds. (Tr. vol. 3, 328.)

However, there is no actual evidence to support this argument. In reference to the first quote above, witness Maher acknowledged on cross-examination that his statement that the Companies would not be incented to issue the bonds at the lowest cost was a presumption on his part and that he didn't have any independent evidence to support it. (Tr. vol. 3, 425-26.) The subsequent statements by witnesses Fichera and Schoenblum are similarly unsupported by actual evidence. The mere fact that the Public Staff Consultants can *imagine* that DEC and DEP *could* choose to issue the bonds at a price higher than the lowest cost objectives

is not evidence. Rather, it is pure speculation that is refuted by the actual record evidence in this case.

First, this argument is refuted by the rebuttal testimony of witness Heath who testified that:

> I particularly reject the notion, which is repeated often in the Public Staff Consultant's testimony, that DEC and DEP would have anything other than their customers best interests at heart and in mind when structuring, marketing and pricing these bonds or are presumptively unsuited to manage the bond structuring, marketing, and pricing process in these circumstances because of alleged conflicts of interest. The fundamental purpose of securitization is to lower customer costs. The Companies are quite capable of managing the issuance of storm recovery bonds in this instance competently and fairly and are ready and willing to certify that such bonds will be issued in a manner consistent with the lowest cost objectives contained in the Securitization Statute as part of that process." (Tr. vol. 1, 72-73.)

Second, this assertion is refuted by the fact that the statutory lowest cost standard applies to the issuance of the storm recovery bonds. As a result, pursuant to the Securitization Statute, the Companies will be held to an even higher standard than exists in other transactions. Therefore, the existence of the statutory standard for the issuance of storm recovery bonds cannot be ignored in the evaluation of how the Companies will approach the structuring, marketing, and pricing of the storm recovery bonds. In fact, as indicated in Mr. Heath's rebuttal testimony, quoted above, the Companies intend and have pledged to comply with this standard.

Even witness Maher acknowledged that the existence of such a statutory standard is meaningful. In the context of a hypothetical involving the repayment

of a loan by a third-party where witness Maher initially speculated that he would be less concerned about the ramifications of loan terms on that third-party, he responded as follows to a question about the impact of a statutory standard:

> Q. …So would you have a different approach if you had a standard that was established by statute in negotiating the loan? Would that cause you to be more concerned about what the terms were?
>
> A. If I had a standard, I would for sure abide by that standard as I interpret it.

(Tr. vol. 3, 427.) Mr. Heath also directly addressed this issue in his rebuttal testimony:

> Q. DO THE COMPANIES HAVE A LEGAL OBLIGATION TO ADHERE TO THE STATUTORY COST OBJECTIVES?
>
> A. Of course we do… (Tr. vol. 1, 87.)

Third, the certification process proposed by the Companies ensures lowest costs are achieved. On its face, the Securitization Statute requires only that the Commission find, in its financing order, that the proposed transaction is reasonably calculated to achieve the lowest customer charges possible taking into consideration market conditions and the terms of the financing order. G.S. § 62-172(d)(3). The Companies have gone beyond this standard, however, and as part of the IAL process have indicated that they will certify, at the time of pricing, that they have achieved the Statutory Cost Objectives and again note that there is an expectation to achieve these objectives. Witness Heath explains the significance of this certification as follows:

> [T]he fact that the company is willing to put that certification in place, especially here in this transaction

> as a lowest cost standard, should give the Commission great comfort that we are taking every effort possible to get the best execution on this deal that we can because . . . a Duke Officer is going to be signing that certification saying we in fact got the best deal that was possible. . . . That's not a certification that we take lightly.

(Tr. vol. 2, 22-23.)[6] As Public Staff Consultant witness Maher indicates in his direct testimony: "When a person is required to pledge something in writing, rather than just orally, and has to account for results later, that person is more likely to take that pledge seriously." (Tr. vol. 3, 289.) Thus, even the Public Staff witnesses' testimony supports the impactfulness of DEC and DEP's certification commitment.

Fourth, in the event the Commission decides to participate in the post-Financing Order proceedings in this docket, it will have direct knowledge and oversight of the bond structuring, marketing, and pricing processes and will, therefore, be able to exercise its own direct judgment as to the achievement of the Statutory Cost Objectives for the issuance of storm recovery bonds.[7] In this scenario, the Commission will know what the Companies know about the structuring, marketing, and pricing of the bonds and its designee would be a joint decision-maker for the entirety of the issuance process.

Fifth, after the storm recovery bonds are priced, the Commission will have the ultimate decisional authority on the issuance of the storm recovery bonds under the IAL process prepared by the Companies in their Joint Petition. If the

[6] Witness Heath also notes that the proposed DEC/DEP "lowest cost" certifications to be provided in this case go well beyond the certification provided by DEF in Florida, which was simply a "lower" cost certification. (Tr. vol. 2, 20.)

[7] DEC and DEP note, as testified to by witness Heath, that even under the IAL process the Companies will provide meaningful detail as to how the decisions on structure and pricing were reached. (Tr. vol. 1, 178-79.)

Commission is not satisfied that the lowest cost objectives are met, then it may elect to stop the issuance of the bonds.

Finally, after the storm recovery bonds are issued, there is the option for the Commission to have additional involvement in the collection of the storm recovery charges if the Commission so chooses (the Public Staff Consultant refers to these substantial protections as "[customer] protections"). (Tr. vol. 3, 330-31.) These additional protections are included in the forms of the transaction documents and examples of these are:

- the satisfactions of "Commission Condition[s]" (being approval or acquiescence constituting approval by the Commission) prior to any amendment or modification to the financing documents;
- a provision authorizing the Commission to institute a proceeding to require either DEC and DEP to make customers whole for any "losses" suffered (i) as a result of negligence, recklessness, or willful misconduct by either DEC or DEP under the servicing agreement or the administration agreement, or (ii) for any failure or breach by either DEC or DEP of certain material representations, warranties or covenants in the purchase and sale agreement;
- a provision making the Commission, on behalf of itself and customers of DEC and DEP, a third party beneficiary of the purchase and sale agreement and the servicing agreement; and
- a provision allowing the Commission to enforce the provisions of the servicing agreement and to terminate the agreement in the event of a default by DEC or DEP. (Id. at 64-65.)[8]

[8] Witness Heath notes that the transaction documents contained the same substantive customer protections that DEF included in its 2016 transaction and the one different provision in the servicing agreement mentioned by Public Staff at the hearing has been updated appropriately to match the 2016 DEF transaction. (Tr. vol. 1, 63, 161.)

Each of the six factors listed above is substantial evidence that the storm recovery bonds will be issued in compliance with the statutory standards resulting in the lowest storm recovery charges to DEC and DEP's customers. These factors refute the unsupported presumption of utility carelessness or even bad behavior upon which the Public Staff Consultants base their arguments for intervenor co-equal decision-making authority in the structuring, marketing and issuance of these bonds – a position that no Commission anywhere has adopted with respect to securitization transactions and one that, as discussed elsewhere in this Brief, is well-beyond any articulated power of the Public Staff under North Carolina law.

While the Public Staff Consultants' testimony is replete with allegations of conflicts of interest, presumptions of self-interest overwhelming customer interests, and opportunities for carelessness or misbehavior by DEC and DEP in the issuance of storm recovery bonds, there is literally no evidence to support the notion that any of these issues are likely to manifest. To the contrary, there is a large amount of material evidence that DEC and DEP are committed to, are required to, and will perform consistent with their statutory duties and with the performance standards they have pledged to the Commission in this proceeding. Moreover, under the IAL procedures proposed by the Companies, the Commission will be able to review and determine DEC and DEP compliance with these standards prior to the issuance of the bonds. In light of the completely lopsided evidence on the issue of risk to DEC and DEP customers – which is the entire basis of the Public Staff Consultants' plea for co-equal decision-making authority

in the issuance of storm recovery bonds – it is clear that such a drastic and unprecedented construct is not necessary in these dockets.

II. THE PUBLIC STAFF'S BOND TEAM PROPOSAL SHOULD BE REJECTED AS AN UNNECESSARY ENCROACHMENT UPON THE COMPANIES' MANAGEMENT FUNCTION.

The Public Staff proposes a post-Financing Order "bond team" that grants the Public Staff and its Consultants joint decision-making authority over the structuring, marketing, and pricing of DEC and DEP's storm recovery bonds. To justify this proposal, the Public Staff makes several unsubstantiated claims regarding its statutory authority and relationship with the Commission, and incorrectly cite to the DEF bond team model as supporting precedent. In short, the Public Staff's proposal is an extraordinary request that is contrary to North Carolina law, regulatory practice, and precedent. Accordingly, the Commission should reject the Public Staff's proposal.

A. The Public Staff's Decision-Making Proposal is Beyond the Scope of their Statutorily Defined Role.

The Public Staff and its Consultants repeatedly cite to G.S. § 62-15(d) and G.S. § 62-172(b)(3)b.12. to argue that they are not "an outside intervenor" and instead have been granted implied authority by the North Carolina General Assembly to have a decision-making role over the structuring, marketing, and pricing of the storm recovery bonds post-issuance of a financing order. (Tr. vol. 4, 138-139; Tr. vol. 2, 220-21.) The Public Staff's interpretation of these statutes is incorrect; the Public Staff has never been granted the authority to make management decisions for public utilities or to participate in day-to-day activities such as the issuance of securities.

The Public Staff and its Consultants first cite to G.S. § 62-15(d) to argue that because the Public Staff is a statutory intervenor, they are more than just a party to this proceeding and therefore should be granted decision-making authority on a bond team. G.S. § 62-15(d) states:

> It shall be the duty and responsibility of the public staff to: (1) Review, investigate, and make appropriate recommendations to the Commission with respect to the reasonableness of rates charged or proposed to be charged by any public utility and with respect to the consistency of such rates with the public policy of assuring an energy supply adequate to protect the public health and safety and to promote the general welfare;
>
> (2) Review, investigate, and make appropriate recommendations to the Commission with respect to the service furnished, or proposed to be furnished by any public utility;
>
> (3) Intervene on behalf of the using and consuming public, in all Commission proceedings affecting the rates or service of any public utility.

(Id.; Tr. vol. 2, 77-78.)

As the North Carolina Supreme Court recently held in State ex rel. Utilities Commission v. Stein, "the cardinal principle of statutory construction is that the words of the statute must be given the meaning which will carry out the intent of the Legislature" and that the legislative "intent must be found from the language of the act…." Stein, 851 S.E.2d 237, 263–64 (N.C. 2020) (citing Milk Commission v. Food Stores, 270 N.C. 323, 332–33, 154 S.E.2d 548, 555 (1967). The plain language of G.S. § 62-15(d) does not grant the Public Staff (or its Consultants) decision-making authority in Commission proceedings or over a utilities' securities offering.

Instead, G.S. § 62-15 grants the Public Staff authority to "intervene" and "review, investigate, and make appropriate recommendations to the Commission…" in utility proceedings. None of these directives can reasonably be equated to a grant of decision-making authority over a quasi-judicial proceeding, or more specifically, decision-making authority over the Companies' day-to-day activities such as the issuance of storm recovery bonds. Pursuant to G.S. § 62-15(d), the Public Staff is only granted authority to make *recommendations* to the Commission, not make rulings or decisions in utility proceedings.[9]

Additionally, nowhere in G.S. § 62-15 does the Legislature use the term "decision," except in G.S. § 62-15(f), where the Public Staff is granted the "right[] [to] appeal from *Commission orders or decisions as other parties* to Commission proceedings." This language in G.S. § 62-15(f) reinforces the Companies' position that the Public Staff is not a decision-maker in utility proceedings, and is in fact a "party" to the proceeding that is not superior in any way to "other parties to Commission proceedings," simply because the Public Staff has a statutory right to intervene. Moreover, G.S. § 62-15(h) makes clear that the Public Staff is to "*participat*[*e*] in Commission proceedings," not rule or decide upon such proceedings. Notably, this same "participation" language contained in G.S. § 62-15(d) is contained in G.S. § 62-20 "Participation by Attorney General in Commission proceedings," which also grants the North Carolina Attorney

[9]At the hearing, the Public Staff seemed to imply that G.S. § 62-15(d)(12), which grants them the ability to advise the Commission with respect to securities, regulations, and transactions, provides them with the authority to be a joint decision maker on a bond team. (Tr. vol. 1, 141-42.) However, when read in concert with the rest of G.S. § 62-15 as discussed herein and their historical role in evaluating other proposed utility financings before the Commission, any such implication is false.

General's Office the statutory right to intervene in utility proceedings. Thus, the logical consequence of accepting the Public Staff's argument that because it has a statutory right to intervene in utility proceedings, it also has decision-making authority in such proceedings, would mean that the Attorney General's Office similarly has such decision-making authority in utility proceedings.

The Commission's implementation of G.S. § 62-15, as well as general North Carolina regulatory practice, similarly supports the Companies' interpretation that the statute does not grant the Public Staff superior rights to other parties to a proceeding or decision-making authority. As Mr. Heath testified, the Companies are unaware of any instances where the Public Staff (or any party other than the Commission) has been granted decision-making authority in a utility proceeding. (Tr. vol. 1, 94-5.)

The Public Staff also provided no precedent in support of its proposal. To the contrary, the Public Staff has in the past put itself on equal footing with other parties to a proceeding, noting, for example, that pursuant to G.S. § 62-70, it is "prohibited…from engaging in ex parte communications with the Commission, *as are all parties to a pending docket."* Order Declining to Adopt Proposed Settlement Rules, Docket No. M-100, Sub 145 (Mar. 1, 2017). It would therefore be unprecedented and an expansion of the Public Staff's authority to grant them decision-making authority on a bond team in this proceeding, as well as raise questions as to whether other parties, such as the Attorney General's Office, should similarly be afforded the same expansion of rights in future utility proceedings.

The only evidence the Public Staff and its Consultants actually put forth in support of their unprecedented decision-making proposal is a citation to G.S. § 62-172(b)(3)b.12., which states that the Commission may include in a financing order "[a]ny other conditions not otherwise inconsistent with this section that the Commission determines are appropriate." However, as first explained by witness Heath, this provision cannot be used as a "catch all" to expand the scope of the Securitization Statute or create conditions in a financing order that do not adhere to the plain terms and requirements of the Securitization Statute. (Tr. vol. 1, 86.)

By the plain terms of the Securitization Statute, the Commission, and not the Public Staff, is granted decision-making authority to issue a financing order. G.S. § 62-172(b)(3)b. Furthermore, the Commission, and not the Public Staff, is required to make certain findings with respect to an offering of storm recovery bonds. G.S. § 62-172(b)(3)b. By the plain terms of the Securitization Statute, the Commission, and not the Public Staff, creates the storm recovery property which provides the security for the issuance of storm recovery bonds. G.S. § 62-172(a)(7). By the plain terms of the Securitization Statute, it is the public utility, not the Public Staff or its Consultant, that is responsible for ensuring the structuring, marketing and pricing of the storm recovery bonds and the resulting storm recovery charge are in accordance with the financing order and the statute. G.S. § 62-172(b)(3)b.10.[10] By the plain terms of the Securitization Statute, it is the

[10] A requirement that, after the final terms of an issuance of storm recovery bonds have been established and before the issuance of storm recovery bonds, the public utility determines the resulting initial storm recovery charge in accordance with the financing order and that such initial storm recovery charge be final and effective upon the issuance of such storm recovery bonds without further Commission action so long as the storm recovery charge is consistent with the financing order.

Commission that is required to afford the public utility, not the Public Staff or its Consultants, a degree of flexibility in establishing the terms and conditions of the storm recovery bonds, including, but not limited to repayment schedules, expected interest rates, and other financing costs. G.S. § 62-172(b)(3)b.8.

Because of these disparate duties and obligations placed upon the Commission and public utility, the Companies believe it is "otherwise inconsistent with," and a dramatic expansion of the scope of the Securitization Statute for the Public Staff and its Consultant (or any other intervenor) to have decision-making authority over the structuring, marketing, and pricing of the storm recovery bonds. Public Staff Consultants themselves seemingly agree, or at least question as much. During the hearing, when counsel for the Companies questioned whether limiting the Companies' flexibility by having the Public Staff be a decision-maker would be "otherwise inconsistent" with the Securitization Statute, Public Staff witness Fichera seemed to change the Public Staff's position by stating that "we're just describing a process that affords the Commission ultimately decision-making authority and it also gives the Company flexibility." (Tr. vol. 3, 437.) Public Staff Consultant witness Fichera went on to state in response to the same question that he thought that the word "flexibility" was "in almost every statute" he'd "dealt with," such as in Florida, but failed to clarify that in every utility bond issuance Saber Partners, LLC had participated, no intervenor or entity other than the public utility and applicable state utilities commission or its representatives were granted decision-making authority with respect to the structuring, marketing, and pricing of utility securitization bonds. (Id.; see, e.g. Tr. vol. 2, 181-83; Tr. vol. 3, 443-44.)

Furthermore, the Public Staff could not cite a proceeding where an intervenor had been given such authority. (See Tr. Vol. 2, 220-21; Tr. Vol. 3, 442-43; Heath Rebuttal Exhibit 2 at DEC/DEP Data Request Nos. 2-18; 2-38; and 2-42.)

Indeed, Public Staff Consultant witness Schoenblum testified that the securitization transaction that occurred during his time a Consolidated Edison of New York did not even include a bond team whatsoever:

> Q. Can you recall whether there was a bond team at all?
>
> A. There was no bond team in that proceeding. It was a very small issuance. I think it was about $40 million or thereabouts. It was a very small securitization, limited securitization.
>
> Q. But regardless of size – regardless of size, it was a utility securitization similar to the one that Duke Energy Carolinas and Duke Energy Progress are proposing in this proceeding; is that correct?
>
> A. Yes, it was, and there was no bond team. In fact, the whole concept of the bond team has evolved over the years as part of the work being done to establish best practices. So while there was no bond team in that proceeding, I would suggest that the concept of the bond team has come about as a result of trial and error over the years. … (Tr. vol. 443-44.)

As exemplified in the above question and answer, Mr. Schoenblum attempted to argue that the Public Staff Consultant's "best practices" have evolved over time, assumingly as support for the fact that the transaction that occurred during his employment at Consolidated Edison of New York did not have a bond team. However, the Texas securitization transactions that were testified to by Public Staff Consultant witness Klein (Tr. vol. 2, 60-61), and that included a financial advisor

with decision-making authority, had already previously occurred before this transaction, meaning that Consolidated Edison of New York, as well as the New Jersey Public Service Commission, did not whatsoever implement those "best practices" and bond team proposal that had occurred in Texas. See Saber Partners, LLC, List of Investor-Owned Utility Securitization ROC/RRB Bond Transactions 1997-Present, (2021), available at https://saberpartners.com/list-of-investor-owned-utility-securitization-rocrrb-bond-transactions-1997-present/ (last visited Feb. 11, 2021).

Finally, and as explained by Public Staff Consultant witness Klein, there are no other provisions of North Carolina law or Commission regulations, beyond the above-cited statutory provisions, that can in any way support the Public Staff as a consumer advocate participating in a securities issuance by a public utility:

> Q. Okay. And there's no other – let me ask you this. Are you aware of any other statute – and I'll make the exception for the one we have already identified, 62-172, which is where you based the argument that basically the clean-up clause, the ability of the Commission to make additional orders that aren't inconsistent with 62-172, other than that provision which is what the Public Staff is hanging its hat on, in addition to 62-15 D12, are you aware of any other provision of North Carolina law or Commission regulations that would support the Public Staff as a consumer advocate participating in a securities issuance by a public utility, or in this case a special purpose entity owned by the public utility?
>
> A. I'm not. (Tr. vol. 2, 106-7.)

Based on the foregoing, acceptance of the Public Staff's arguments to expand their powers to include decision-making authority would be contrary to North Carolina

law and regulatory practice, and additionally raises serious questions with regards to the Public Staff's and other intervenors' participation, rights and liabilities in future utility proceedings.

B. The Public Staff's Argument that it is an Extension of the Commission is Incorrect and Contrary to Precedent.

During the evidentiary hearing, the Public Staff attempted to assert that the agency was established "in" the Commission and is therefore an extension "of" the Commission that should be granted a decision-making role similar to the Commission itself in the structuring, marketing, and pricing of the storm recovery bonds. In particular, counsel for the Public Staff stated the following while questioning witness Atkins:

> Q. And would you agree that under [G.S. § 62-15(b)] it says it shall be the duty and responsibility of the Public Staff to, and then down on three intervene on behalf of using and consuming public in all Commission proceedings affecting the rates or service of a public utility?
>
> A. I do see that. And I also see also in [G.S. § 62-15(b)] there that the Public Staff shall not be subject to the supervision, direction or control of the Commission.
>
> Q. But in [G.S. § 62-15(b)] doesn't it also say in the beginning there is established in the Commission – I use the word in – the Commission a Public Staff?
>
> A. It does say that, but it also makes it quite clear and I believe that the Public Staff's Website does also cite that the Public Staff is independent. It even says that it is an independent agency. And so – for this particular statute.

Q. We're proud to be independent but we're also proud to be established in the Commission…

(Tr. vol. 2, 220-21.)

First, the Public Staff's assertion that they are part and parcel with the Commission is incorrect and contrary to the language of G.S. § 62-15(b), which, as illustrated by witness Atkins' answers in the above line of questioning, plainly states that the Public Staff is an "independent agency" separate from the Commission in the same provision it states the Public Staff is "established in the Commission."

As mentioned above, the Public Staff has also in the past considered itself "**entirely independent of the Commission** in the performance of its duties, being under the sole supervision, direction, and control of an Executive Director appointed by the Governor," and has explained how it "is prohibited by G.S. § 62-70 from engaging in ex parte communications with the Commission…" Order Declining to Adopt Proposed Settlement Rules, Docket No. M-100, Sub 145 (Mar. 1, 2017). The mere fact that G.S. § 62-15(b) states that the Public Staff is independent from the Commission, in addition to the fact that G.S. § 62-70 prohibits the Public Staff from ex parte communications with the Commission, further illustrates that the Public Staff is not interchangeable with the Commission. It is not reasonable for the Public Staff to assert its independence when it suits its purpose and claim that it is an instrument of the Commission when it does not. Indeed, the Public Staff's position in this case is inconsistent with and contradicts the very reasons for its creation by the General Assembly in 1977. Prior to 1977, the Commission had a traditional advisory staff and consumers were represented

by the Attorney General. However, the Attorney General had no support staff. Due to the energy crisis and increasing utility rates, the General Assembly, at the initiation of then Governor Jim Hunt, enacted then Senate Bill 229 establishing the Public Staff. The effect of the law was to split the old Commission Staff into two parts, with a limited number of Staff members retained to advise the Commission and the remainder of the staff transferred to a new, independent organization to represent the using and consuming public. If, as the Public Staff contends, it is merely an arm of the Commission, it raises the question as to why the General Assembly chose to create it in the first place. "It is presumed that the Legislature acted with reason and common sense and that it did not intend an unjust and absurd result." King v. Baldwin, 276 N.C. 316, 325, 172 S.E. 2d 12, 18 (1970).

The Commission has also similarly and repeatedly recognized the General Assembly's intent in creating the Public Staff and articulated the Public Staff's role as separate and independent from its own:

> **Nothing is more fundamental to the statutory framework for the regulation of public utilities in North Carolina than the independence of the advocate** for the interests of the millions of individuals and businesses who purchase service from those utilities. The General Assembly created the Public Staff in 1977 and charged it with representing the interests of the using and consuming public in all Commission proceedings. The General Assembly assigned numerous responsibilities to the Public Staff, including the duty to 'make appropriate recommendations to the Commission' as to public utilities' rates and services. G.S. § 62-15(d). To insure its independence, the General Assembly created the position of Executive Director to hire and supervise Public Staff personnel. The General Assembly specifically provided, **'The public staff shall not be subject to the supervision, direction, or control of**

> **the Commission, the chairman, or members of the Commission.'** G.S. § 62-15(b). All parties — industry and customer advocates alike — are allowed by statute to seek review and reconsideration of Commission decisions as part of a fundamental, lawful system of checks and balances. This is as it should be.

In re Carolina Power & Light Co., Docket No. E-2, Sub 822 (Feb. 14, 2003) (emphasis added).

Moreover, as witness Atkins also illustrates in the above-line of questioning, the Public Staff presents itself as an independent agency in its very own description of itself on its publicly-available website. It also states that its mission is:

> To ensure that customer interests are represented in the development and application of public policy by serving as a resource to the North Carolina Utilities Commission, **government agencies, Governor's Office and the North Carolina General Assembly**.

Public Staff, "About Us" – Our Mission, (last visited Feb. 5, 2021), *available at* https://publicstaff.nc.gov/about-us (emphasis added). Thus, in the same place the Public Staff purports to be an "independent agency" to the public, it also states that it is a resource to state agencies other than the North Carolina Utilities Commission, including to the Governor's Office and North Carolina General Assembly. The Public Staff's stated mission statement further undermines the Public Staff's argument in this proceeding that it is an extension of the Commission. Perhaps the most damaging piece of evidence against the Public Staff's argument that it is an extension of the Commission in this proceeding is provided by the Public Staff's own statements in its Request for Quotations ("RFQ") for expert witnesses to this docket as well as the upcoming securitization

rulemaking. In the RFQ, which is specific to this very proceeding, the Public Staff stated the following in the opening first sentences of its RFQ:

> The Public Staff – N.C. Utilities Commission is a state agency that represents customer interests before the North Carolina Utilities Commission. **The Public Staff is independent from the Commission**.

DEC/DEP Brief Exhibit 1 (emphasis added).

North Carolina law, Commission precedent, and the Public Staff's own statements and representations to the public clearly illustrate that the Public Staff is separate and independent from the Commission. For the Public Staff to now claim it is part and parcel with the Commission to argue it should be granted decision-making authority in this proceeding related to the structuring, marketing, and pricing of the storm recovery bonds is not justified by the facts of this case or the law of the state of North Carolina and should be rejected.

Except as otherwise expressly provided or by reasonable implication in Chapter 62, a utility is free to manage its property and business as it sees fit and the Commission may not restrict or control the utility's discretion. State ex. rel. Utilities Commission v. General Telephone, 281 N.C. 318, 189 S.E. 2d 705 (1972). While the Commission has statutory authority to regulate a utility to assure that its decisions are reasonably and prudently made, it is not the role of the Commission to make business decisions on behalf of the utility. It is even less so for an adversary party like the Public Staff. In fact, it is this pervasive authority of the Commission to review and regulate utilities that provides, contrary to the contentions of the Public Staff, the incentive for the Companies to make decisions

that are in the best interests of its stakeholders, including customers. It has always been so and this proceeding is not unique in that respect.

C. The Duke Energy Florida Bond Team is not what the Public Staff has Proposed for North Carolina.

The Public Staff Consultants' testimony extensively references the bond team precedent from DEF's 2016 securitization transaction for their proposal that they be granted decision-making authority in the structuring, marketing, and pricing of the storm recovery bonds. (Tr. vol. 1, 99 (internal citation omitted).) The Public Staff Consultants go so far as to state that the Commission should "not tamper with success" and adopt the DEF bond team model. (Tr. vol. 3, at 323.) However, the DEF bond team model is not what the Public Staff has proposed in this proceeding.

As explained in the rebuttal testimony of witness Heath, the Public Staff Consultants' proposal goes beyond the bond team model used in the DEF transaction by recommending an intervening party, in this case, the Public Staff, be included as a member of the bond team and have joint decision-making authority. First, membership on the DEF bond team was limited to DEF (the public utility) and its structuring advisor, and the Florida Public Service Commission staff and its financial advisor. (Tr. vol. 1, 101.)[11] Bond team membership was not extended to any intervening party to the proceeding. (Id.) Representatives of the Florida consumer advocate group, Office of Public Counsel ("OPC"), were not members of the bond team. (Id.) The OPC also did not have a role in the

[11] What occurred in Florida is, however, very similar to what DEC and DEP propose as an alternative to its IAL process in this case.

structuring, marketing, and pricing of the bonds. (Id.) The OPC, as well as other intervenors were, however, invited to join certain bond team calls. (Id.) Other transaction participants such as underwriters, etc., were also invited to participate in bond team calls but again were not formal members of the DEF bond team. (Tr. vol. 1, 101.)

Second, and most importantly, there was no joint decision-making authority between the members of the DEF bond team. Decision-making authority was limited to a designated representative of DEF and a designated representative of the Florida Public Service Commission staff. Decision-making authority was not granted to an intervenor or any financial consultant or "group" of representatives. (Id.)

As illustrated further in witness Heath's testimony, the Public Staff Consultants' testimony portrays the DEF bond team as encompassing a broader group of participants with broader decision-making authority than actually occurred. (Id. at 102-103.) For purposes of clarifying the record and explaining the actual facts surrounding the DEF transaction, the Companies want to make clear to the Commission that the Public Staff has proposed an unprecedented bond team model that is inconsistent with the DEF model. Furthermore, the Companies want to reiterate that the Public Staff and its Consultants' proposal to grant a consumer advocate state agency or third-party intervenor decision-making authority in a utility securitization is extraordinary, unprecedented, and unnecessary. (Tr. vol. 1, 90, 103.)

D. The Public Staff Consultant's fiduciary duty arguments are a red herring.

The Public Staff Consultants indicate throughout their testimony that their expertise and participation is needed to protect customers from alleged utility carelessness or misbehavior in the structuring, marketing, and pricing of the storm recovery bonds because they are the only party involved in such processes that have a fiduciary duty to customers. This argument is completely unsupported by the Company's track record, the law of North Carolina, and the evidence in this case. Moreover, it is based on three fundamentally flawed premises: (1) that DEC and DEP have an incentive to be careless, and/or will be careless, in the structuring, marketing, and pricing of the storm recovery bonds at the best price for customers; (2) that the Public Staff Consultants have a fiduciary obligation to protect such customers; and (3) that the Commission itself is not able to protect customers either through its financing order or through its direct supervision of the issuance of bonds. None of these is the case.

In his testimony, Public Staff Consultant witness Maher discusses the absence of fiduciary duties among issuers, underwriters, and financial advisors in traditional bond transactions and the genesis of that state of affairs dating back to securities fraud litigation in 2005. Witness Maher then indicates that the lack of such duty means that "bond issuers need to be very active in the offering process: to protect their own interest." (Maher Dir. 14.) He never addresses, however, why DEC and DEP will not be very active in their own issuances of storm recovery bonds. Witness Maher then indicates his belief that the Public Staff Consultants have a fiduciary duty to DEC and DEP customers:

Q. DOES SABER PARTNERS HAVE A FIDUCIARY DUTY TO NORTH CAROLINA RATEPAYERS?

A. Yes. As financial advisor to the Public Staff, Saber Partners considers itself as having a fiduciary duty to North Carolina ratepayers.

(T. vol. 3, 284.) This statement is remarkable in several ways. First, as witness Maher acknowledged on cross-examination at the hearing, he is not a lawyer and, therefore, is not competent to render an opinion as to a purported legal duty arising between the Public Staff Consultants and "North Carolina Ratepayers"[12] under North Carolina law. (Tr. vol. 3, 416.) Second, he does not cite to any precedent establishing that either the Public Staff or its Consultants have a fiduciary duty to DEC and DEP's customers in this instance. Third, this statement is directly contrary to his testimony just five pages earlier where the following question and answer appears:

Q. ARE YOU GIVING AN OPINION AS TO WHETHER THERE IS A LEGAL REQUIREMENT OF ANY PARTY IN THIS TRANSACTION TO HAVE A FIDUCIARY RELATIONSHIP?

A. No. I am discussing the important issues related to whether a fiduciary relationship exists and what the Commission should consider in deciding how to evaluate information it receives from different parties to the proposed transaction.

Finally, it is also undermined by his testimony at the hearing of this matter where he testified that "well, I say they [Saber Partners, LLC] consider themselves as having it [a fiduciary duty to customers], right? And I guess there's – and so that, again, is not a definitive thing." (Tr. vol. 3, 417.)

[12] It is also remarkable that Mr. Maher's assertion of duty extends to "North Carolina ratepayers" in general and is not even limited to DEC and DEP ratepayers.

Other witnesses employed by the Public Staff Consultants also raise the issue of fiduciary duties as they relate to storm recovery bond transactions. For example, witness Klein mentioned in her testimony that she considered that she personally had a fiduciary duty to the public interest as a commissioner on the Public Utilities Commission of Texas ("PUCT") in addressing certain securitization transactions in the 2003 -2004 timeframe. (Tr. vol. 2, 79.) She did not cite any legal authority for this proposition but even assuming she had such a duty as a Commissioner on the PUCT, that entity was the decisional authority in those transactions – which is far different from Saber Partner LLC's role here as a consultant for an intervenor in this proceeding. Witness Fichera also mentions the need for the Commission and the Public Staff and its Consultants (which he conveniently lumps together) to supervise the bond transaction in this instance so that someone with a fiduciary duty to customers is involved. (Tr. Vol 2, 216.) Mr. Fichera does not cite to any authority in his testimony for his assertion of a fiduciary duty owed by the Public Staff to DEC and DEP customers.

Fiduciary duties are legal duties that can only be created through contractual relationships or through a relationship recognized by law that imposes such duties. Azure Dolphin, LLC v. Barton, 821 S.E.2d 711, 725 (N.C. 2018). The existence of fiduciary duties is dependent on the existence of a fiduciary relationship between the parties – in this case Saber Partners, LLC and DEC and DEP customers. In order for a fiduciary relationship to exist, there must be "a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the

confidence." Dalton v. Camp, 548 S.E.2d 704, 707 (N.C. 2001). In North Carolina, all fiduciary relationships have a "heightened level of trust and the duty of the fiduciary to act in the best interests of the other party." Dallaire v. Bank of Am., N.A., 760 S.E.2d 263, 266 (N.C. 2014). If a fiduciary behaves in a manner that contradicts their legal duty, they may be held liable for damages. See King, 795 S.E.2d at 349 (internal quotations omitted); Dallaire, 760 S.E.2d at 266.

The record in this case contains no evidence of a contractual or legal relationship between the Public Staff Consultants and DEC or DEP's customers. It is obvious that the Public Staff Consultants have no contractual relationship with DEC and DEP customers in this case, because there is no contract between those consultants and DEC and DEP customers. Nor does the record contain any evidence of a "special confidence" reposed in the Public Staff Consultants by DEC or DEP customers, who in all likelihood do not even know that the Public Staff Consultants exist. This record is wholly insufficient to support the existence of **any** duty of the Public Staff Consultants to DEC and DEP customers much less the highest sort of legal duty possible under North Carolina law – that of a fiduciary.

What the record does show, however, is that the Public Staff Consultants likely have a contractual duty to the Public Staff but the nature of that duty is undetermined given the absence from the record of the contract between the Public Staff and its Consultants.[13] What is also clear from the record in this case is the fact that the Public Staff Consultants have a direct, pecuniary self-interest in

[13] DEC and DEP requested a copy of the contract in discovery but the Public Staff objected to the request and ultimately declined to produce a copy for DEC and DEP. (Heath Rebuttal Exhibit 2 at DEC/DEP DR 2-33, Heath Confidential Rebuttal Exhibit 2 at DEC/DEP DR 2-30.)

the outcome of this proceeding because they will be paid for their continuing labors if they are included in post-Financing Order activities involved with the structuring, marketing and pricing of the storm recovery bonds. Their fees will be added to the transaction costs and recovered from DEC and DEP customers as part of the securitization transaction under G.S. § 62-172(a)(4)f. In addition, assuming there is continuing involvement, as testified to by witness Fichera at the hearing, the Public Staff Consultants will be additionally compensated for any post-Financing Order work:

> Q. And if you were centrally involved in the structuring marketing [and] issuance of these bonds, that would be additional work, would it not?
>
> A. It would be additional work. We're not being paid out of the bond proceeds. We're being paid out of a public -- specific statute that allows staff to have. And, you know, if we do additional work, yes, we get additional -- we have additional compensation.

The testimony of Public Staff Consultants witnesses is completely silent as to this direct continuing pecuniary interest in the securitization transaction that will (presumably) follow the Commission's Financing Orders in this proceeding.

So why is the Public Staff Consultants' fiduciary duty argument a red-herring? Because Public Staff Consultants have no such duty under the law of this state and the record does not provide any basis for the existence of such duty. Moreover, they have a direct pecuniary interest in continuing to serve in some supervisory role in the post-Financing Order process.[14] So, why do the Public Staff

[14] This pecuniary interest ironically means that the Public Staff Consultant is similarly situated to underwriters, in that they have a contractual duty to a party (the Public Staff) and not DEC and

Consultants make this argument? Clearly, the argument does lend itself to potential marketing of the Consultants' to create the need for their services on an ongoing basis and the Companies presume that the argument is presented for that purpose.

Notwithstanding the patent fallacy of the fiduciary duty argument raised by the Public Staff Consultants, DEC and DEP acknowledge that their respective customers have significant interests in the outcome of this proceeding that must be looked after. As discussed in more detail elsewhere in this Brief, those interests are protected and served by DEC and DEP's experience in issuing long-term bonds in the capital markets, by a statutory lowest charge standard mandated by G.S. § 62-172, by DEC and DEP's repeated commitment to this standard in their witnesses' testimony in this case, by the obligation of DEC and DEP to certify to the achievement of the statutory lowest charge standard as part of the IAL process, and ultimately by this Commission's direct oversight of the bond issuances either through the IAL process or through active participation by the Commission in a bond team, if the Commission decides to adopt this approach. These multi-level protections of customer interests in the securitization process are real and far outweigh the contrived and legally unsupported claims of the Public Staff Consultants having a fiduciary duty to DEC and DEP customers.

DEP's customer base, with a pecuniary interest to continue to be involved in the transaction as much as possible.

III. IT WOULD BE IMPROPER AND A CONFLICT OF INTEREST FOR THE COMMISSION TO HIRE THE PUBLIC STAFF CONSULTANTS AS ITS FINANCIAL CONSULTANTS.

During the hearing, a question was asked confirming that the Companies had not included the Public Staff Consultants in their list of potential firms the Commission could hire as its financial consultant. (Tr. vol. 2, 8-10.) In response to the question, Mr. Heath stated that the Public Staff Consultants were not included in the list because they were "already engaged in the advisory or consultant capacity to the Public Staff," and that the Companies believed the Commission's financial consultant, if it chooses to retain one, should be someone that is "independent" to the parties to the proceeding. (Id.) Having further evaluated this question, DEC and DEP submit that the Commission's hiring of the Public Staff Consultants as its financial consultant at this stage of the proceeding would be contrary to the North Carolina Code of Judicial Conduct, in that it creates the appearance of bias and additionally has the potential to create conflicts of interest pursuant to the State Government Ethics Act in the upcoming securitization rulemaking proceeding.

G.S. § 62-10(i), which generally establishes the North Carolina Utilities Commission, states that "the standards of judicial conduct provided for judges in Article 30 of Chapter 7A of the General Statutes shall apply to members of the Commission." Pursuant to G.S. 7A-10.1, the North Carolina Supreme Court has prescribed standards of judicial conduct that are applicable to the Commission, the North Carolina Code of Judicial Conduct (Code). Canon 1 of the Code states:

> A judge should uphold the integrity and **independence** of the judiciary.

> A judge should participate in establishing, maintaining, and enforcing, and should personally observe, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved.

(emphasis added). Canon 2 of the Code goes on to state:

> A judge should avoid impropriety in all the judge's activities.
> A. A judge should respect and comply with the law and should conduct himself/herself at all times in a manner that **promotes public confidence in the integrity and impartiality of the judiciary**.
> B. A judge should not allow the judge's family, social or other relationships to influence the judge's judicial conduct or judgment. The judge should not lend the prestige of the judge's office to advance the private interest of others except as permitted by this Code; **nor should the judge convey or permit others to convey the impression that they are in a special position to influence the judge**. A judge may, based on personal knowledge, serve as a personal reference or provide a letter of recommendation. A judge should not testify voluntarily as a character witness.
> C. A judge should not hold membership in any organization that practices unlawful discrimination on the basis of race, gender, religion or national origin.

(emphasis added). In the Companies' opinion, both Canons 1 and 2 are implicated by the potential hiring of the Public Staff's expert witness as the Commission's own financial consultant in this docket, and believe the hiring, and even consideration of the Public Staff's expert witness in this very same proceeding creates the appearance of bias.

First, and as explained in detail in section II.B. of this Brief, the Public Staff is an independent agency, separate and apart from the Commission. The Public Staff is also an intervening participant to this proceeding and not itself subject to the Code or State Government Ethics Act. Additionally, according to the Public

Staff's securitization RFQ as confirmed by Public Staff Consultant witness Fichera's testimony, the Public Staff has employed Saber Partners, LLC pursuant to G.S. § 62-15(h) as an expert witness, and not solely pursuant to G.S. § 62-172 as a financial consultant specifically. (DEC/DEP Brief Exhibit 1, Tr. vol. 3, 424.) Employing an intervening party's expert witness to a proceeding as the Commission's own financial consultant in that very same proceeding blurs the lines of the Commission's independence from that party, here the Public Staff, potentially implicating Canon 1 of the Code. Employing the Public Staff's expert witness from this proceeding to advise the Commission in post-Financing Order decision-making, as opposed to any other party's expert witnesses or an independent financial consultant, also does not promote public confidence in the "integrity and impartiality" of the Commission and creates the appearance of bias.

This Commission's employment of the Public Staff Consultants could also convey the impression to the public that the Public Staff and its expert witnesses, as opposed to other parties and their expert witnesses, are in a special position to influence the Commission, and implicate Canon 2 of the Code. As witness Heath testified at the hearing, it would similarly create the appearance of bias whether the Commission hired the Public Staff Consultants, or any other parties, such as the Companies' financial consultants, as its own financial consultant:

> Q. …Do you remain of the opinion that you stated yesterday that there would still be a potential conflict, and is that a conflict that you feel needs to be addressed?
>
> A. I still do believe it would be a conflict. As I mentioned yesterday, if the – you know, Duke's looking out for its customers here certainly, our interests are aligned here, and the Commission

> staff is looking – or the Public Staff has got – Is looking out for customer interest, right. And the Commission is looking at both the viability of the utility as well as the customer – the customer impacts, right. And so I think if you were to hire either Guggenheim, our advisor today, or if you were to hire the Saber Partners, I would see that as equally being – you know, either one of those would potentially or could be – would be a conflict. (Tr. vol. 4, 175.)

Just as it would be improper for the Commission to hire the Companies' expert witnesses as its own, it would be improper for the Commission to hire the Public Staff's. Moreover, the mere fact that the Commission has actively contemplated hiring Public Staff's expert witness in the hearing of this matter (where the Commission is acting in a judicial capacity and is charged with deciding between competing approaches to the securitization) could be interpreted as evidence of the appearance of bias.

Second, and as exemplified in the Public Staff's RFQ, the Public Staff has hired Saber Partners, LLC not just as its expert witness in this proceeding, but also as its expert witness in the forthcoming securitization rulemaking proceeding. If the Commission were to employ the Public Staff Consultants as its financial consultant in this proceeding, and then the Public Staff continue to utilize them as its expert witness in the forthcoming rulemaking proceeding, questions under the State Government Ethics Act[15] as to whether there is a conflict of interest could arise. Therefore, to avoid any improprieties or appearances of biases, the Companies recommend that the Commission hire its own, independent financial consultant and not the Public Staff Consultants, who are parties to this proceeding

[15] See G.S. 138A-1 et. seq.

advocating for a specific outcome, if the Commission ultimately concludes that it requires an expert consultant.

IV. PUBLIC STAFF TESTIMONY ELICITED AT THE HEARING RAISES SERIOUS LIABILITY CONCERNS UNDER FEDERAL SECURITIES LAWS.

In addition to concerns about a conflict of interest if the Commission were to hire the Public Staff Consultants as its own consultant, after listening to the witnesses' testimony during the hearing, the Companies have significant concerns arising from elicited testimony. The witnesses of the Public Staff described that, as part of their due diligence efforts as a purported member of a bond team, it would be necessary to communicate with transaction participants, including potential investors in the storm recovery bonds. Public Staff witness Fichera explained, "we're not trying to impugn anybody in terms of it, but I've been an underwriter, and I have seen that sometimes things get distorted, or there's different approaches, different things said with different emphasis." (Tr. vol. 4, 57). In describing his certification process, witness Fichera also stated that "I need to do **my** own due diligence and own homework…." (Id. at 41-42.) The Companies interpret these statements to mean that the Public Staff Consultants propose, as part of their due diligence, to have direct communications with potential investors. These are troubling statements that could expose the Companies and any underwriters to additional securities law liability. Given the extensive rules and regulations that govern securities offerings, issuers and underwriters institute

guardrails regarding their own communications with investors in connection with securities offerings, to comply with these rules and regulations.[16]

It would be unprecedented and unnecessary to have someone other than the issuer or an underwriter speak with investors. (Tr. vol. 3, 442). This is for the obvious reason, among others, that the issuers and underwriters who market the securities adhere to strict protocols regarding the preparation and dissemination of information to the investing public. Those same parties also commit to well defined indemnification and other contractual obligations to mitigate against any potential liability that may arise as a result of a breach of the securities laws. Allowing someone other than the issuer or underwriters to independently communicate directly with investors would substantially alter the Companies' exposure by introducing a participant who is not bound by the same duties, contractual obligations and responsibilities as the Companies and underwriters, while exposing the Companies and underwriters to additional, unnecessary liability under Section 10(b) of the Securities Exchange Act of 1934 under the theory of "adoption". As such, the Companies may incur significant additional exposure, but have little or no recourse, in the event that the Companies were found to have adopted statements made by Public Staff Consultants because an investor equates the Companies' consent to treat such third-party as equivalent to allowing the Consultant to speak on behalf of the Companies or its underwriters. This is why despite repeated questions from the Companies, witnesses Moore, Maher,

[16] Indeed, the federal securities laws and the Securities and Exchange Commission serve to protect the public interests against any potential for misstatements or omissions by an issuer or underwriters.

Schoenblum, and Sutherland, all of whom have knowledge of securities offerings conducted by the companies for whom they worked, could not identify a single instance when someone other than the company or their underwriters was authorized to speak to investors as part of an offering of securities. For these reasons, the Commission should not endorse any proposal that would create unnecessary or unwarranted exposure to additional securities law liability.

V. THE COMPANIES' PROPOSED IAL PROCESS IS APPROPRIATE AND CONSISTENT WITH THE SECURITIZATION STATUTE; HOWEVER, THE COMPANIES' BOND TEAM PROPOSAL, IF THE COMMISSION SO DECIDES, IS A COMPROMISE POSITION THAT IS SIMILAR TO THE DEF BOND TEAM.

A. The Issuance Advice Letter Process allows the Commission to be the Ultimate Decision Maker to Issue the Bonds.

In their Joint Petition, the Companies proposed an IAL process, which would include certifications from each Company that the structuring, marketing, and pricing of the storm recovery bonds transparently satisfy the Statutory Cost Objectives, and which would give the Commission final say on whether the transaction is executed or not. Whether or not the Commission decides to accept the Companies' compromise Bond Team proposal, DEC and DEP plan to each deliver to the Commission an IAL as well as True-Up Adjustment Letter ("TUAL") after the pricing of the storm recovery bonds but prior to the actual issuance.

Specifically, each Company proposes to deliver to the Commission an IAL that contains the final pricing terms, updated estimates of the up-front and on-going financings costs and certifications from each Company to demonstrate that the issuance satisfies the Statutory Cost Objectives. Thus, the actual details of the transaction are included in the IAL. Once the Commission receives the IAL, the

transaction will proceed without any further action from the Commission unless the Commission issues an order stopping the issuance before noon on the third business day after pricing. The Commission could issue a stop order if it determines that (i) the IAL/TUAL and all required certifications have not been delivered or (ii) the transaction does not comply with the standards set forth in the Financing Orders as defined therein.

Even if the Commission does not desire any sort of Bond Team, the IAL/TUAL process will nevertheless ensure the Commission has final authority over whether the issuance shall proceed, as well as an opportunity to evaluate whether the proposed structuring, marketing, and pricing of the proposed issuance achieves the Statutory Cost Objectives.

B. Bond Team Membership

In the event the Commission desires a level of participation in the structuring, marketing and pricing phases of the transaction prior to the IAL process, the Companies have proposed a Bond Team comprised of the Companies, their advisor(s), and counsel, a designated Commissioner or member of Commission staff, including any independent consultants or counsel hired by the Commission to ensure that the structuring, marketing, and pricing of the storm recovery bonds achieve the Statutory Cost Objectives.

Although formal Bond Team membership would be limited to representatives of the Companies and the Commission under this model, the Companies are not opposed to the underwriters, the Public Staff and its Consultants, and other intervening parties to this proceeding being invited to join all Bond Team meetings to provide input and perspective.

Specifically, during Bond Team meetings, the Public Staff, its Consultants, and the underwriters would have the opportunity to voice their opinions and suggestions to the Companies and Commission on the best way to structure, market, and price the storm recovery bonds. The Companies and the Commission representative would then be able to receive and evaluate suggestions from the Public Staff and the underwriters, and retain final decision-making authority as to which suggestions best achieve the Statutory Cost Objectives.

C. Decision-Making Authority

Similar to the DEF bond team, a designated representative of the Companies and a designated representative of the Commission (either a Commissioner or a designated member of Commission staff) would be joint decision-makers in all aspects of the structuring, marketing, and pricing of the storm recovery bonds except for those recommendations that in the sole view of the Companies would expose either the Companies or the Special Purpose Entities to securities law or other potential liability relating to the issuance of storm recovery bonds or contractual liability. This joint decision-making authority would extend to hiring decisions related to underwriters [and other transaction participants][17], as well as the close monitoring and review of the investor order book for the bonds. The Companies' and Commission's respective designated

[17] Note the Companies have proposed that the underwriters be selected through a Request For Proposal, and that the underwriters not have decision-making authority or be formal members of the Bond Team. This proposal eliminates the Public Staff Consultant's perceived risks associated with underwriter's participation in the storm securitization transactions. (Tr. vol. 2, 185-186; Tr. vol. 3, 224-28.)

representative would also have decision-making authority to increase or decrease the proposed bond pricing credit spreads, as well as the final bond pricing.

Under this proposal, the Companies retain sole decision-making authority over the accuracy of disclosure documents including the registration statement for the storm recovery bonds and any other materials and information provided to investors. Pursuant to federal securities laws, the Companies, in their role as "sponsors" and "depositors," and the SPEs have strict liability for these documents and any other materials and information communicated to investors. Therefore, because no other parties to the transaction have this liability, the Companies believe it is of paramount importance of the transaction for the Companies to retain sole decision-making authority over these items. Additionally, the Companies believe it is appropriate to retain sole decision-making authority over selection and engagement of any counsel for the Companies, SPEs and underwriters.

VI. THE COMMISSION'S ACCEPTANCE OF THE COMPANIES' CERTIFICATION SHOULD NOT BE DEPENDENT UPON OTHER PARTIES' CERTIFICATIONS.

The Public Staff Consultants have proposed that the Companies' Financing Orders "require fully accountable certifications" from the bookrunning underwriter(s), the Public Staff Consultants, and the Companies that certify to a "lowest cost" standard. (Tr. Vol 3, 364.) In support of their certification proposal, the Public Staff cites to the DEF bond team model certification process and allege that the Companies' certification proposal is "ambiguous." (Tr. Vol 3, 342) They also argue that the Companies have "no liability for the resulting storm recovery charges and arguably no liability in giving the certifications." (Id. at 236). Last, Public Staff Consultants argue that they "believe the [Companies are] honest" but

believe the Companies would somehow be "more honest" if they are "watch[ed] like a hawk" by the Public Staff Consultants, essentially implying the Companies' lowest cost certification cannot be trusted and must be "verified." (Tr. vol. 4, 41-42.)

Similar to the Public Staff's bond team proposal, the Public Staff's recommendation to have an intervening party issue a certification is unprecedented and an expansion of what was required by the Florida Public Service Commission under the DEF bond team model. To be clear, under the DEF bond team model, an "independent" certification was not required to be delivered by an intervenor. Certifications for the DEF transaction were provided by DEF, the Florida Public Service Commission's financial advisor, and the lead underwriters.

In this case, the Companies are proposing that the only *required* certification be from the Companies themselves. This proposal differs from the DEF bond team certification process because the Companies have agreed in connection with the IAL process to certify to a more stringent standard than that required in Florida—in short, a "lowest cost" standard. Based on the actual results after pricing, the Companies are willing to certify that the structuring, marketing, and pricing of the SRB Securities and underlying storm recovery bonds issued on behalf of DEC and DEP result in the lowest storm recovery charges payable by the customers of DEC and DEP, consistent with market conditions at the time such SRB Securities and underlying storm recovery bonds are priced and the terms set forth in the Financing Orders. (See Joint Petition Exhibits B and C, at Appendix C, Attachment 8). In contrast, in Florida, DEF was only obligated to certify that "the structuring, pricing

and financing costs of the [securitization] bonds and the imposition of the proposed [securitization] charges have a *significant likelihood of resulting in lower overall costs or significantly mitigate rate impacts to customers* as compared with the traditional method of financing and recovering [securitization] costs"—a standard less stringent than the Companies' "lowest cost" standard. (Tr. Vol 1, 106.) Moreover, witness Heath has testified that "the Companies will not price the storm recovery bonds unless they are comfortable that they can deliver the proposed certifications." (Id. at 85.)

Because the Companies are willing to certify to a lowest cost standard, they question what value other required certifications will add to the Companies' own lowest charge certification. Additionally, the Public Staff offers no further justification for their proposal other than their arguments that the Companies have no "liability" for the certifications and must be "watched like a hawk" to be "more" honest—arguments that are unsupported by the facts and the Public Staff's own testimony.

First, the Companies reject any insinuation by the Public Staff Consultants that they would be untruthful somehow in their certification. Beyond the fact that this insinuation is baseless, and frankly, insulting, the Companies are required by law to truthfully certify to the lowest cost standard they are proposing, as they are with all communications to the Commission. See G.S. § 62-325 (codifying that it is a criminal misdemeanor to knowingly or willfully file or give false information to the Commission in any report, reply response or other statement or document furnished to the Commission). Accordingly, the Companies do have liability to

truthfully certify to the Securitization Statute's lowest storm recovery charge standard.

The fact that the Companies would truthfully certify to achieving a lowest cost standard in the certification is also supported by the fact that the Public Staff Consultants refused to testify on record that the Companies would actually lie, or should for any reason be mistrusted in delivering a truthful lowest cost standard:

> Q. … You don't have any reason to believe that Mr. Heath was being untruthful about his intent to comply with the statutory standard or provide a certification to that effect to the Commission, do you?
>
> A. I do not.

(Tr. vol. 3, 403.) As illustrated by the above, Public Staff Consultant witness Moore in fact has no reason, and therefore no evidence, to suspect that the Companies would deliver anything less than a truthful, lowest cost certification. Similarly, Public Staff Consultant witness Fichera stated the same:

> …It's not saying that you're -- your certification, you're lying…

(Tr. vol. 4, 41.) The Public Staff Consultants' statements at the hearing illustrate how their stated necessity for "verifying" the Companies' certifications are without support. In sum, because the Companies are willing to, and will certify to the Securitization Statute's lowest storm recovery charge standard, the Commission should not require certifications in order to approve the bond issuance from any other party than the Companies.

VII. THE COMPANIES' REQUEST FOR FLEXIBILITY IS APPROPRIATE AND REQUIRED BY THE SECURITIZATION STATUTE.

G.S. § 62-172(3)(b)b.8. requires the Commission to specify the degree of flexibility to be afforded to DEC and DEP in establishing the terms and conditions of the storm recovery bonds, including, but not limited to, repayment schedules, expected interest rates, and other financing costs consistent with G.S. § 62-172(b)(3)b.1.-7. As Public Staff Consultant witness Fichera admitted during the hearing, a requirement of flexibility is found "in almost every [utility securitization] statute" that Saber Partners, LLC has "dealt with." (Tr. vol. 3, 436.) The main reason being because, as Public Staff witness Fichera also explains in his testimony, "the precise bond structure, interest rates and other costs cannot be known with certainty at the time the financing orders are issued." (Tr. vol. 3, 205.) Accordingly, a public utility must be granted flexibility in a financing order to achieve the structure and pricing that is necessary to meet the Statutory Cost Objectives, including the lowest storm recovery charge, consistent with market conditions on the day of pricing, rating agency considerations, and the terms of each Financing Order.

As testified to by witness Atkins, at this time, the Companies are considering three main strategies in issuing the storm recovery bonds to investors. (Tr. vol. 2, 197.) Mr. Atkins' testimony summarizes the three strategies as follows:

> One potential issuance strategy is to market and price the DEP and DEC storm recovery bonds separately, spaced out by several weeks or months….A second strategy would involve marketing and pricing the DEC and DEP transactions simultaneously. …

> The third issuance strategy is the SRB Securities structure discussed in my direct testimony, which would be structured to be eligible for the Corporate Index. This structure involves SPE subsidiaries of DEC and DEP issuing storm recovery bonds to a bankruptcy-remote trust wholly owned by Duke Energy. Specifically, the trust would then issue notes to the marketplace backed by the DEC and DEP bonds. The interest rates on the trust note tranches would set the interest rate for each tranche of the DEC and DEP bonds. Thus, each corresponding tranche of the DEC and DEP bonds would have the same interest rate. While there are certain incremental costs associated with the SRB Securities structure, which would be reviewed closely, this structure would result in securitization charges based on the same interest rates, thus eliminating the risk that the smaller DEC transaction might be treated less favorably.

(Tr. vol. 2, 198-199.)

It is important that the Financing Orders provide the flexibility necessary for the Companies to review each of these proposed structures, and choose the structure that, at the time of issuance, will achieve the Statutory Cost Objectives. As also testified by witness Atkins, the Companies are committed to, and "completely agree with the Public Staff Consultants that the SRB Securities structure should be and will be closely evaluated, along with the two alternative separate issuance approaches at the appropriate time." (Tr. vol. 2, 190.)

Despite the Securitization Statute's plainly-stated statutory mandate to provide a public utility flexibility in a financing order, the Companies reiterate their need for flexibility herein because throughout Public Staff Consultants' prefiled testimony, they argue for a limitation of the Companies' flexibility—seemingly only in support of their post-Financing Order joint decision-making proposal. For example, both Public Staff Consultant witnesses Schoenblum and Sutherland

answer the below question in their prefiled testimony with a "no" followed by an unsupported explanation for "equal authority" amongst bond team members:

> Q. IN YOUR VIEW, SHOULD THE COMMISSION GIVE THE COMPANIES BROAD FLEXIBILITY TO ESTABLISH THE FINAL TERMS AND CONDITIONS OF THE BONDS AS SUGGESTED BY WITNESSES ATKINS AND HEATH?
>
> A. No.[18]

(Tr. vol. 3, 116, 331-332.) At the hearing, however, Public Staff witness Schoenblum stated the following in regards to the above prefiled question and answer when questioned by counsel for the Companies on his prefiled statements:

> Q. My question was, in answering no to that question in your testimony, are you suggesting that the Companies should not have flexibility to address market conditions at the time of the bond issuance?
>
> A. No, I'm not entirely suggesting that. **Obviously, any issuer needs to have some flexibility.** But at the same time, this is the first securitization issue for both of these companies, and they might not be totally familiar with all of the aspects of securitization, whether it's, you know, documentation, market pricing, type of investors that invest in these type of securities. So, yeah, flexibility is okay, but at the same time, there are other factors that come into play that may work to limit that flexibility.

[18] Public Staff witness Sutherland's answer to this question in his prefiled testimony goes on to state: "Were these normal utility bonds subject to standard review and approval by the Commission, the Commission could easily grant that broad flexibility because it would have the authority for an unlimited after-the-fact review. In this case, however, the Commission does not have that opportunity, as described by other witnesses. As such, the Commission's Order in this proceeding should require that the final terms and conditions be determined in a joint, collaborative process with the Commission, the Public Staff, and/or its independent advisors participating actively, visibly, and in real-time." (Tr. vol. 3, 116.)

(Tr. vol. 3, 431.) The Public Staff Consultants provide no explanation or evidence as to what these "additional factors" may be that necessitate limiting the Companies' flexibility as to the proposed transaction structures. Moreover, even assuming this additional factor is the Companies' lack of experience, as explained above in Section I to this Brief, the Companies are well experienced in capital markets, and even experienced in utility securitizations, which dispels witness Schoenblum's argument that because this is the first securitization, the Companies' flexibility should be limited.

The Public Staff Consultants also provide no references—besides witness Fichera's above-referenced comment that *every* securitization statute he's worked with contains flexibility provisions—to transactions where a public utility's flexibility was in fact "limited" for the purpose of ensuring a consumer advocate or third-party intervenor's equal decision-making authority on a bond team. Most telling is the fact that Public Staff Consultants agree that at least some flexibility is necessary, and that flexibility is in fact for the benefit of the Companies' customers:

> Q. So would you agree with me that granting the Companies some flexibility can be to the benefit of customers?
>
> A. I can agree with that statement in its broadest terms, yes.

(Tr. vol. 3, 434.) To argue on the one hand that the Companies' flexibility should be limited, but simultaneously agree that the Securitization Statute requires flexibility be granted to the Companies *for the benefit of customers,* most clearly illustrates the contradiction in the Public Staff's arguments to limit the Companies' flexibility in the proposed Financing Orders, for the sole purpose of supporting their

arguments that post-Financing Order decision-making authority should be granted to the Public Staff and its Consultants.

The Companies' Financing Orders, as modified and submitted concurrently with this Brief, accurately provide the Companies the necessary flexibility they need to achieve the Statutory Cost Objectives. This flexibility is key to executing a successful transaction that best achieves the Statutory Cost Objectives, and, as the Public Staff Consultants agree, is for the benefit of the Companies' customers. Moreover, limiting the Companies' flexibility may make it impossible for the Companies to achieve the Statutory Cost Objectives. Any arguments submitted by the Public Staff to limit the Companies' flexibility are contrary to the plain terms of the Securitization Statute, and most importantly, are arguments put forth by the Public Staff solely to support their unprecedented and extraordinary proposal for joint decision-making authority on a post-Financing Order bond team. Such arguments must be rejected, and the Companies' customers' interests put before the Public Staff's.

CONCLUSION

For the reasons set forth herein, Duke Energy Carolinas, LLC and Duke Energy Progress, LLC respectfully request that the Commission grant it the relief it seeks herein; that its proposed Financing Orders filed simultaneously with this Brief be approved; that its proposed IAL process be approved or, if the Commission so desires, its proposed structure and activities of the Bond Team be approved; that the Commission reject the Public Staff's request for joint decision-making authority; and that the Commission grant the Companies the necessary flexibility required to achieve the Statutory Cost Objectives.

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DEC/DEP
Brief Exhibit 1

Docket No. E-2, Sub 1262
Docket No. E-7, Sub 1243

Request for Quotations

Consultant to the Public Staff on Electric Utility Storm Cost Securitization

March, 2020

Introduction

The Public Staff – N.C. Utilities Commission is a state agency that represents customer interests in proceedings before the North Carolina Utilities Commission. The Public Staff is independent of the Commission.

The Public Staff may, with approval, hire independent contractors to provide subject matter expertise, pursuant to N.C. General Statute 62-15(h):

> The executive director is authorized to employ, subject to approval by the State Budget Director, expert witnesses and such other professional expertise as the executive director may deem necessary from time to time to assist the public staff in its participation in Commission proceedings, and the compensation and expenses therefor shall be paid by the utility or utilities participating in said proceedings. Such compensation and expenses shall be treated by the Commission, for rate-making purposes, in a manner generally consistent with its treatment of similar expenditures incurred by utilities in the presentation of their cases before the Commission. An accounting of such compensation and expenses shall be reported annually to the Joint Legislative Commission on Governmental Operations and to the Speaker of the House of Representatives and the President Pro Tempore of the Senate.

The Public Staff seeks a consultant to assist the Public Staff with separate petitions by Duke Energy Carolinas, LLC (DEC), and Duke Energy Progress, LLC (DEP), for storm cost securitization, and for Commission rulemaking for storm cost securitization (Securitization Consultant).

Background

During the 2019 Session, the North Carolina General Assembly enacted N.C. Gen. Stat. § 62-172 in Senate Bill 559 (SB 559), entitled Financing of Certain Storm Recovery Costs. This bill was enacted effective November 6, 2019, and is included in this RFQ as Attachment A. Section (b)(1)a. of this bill provides that a public utility may petition the

North Carolina Utilities Commission for a financing order to issue bonds for storm recovery activities.

Prior to enactment of SB 559, DEC filed a general rate case on September 30, 2019, in Docket No. E-7, Sub 1214, which includes a request for recovery of storm costs on page 11, lines 2 through 7 of the direct testimony of the President of DEC, Stephen DeMay. Mr. DeMay described DEC's intent to evaluate securitization of the storm costs presented in the general rate case if the pending storm securitization legislation became law, which occurred subsequently. The DEC evidentiary hearing is scheduled to commence on March 23, 2020. The Commission Order is expected to be issued in July 2020.

Similarly, prior to enactment of SB 559, DEP filed a general rate case on October 30, 2019, in Docket No. E-2, Sub 1219, which includes a request for recovery of storm costs. On page 11, lines 10 through 15 of the direct testimony of DEP President Stephen DeMay. Mr. DeMay described DEP's intent to evaluate securitization of the storm costs presented in the general rate case if the pending storm securitization legislation became law. The DEP evidentiary hearing is scheduled to commence on May 4, 2020. The Commission Order is expected to be issued in August 2020.

This RFP is issued in anticipation of a future filing of petitions to securitize storm costs by DEC and DEP later this year, although the timeframe is uncertain. Please note that the decision to file such a petition is solely within the discretion of the utility, thus it is possible DEC, and DEP may not file a petition. The extent of the work will be dependent upon the filing of a securitization petition.

Scope of Work

The securitization consultant will review and analyze the storm cost securitization petitions of both DEC and DEP, pursuant to N.C. Gen. Stat. § 62-172, and present testimony on the Public Staff's position. The securitization consultant also will support the Public Staff's oversight of the negotiation and issuance of any storm recovery bonds.

The securitization petitions and rulemaking will require more resources and expertise than the Public Staff has available in-house, considering current workload. The Public Staff seeks to hire a consultant with the appropriate expertise and resources to conduct such analysis and provide advice. Ideally, the Public Staff would like to have a contract in place with the consultant ready to perform by May 18, 2020.

The scope of work will include:

1. Review the respective DEC and DEP storm cost securitization petition(s) and all testimony, exhibits, responses to data requests, deposition transcripts, and hearing transcripts.

2. Assist Public Staff in the preparation of discovery for the DEC and DEP petitions for a securitization financing order.

3. Review proposed financing costs, structuring of bond issuance, expected pricing of the bonds, and terms and conditions of the Electric Utility Storm Securitization Bonds and make recommendations for any suggested modifications to the proposed offering(s).

4. Analyze whether the financing proposed in the petitions would be reasonably expected to result in lower overall costs, or would avoid or significantly mitigate rate impacts to customers, compared to alternative methods of financing, and make recommendations for suggested modifications.

5. Assist in the preparation and review of any North Carolina Utilities Commission Financing Order(s).

6. Assist the Public Staff in evaluating all testimony, exhibits, filings, and reports in connection with a bond issuance, including but not limited to: Issuance Advice Letter, proposed servicing reports, and proposed true-up calculation procedures.

7. Participate fully, and in advance of, all plans and decisions concerning the structuring, pricing, and marketing of any Electric Utility Storm Securitization Bonds proposed to be issued by DEC and DEP.

8. Review documents associated with any final bond issuance, monitor the actual solicitation of bonds, and ensure that all reasonable and customary due diligence has been performed on the part of the DEC and DEP, their bond underwriters, and their financial advisors.

9. Provide updates on the status of any bond issuances and information on prevailing market conditions.

10. Assist the Public Staff in its review of information submitted by DEC and DEP on the actual costs of an Electric Utility Storm Securitization Bond issuance.

11. Produce fully supported and documented statements concerning the fairness or reasonableness of the timing of a sale, gross underwriting spread, and pricing of any DEC and DEP Electric Utility Storm Securitization Bond(s) and other reports and documents as needed to effectuate the purposes of this RFQ.

12. Assist and consult with the Public Staff, and testify before the Commission in a rule making proceeding on storm cost securitization as provided in N.C. Gen. Stat. § 62-172.

13. Attend and testify, if necessary at evidentiary hearings before the Commission.

14. Prepare and submit bi-weekly reports on the progress of the investigation or to-date results of the investigation as appropriate.

15. Be available for weekly conference calls with the Public Staff.

16. Participate with Public Staff personnel in interviews and conference calls with the utilities.

17. Communicate regularly with Public Staff personnel regarding project status and planning.

18. Submit a final report to the Public Staff with detailed analysis and recommendations.

Issues related to storm cost securitization debt structure will be governed by statutory and Commission procedural deadlines, so the consultant must complete its duties within the time frames specified by the Public Staff. Thus, the consultant must have available sufficient staff resources to review and provide analysis of voluminous information within the available time frame. Time is of the essence in completing reviews for the Public Staff.

The consultant will be called upon to provide written and oral testimony in a litigated proceeding before the Utilities Commission. Therefore, preference will be given for experience in testifying in legal proceedings.

The Public Staff cannot easily predict the consultant's time commitment for this project, so in addition to a not-to-exceed total contract dollar value based on an estimated one-year timeframe for the work, the Public Staff requests quotes including personnel hourly rates plus a schedule of any incidental charges (e.g., photocopying costs).

Consultant must bill at least monthly. Invoices must include a list of each consultant employee (or contractor if approved in advance by the Public Staff) who worked on the billed items, his/her hourly rates, the number of hours worked, the nature of the work, and the North Carolina Utilities Commission docket number of the case to which the time should be billed.

Consultant may be required to execute confidentiality agreements with the utilities or other parties whose documents are being reviewed by the Public Staff and consultant.

Consultant shall be an independent contractor. The Public Staff shall have the right to unlimited use of all work product prepared by the consultant pursuant to the contract executed under this RFQ.

Required Information in Quotation

All responses to this RFQ must be sent in written form, either electronically or hard copy. Responses should include:

- A statement of the consultant's qualifications to perform the requested work, with a focus on experience in electric utility storm cost securitization investigations.

- A list of personnel, to the extent known, who will provide the consulting and other utility securitization investigation services to the Public Staff, their hourly rates, and their credentials including academic background and work experience.

- A list of possible non-personnel costs and the associated rates where applicable. (E.g., any separate charges for communications, copying, or travel time.)

- At least two references who can speak to previous work done by the consultant, with a focus on electric utility expense securitization investigations or other utility securitization investigations to the extent possible.

- A description of similar prior projects performed by the consultant, including names of clients (if not confidential), the nature of the analysis performed, and the timeframe of that performance. If applicable, please provide weblinks to or copies of any testimony as a storm cost securitization expert or other type of expert testimony before a regulatory body, as well as weblinks to cases filed since 2016.

- A statement affirming that the consultant has not performed work for Duke Energy Corporation, Duke Energy Progress, LLC, Duke Energy Carolinas, LLC, or any of their affiliates. If the consultant has performed any work under contract for Duke Energy Corporation, Duke Energy Progress, LLC, Duke Energy Carolinas, LLC, or their affiliates in the past, or expects to perform work in the future, it must identify all such work, indicate whether any such work is ongoing, and explain why such work would not create a conflict of interest if the consultant is retained to work on behalf of the Public Staff.

- A statement of any past or present criminal charges (state or federal), and any government debarments from contracts, made against the consulting business or its current personnel.

- The consultant's federal employer identification number.

- The name, job title, mailing address, physical address, telephone number, and email address of the person who has the legal authority to issue the quotation on

behalf of the consultant and to legally bind the consultant in a contract for consulting services pursuant to this RFQ.

- A statement that the consultant accepts all the provisions, terms, and conditions of this RFQ.

- A statement of the not-to-exceed dollar amount for providing consulting services for the DEC and DEP storm securitization petitions and Commission rulemaking case pursuant to this RFQ for a one-year period beginning with commencement of the contract (anticipated to be May 18, 2020, but subject to change), and a statement of additional costs if completion of the investigation and presentation of testimony on the results of the investigation should take longer than one year.

Procedure

All inquiries about procedures and responses to this RFQ should be directed in writing to the Business Officer of the Public Staff: Carl Goolsby, email at carl.goolsby@psncuc.nc.gov or U.S. Mail at Carl Goolsby, Public Staff – NC Utilities Commission, 4326 Mail Service Center, Raleigh, NC 27699-4300.

Any questions about the RFQ scope of work may be sent to the Public Staff by email to William Grantmyre at william.grantmyre@psncuc.nc.gov until 5:00 pm (Eastern) on March 25, 2020. Responses will be in writing via email, and will be made available upon request.

Quotations in response to this RFQ must be received by the Public Staff no later than 5:00 p.m. (Eastern) on March 31, 2020.

All quotations will be kept confidential by the Public Staff until a contract for consulting services has been executed.

The Public Staff hopes to select a consultant from the quotation submissions in April, 2020; however, the process may take longer if we have follow-up questions on the quotation, and we must also obtain approval thereafter from the State Budget Director. Acceptance of a contract for consulting services pursuant to this RFQ is subject to both the Public Staff's discretionary judgment, and approval by the State Budget Director.

The contract for consulting services pursuant to this RFQ shall consist of this RFQ, the written quotation in response to the RFQ, and a signed acceptance letter from an authorized employee of the Public Staff to the consultant.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing *Post-Hearing Brief* as filed in Docket Nos. E-7, Sub 1243 and E-2, Sub 1262, were served via electronic delivery or mailed, first-class, postage prepaid, upon all parties of record.

This, the 18th day of February, 2021.

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