BEFORE THE NORTH CAROLINA UTILITIES COMMISSION
DOCKET NO. E-100, SUB 158

In the Matter of:	**)**	**JOINT RESPONSE TO**
Biennial Determination of Avoided Cost Rates for Electric Utility Purchases from Qualifying Facilities – 2018	**)**	**MOTION TO DISMISS APPEAL**

JOINT RESPONSE TO MOTION TO DISMISS APPEAL

NOW COME the North Carolina Sustainable Energy Association ("NCSEA") and the North Carolina Clean Energy Business Alliance ("NCCEBA") (collectively, "Appellants"), pursuant to Rule 37 of the North Carolina Rules of Appellate Procedure, and hereby respond to Duke Energy Carolinas, LLC and Duke Energy Progress, LLC's (together, "Duke") Motion to Dismiss Appeal ("Motion to Dismiss") filed in this docket on 10 September 2020. As more fully articulated below, Duke's Motion to Dismiss should be denied because Appellants' Notice of Appeal was timely filed.

I. BACKGROUND

On 15 April 2020, the North Carolina Utilities Commission ("Commission") entered its *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities* ("Avoided Cost Order") in this docket. Appellants filed a Joint Motion for an Extension of Time to File Notice of Appeal and Exceptions on 8 May 2020 ("Joint Motion for Extension of Time to File Notice of Appeal"). In the Joint Motion for Extension of Time to File Notice of Appeal, Appellants requested "an extension of an additional 30 days, up to and including June 15, 2020" for any party to file a notice of appeal and exceptions to the Order.[1] On 13 May 2020, the Commission entered an *Order Granting*

[1] *See* Joint Motion for Extension of Time to File Notice of Appeal, p. 2.

Motion for Extension of Time to File Notice of Appeal and Exceptions ("Extension Order"), granting the Appellants' request for an additional thirty days for parties to file notices of appeal and exceptions applicable to the Avoided Cost Order.

On 15 June 2020, Appellants filed a Joint Motion for Reconsideration and Clarification of the Avoided Cost Order pursuant to N.C. Gen. Stat. § 62-80 ("Motion for Reconsideration"). In the Motion for Reconsideration, the Appellants requested that the Commission "reconsider and clarify" certain aspects of the Avoided Cost Order, including the implementation of the Solar Integration Services Charge Technical Review Committee,[2] the Commission's determination of the seasonal allocation weighting,[3] how to treat renewing solar qualified facilities ("QFs") with regard to capacity payments,[4] and the Commission's determinations with regard to "material alterations" to existing QF contracts, including the Commission's decision to modify existing contract terms and conditions.[5]

With regard to modifying existing contracts, in the Motion for Reconsideration, Appellants pointed out that Duke takes the position that modifications to existing contracts are merely clarifying in nature and that such changes do not require Duke to request that the Commission formally modify the existing contractual language.[6] Appellants note that the Commission elected to interpret the existing purchase power agreement ("PPA") terms and conditions in a manner different than their strict contractual language.[7] In their request for reconsideration and clarification, the Appellants pointed out that the Order did not

[2] Joint Motion for Reconsideration, pp. 4-5.
[3] Joint Motion for Reconsideration, pp. 6-10.
[4] Joint Motion for Reconsideration, pp. 10-13.
[5] Joint Motion for Reconsideration, pp. 13-22.
[6] Joint Motion for Reconsideration, p. 14.
[7] *Id.*

recognize that these existing contracts are binding legal documents and must be interpreted within the four corners of the document and not thus allowed to be later modified in such meaningful ways.[8] The Appellants stated that "[t]he Commission specifically erred in failing to consider or discuss in the Order the actual language of the existing contracts and NCSEA and NCCEBA extensive briefing on that issue."[9]

On 21 July 2020, the Commission entered a detailed nineteen-page *Order Denying Motion for Reconsideration* ("Reconsideration Order"). In pages 10 through 19 of the Reconsideration Order, the Commission addressed the Appellants' request for reconsideration of the issues related to material alterations and provided wholly new legal analysis and Conclusions in its decision to deny the Motion for Reconsideration on this point. Specifically, the Commission analyzed, among other issues, "like-kind" definitions and, also, that the Commission will allow Duke the "sole discretion" to determine whether to disallow an alteration to a facility.[10] It should be noted that the remainder of the topics outlined in the Appellants' Motion for Reconsideration were also reviewed, analyzed, and determined in the Reconsideration Order.

The Reconsideration Order contains new and additional Discussion and Conclusions that are not part of the Avoided Cost Order. Specifically, in the Reconsideration Order, the Commission disagreed with the Appellants' assertion that the Avoided Cost Order improperly modifies the standard contracts, stating that "[t]he Commission, however, disagrees with NCSEA and NCCEBA; the April 15 Order does not improperly modify existing Standard Offer PPAs to include the provision on Material

[8] *Id.*
[9] *Id.*
[10] Reconsideration Order, pp. 17-19.

Alterations and limit a QF's ability to add battery storage to an existing facility."[11] The Commission then went through an extensive history of several past avoided cost proceedings to detail some standard contract evolution details before reaching a wholly new analysis. The Commission stated:

> A proper reading of each of these contracts provides that the terms and conditions of the contract, other than the specific rates, "are subject to change, revision, alteration or substitution, either in whole or in part, upon order of [the] Commission . . ., and any such change, revision, alteration or substitution shall immediately be made a part hereof as though fully written herein, and shall nullify any prior provision in conflict therewith." For DEC, the initial change was one approved in the rate tariff; for DEP and subsequent DEC tariffs, the change was in the Terms and Conditions. Here, the Commission approved an amendment to the Terms and Conditions to add the provision regarding Material Alterations. This amendment to the Terms and Conditions does not "interpret the existing PPA terms and conditions in a manner different than their strict contractual language" and does not violate a QF's right to sell energy and capacity under an existing PPA as the facility was described at the time the agreement was entered into and at the rates set forth in that agreement. Thus, not only are such changes consistent with the language of prior agreements, they were contemplated and specifically included in the contract language.[12]

Also, in the Reconsideration Order, the Commission went on to make new conclusions – that the Appellants dispute – that were not part of the underlying Avoided Cost Order. For example, the Avoided Cost Order was limited in its assessment of the modification of existing contracts, whereas the Reconsideration Order determined that a "QF cannot demand strict compliance with the agreement." That conclusion is a critical issue in the Appellants' appeal.

On 20 August 2020, within thirty days after entry of the Reconsideration Order, the Appellants filed their Joint Notice of Appeal and Exceptions ("Notice of Appeal"). The

[11] *Id*. at p. 13.
[12] *Id*. at 14.

Appellants appealed the Commission's determinations in regard to "material alterations" to existing QF contracts in the Avoided Cost Order, for which the Commission issued new and additional Discussion and Conclusions in the Reconsideration Order.

On 10 September 2020, Duke filed a Motion to Dismiss Appeal.

II. ARGUMENT

Duke erroneously contends that the Appellants failed to timely file their Notice of Appeal. Duke's argument should be rejected as contrary to statutory authority and caselaw, and also because Duke's position is completely unworkable from a procedural standpoint. In fact, Duke has failed to cite or acknowledge the controlling Supreme Court precedent, *N.C. Utils. Com. v. Norfolk S. R. Co.*, 224 N.C. 762, 765, 32 S.E.2d 346, 348 (1944),[13] and inappropriately relies upon dicta in *State ex rel. Utils. Comm'n v. MCI Telecomms. Corp*., 132 N.C. App. 625, 514 S.E.2d 276 (1999). Consistent with North Carolina law, the Appellants' Notice of Appeal is timely, as it was filed within thirty days of issuance of the Reconsideration Order.

Pursuant to N.C. Gen. Stat. § 62-90, an appellant has thirty days to file a notice of appeal following entry of a final order. The thirty-day appeal period may be extended for an additional thirty days. Here, the Appellants requested, and were granted, an additional thirty days – until 15 June 2020 – to file their Notice of Appeal.

Upon review of the Avoided Cost Order, the Appellants believed that certain aspects of the decision required reconsideration or, at least, clarification so that they could determine whether some issues might be resolved so that they would not need to be included in the appeal or the need for an appeal might be avoided altogether. In an effort

[13] Duke's failure to discuss the Supreme Court's *Norfolk* decision underscores the legal deficiencies of its position.

to try to avoid the need for an appeal, or at least reduce the number of issues on appeal, the Appellants filed their Motion for Reconsideration before the time for seeking appellate review of the Avoided Cost Order expired. However, the Commission's decision in the Reconsideration Order about material alterations to existing QF contracts did not resolve that issue or prevent the need for an appeal. In fact, the Commission's new and additional Discussion and Conclusions in the Reconsideration Order about material alterations to existing contracts made it clear that appeal of that issue is necessary.

a. The deadline for appealing the Avoided Cost Order is thirty days after entry of the Reconsideration Order.

Under long-standing North Carolina caselaw, the timely filing of a motion for reconsideration pursuant to N.C. Gen. Stat. § 62-80 tolls the time for a party to notice appeal until the Commission enters an order on the motion for reconsideration. *N.C. Utils. Com. v. Norfolk,* 224 N.C. 762, 765, 32 S.E.2d 346, 348. In *Norfolk*, the North Carolina Supreme Court reversed an order denying a motion to dismiss an appeal as untimely where the appellant filed its notice of appeal outside of the statutory appeal period. *Id*. Specifically, under the then-applicable N.C. Gen. Stat. § 62-20[14], the party seeking to appeal had ten days following entry of a final order to file a notice of appeal. The appellant in *Norfolk* failed to file notice of appeal or seek reconsideration of the Commission's order with the ten-day period. Instead, the appellant filed a petition for rehearing outside the ten-day appeal period. The Commission denied the petition for rehearing, and the appellant then filed notice of appeal of the underlying order. The opposing party moved to dismiss

[14] N.C. Gen. Stat. § 62-20 is not the current citation related to filing of a notice of appeal from an order from the North Carolina Utilities Commission. N.C. Gen. Stat. § 62-90 is the current applicable statute, which evolved from the statute relied upon in *Norfolk*. Also, the statutory time allotted to file a notice of appeal has increased from ten days to thirty days.

the appeal on the basis that notice of appeal was not filed within ten days of the underlying order. The Supreme Court held that when a petition for rehearing is filed before the time period for appeal has expired, the petition "tolls the running of the time and *appeal may be taken within the statutory time for appeal from the date of denial of the petition for rehearing*." *Id*. at 348 (emphasis added). In reaching this ruling, the *Norfolk* case cited *Morse v. United States,* 299 U.S. 417, 419, 57 S. Ct. 283, 285 (1937), and *United States v. Seminole Nation,* 270 U.S. 151, 152, 46 S. Ct. 241, 241 (1926), two U.S. Supreme Court cases that remain good law and that establish as a matter of federal common law that an appeals period runs from entry of an order ruling on a timely motion for rehearing. Stated succinctly, the law in North Carolina, which is consistent with federal law, is that if a petition for rehearing (the procedural ancestor to the motion for reconsideration under N.C. Gen. Stat. § 62-80) is filed with the Utilities Commission before the appeal period expires, then the thirty-day appeal period begins to run upon entry of the order denying the rehearing.

The holding in *Norfolk* is fully consistent with the North Carolina Rules of Appellate Procedure. Appellate Rule 3(c) provides for a specific method of calculating the thirty-day appeal period when certain post-judgment motions have been timely filed. Specifically, Appellate Rule 3(c)(3) provides:

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

This appellate rule reflects the "common sense notion that certain post-judgment motions should be resolved before appeal, as the disposition of those motions may alter the substantive contours of the appeal or even obviate the need for appeal altogether."[15]

While the Utilities Commission statute authorizes, and the Commission routinely decides, motions for reconsideration, the North Carolina Rules of Civil Procedure do not specifically provide for motions for reconsideration. However, Rules 50(b), 52(b), and 59 of the Rules of Civil Procedure provide for post-judgment relief (such as a Rule 59 Motion for New Trial or Motion for Amendment of Judgment) that is similar to the reconsideration relief at the Commission that can be filed after entry of a Commission's decision. Appellate Rule 3(c) provides that the thirty-day appeal period is "tolled" during the pendency of those types of motions. That means that the thirty-day appeal period *starts over* upon entry of an order disposing of the post-judgment motion. In other words, the "tolling" means that the full time for appeal (thirty days) commences to run and is computed from the entry of the order granting or denying the motion.[16] This is congruent with the *Norfolk* holding that allows a party the entire statutory appeal period following an order on a motion for reconsideration.

b. Duke's reliance of the MCI case is misplaced.

Duke's Motion to Dismiss relies entirely upon *State ex rel. Utils. Comm'n v. MCI Telecomms., Corp*., a Court of Appeals case in which the Court found timely an appeal that was filed within thirty days of entry of the underlying final order, excepting days between the filing of a petition for reconsideration and the order related thereto. The *MCI* holding is that days while a motion for reconsideration is pending, those days do not count toward

[15] Scherer & Leerberg, *North Carolina Appellate Practice and Procedure* § 5.04[4][a] (2019).
[16] *Id.*

the running of an appeal period. The *MCI* Court did not consider or need to decide, however, whether the appeal period begins anew once a reconsideration order is entered. Consequently, *MCI* did *not* rule that an appellant does not have the full thirty-day appeal period once a reconsideration order is entered – a ruling that would be inconsistent with *Norfolk* and incongruous with the U.S. Supreme Court precedent it relied upon. Duke's argument -- when counting days for an appeal period, the appealing party must *continue* counting following an order on a motion for reconsideration, rather than *starting over* -- relies on *MCI* for a holding that it did not make, while ignoring controlling North Carolina Supreme Court precedent and Appellate Rule 3. Its argument is unfounded and should be rejected.

c. Providing a thirty-day appeal period after a reconsideration order is necessary from a procedural standpoint.

Not allowing the full thirty-day appeal period after entry of a reconsideration order would be completely unworkable and in conflict with important policy objectives. In many instances, such as the Reconsideration Order in this matter, the Commission may provide additional analysis and conclusions in denying requests for reconsideration. Here, the Commission's Reconsideration Order was a detailed, nineteen-page Order that included new and additional Discussion and Conclusions not provided in the original Avoided Cost Order. As previously discussed, unlike the Reconsideration Order, the Avoided Cost Order does not hold that the Duke has the right to make changes to existing contracts without obtaining Commission approval. The issue that the Appellants have appealed is central to that topic; therefore, the Reconsideration Order expanded the breadth of the Appellants' appellate review of the Avoided Cost Order. With the addition of new Conclusions that are

not part of the Avoided Cost Order, the appeal period properly commences from entry of this decision.

Furthermore, Duke's position – that the appeal period is simply tolled for the number of days between the filing of the motion for reconsideration and the reconsideration order – is unworkable. Duke's position would mean that the Appellants would have had to file their Notice of Appeal and detailed exceptions the day after they received the Commission's nineteen-page Reconsideration Order, including its new explanation and justifications for the Commission's original decision.

As previously mentioned, the court's policy in allowing thirty days to file an appeal after disposition of certain post-judgment motions is to allow for the "alteration of the substantive contours of the appeal". If a party were required to file notice of appeal the day after entry of a long and detailed reconsideration order with new conclusions, the policy objective of allowing meaningful consideration of whether an appeal is necessary and what issues should be raised on appeal would be frustrated.

Finally, Duke's position is inconsistent with the plain language of N.C. Gen. Stat. § 62-80. The statute provides that "any order rescinding, altering or amending a prior order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for *original* orders or decisions." *Id.* (emphasis added). Here, the Commissions' Reconsideration Order did not leave its original judgment unaltered. Rather, it altered and amended its original decision by changing the scope and legal impact of its original decision. Under the plain terms of the statute, this new Reconsideration Order replaced the original order. As the Commission's new "final order," the Commission's

altered reconsideration order became the applicable "final order or decision" of the Commission, and appeal is within thirty days of its entry. N.C. Gen. Stat. § 62-90.

III. CONCLUSION

North Carolina law is clear that the Appellants had thirty days from the date of the Reconsideration Order to file their Notice of Appeal. The Appellants filed their Notice of Appeal within the statutory time period in accordance with the *Norfolk* decision. Duke's motion should therefore be denied.

Respectfully submitted this the 21st day of September, 2020.

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CERTIFICATE OF SERVICE

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

This the 21st day of September, 2020.

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