

**BEFORE THE NORTH CAROLINA UTILITIES COMMISSION  
DOCKET NO. M-100, SUB 145**

**In the Matter of:** )  
**Rulemaking to Establish Procedure for** ) **NCSEA’S COMMENTS**  
**Settlements and Stipulated Agreements** )

**NCSEA’S COMMENTS**

Pursuant to the *Order Requesting Comments Regarding Proposed Rule* issued by the North Carolina Utilities Commission (“Commission”) in the above-captioned docket on August 1, 2016, the North Carolina Sustainable Energy Association (“NCSEA”) submits the following comments.

NCSEA believes settlement of matters before the Commission should be encouraged. See N.C. Gen. Stat. § 62-69 (“the Commission ... shall encourage ... stipulations ... [and] may make informal disposition of any contested proceeding by stipulation, agreed settlement, consent order or default.”).<sup>1</sup> NCSEA further believes that

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<sup>1</sup> N.C. Gen. Stat. § 62-69 reads as follows:

Stipulations and agreements; prehearing conference.

(a) In all contested proceedings the Commission, by prehearing conferences and in such other manner as it may deem expedient and in the public interest, shall encourage the parties and their counsel to make and enter stipulations of record for the following purposes:

- (1) Eliminating the necessity of proof of all facts which may be admitted and the authenticity of documentary evidence,
- (2) Facilitating the use of exhibits, and
- (3) Clarifying the issues of fact and law.

The Commission may make informal disposition of any contested proceeding by stipulation, agreed settlement, consent order or default.

(b) Unless otherwise provided in the Commission's rules of practice and procedure, such prehearing conferences may be ordered by the Commission or requested by any party to a proceeding in substantially the same manner,

transparency affords a robust, well-informed public discourse about energy issues and promotes customer and public confidence, both of which advance the public interest. To this end, NCSEA has previously advocated for greater transparency on various issues.<sup>2</sup>

In order to both provide transparency in process and further encourage settlement discussions among all the parties,<sup>3</sup> the Commission can explore utilizing prehearing conferences more frequently; the Commission could even explore making prehearing conferences mandatory in certain complex contested proceedings, such as rate cases and mergers. To this end, Commission Rule R1-20 – which addresses prehearing conferences and appears to have been promulgated several decades ago – merits review. If the Commission is inclined to modify its rules, NCSEA recommends modernizing Commission Rule R1-20 as shown in Exhibits A and B.<sup>4</sup> As explained further in the comments included in Exhibit A, NCSEA’s proposed language updates Commission Rule R1-20 to include language derived from sources including the Rules Implementing

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and with substantially the same subsequent procedure, as provided by law for the conduct of pretrial hearings in the superior court.

Since N.C. Gen. Stat. § 62-69 was last amended in 1963, the General Assembly has enacted a number of sections in Article 5 of Chapter 7A of the General Statutes that strongly encourage or mandate pretrial alternative dispute resolution.

<sup>2</sup> See generally, *NCSEA’s Motion for Disclosure*, pp. 5-6, Commission Docket No. E-100, Sub 137 (February 5, 2013); *NCSEA’s Post-Hearing Brief*, pp. 4-5, Commission Docket No. E-22, Sub 503 (December 3, 2013); *NCSEA’s Post-Hearing Brief*, p. 3, Commission Docket No. E-2, Sub 1071 (October 15, 2015).

<sup>3</sup> In NC WARN’s Petition for Rulemaking, it asserts that some “parties do not have the opportunity to enter into the negotiations . . . .” *Petition for Rulemaking by NC WARN*, p. 2, Commission Docket No. M-100, Sub 145 (July 14, 2016).

<sup>4</sup> **Exhibit A** is a redlined version of Commission Rule R8-20 that incorporates NCSEA’s proposed changes as well as comments to provide context for the proposed changes. **Exhibit B** is a clean version of Commission Rule R8-20 that incorporates NCSEA’s proposed changes.

Statewide Mediated Settlement Conferences in Superior Court Civil Actions, the General Rules of Practice for the Superior and District Courts, the South Carolina statutes governing that state's Office of Regulatory Staff, and the now-repealed Rules of the North Carolina Supreme Court Implementing the Electric Supplier Territorial Dispute Mediation Program.

Respectfully submitted, this the 16<sup>th</sup> day of September, 2016.

/s/ Peter H. Ledford  
Peter H. Ledford  
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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 Comments 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 16<sup>th</sup> day of September, 2016.

/s/ Peter H. Ledford  
Peter H. Ledford  
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# Exhibit A

**Rule R1-20. PREHEARING CONFERENCES.**

(a) Purpose. — ~~Upon written notice by the Commission in any pending proceeding, or by the chairman of the Hearing Division or any Hearing Commissioner or Examiner to whom any such proceeding has been referred for hearing, †In any pending proceeding, the parties or their attorneys may be directed to appear before the Commission, or such Commissioner or Examiner, at a time and place designated in such notice, convene~~ for a prehearing conference for the purpose of formulating issues and consideration of:

- (1) The simplification of issues;
- (2) The necessity or desirability of amending the pleadings either for the purpose of clarification, amplification, or limitation;
- (3) The possibility of making admissions of certain averments of fact or stipulations concerning the use by either or both parties of matters of public record, such as annual reports and the like, to the end of avoiding the unnecessary introduction of proof;
- (4) The procedure at the hearing;
- (5) The limitation of the number of witnesses;
- (6) The propriety of prior mutual exchange between or among the parties of prepared testimony and exhibits; and
- (7) Such other matters as may aid in the simplification of the evidence and disposition of the proceeding.

This rule is designed to focus the parties' attention on stipulation and agreed settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those held pursuant to this rule.

(b) By Order. — ~~Upon written notice by the Commission in any pending proceeding, or by the chairman of the Hearing Division or any Hearing Commissioner or Examiner to whom any such proceeding has been referred for hearing, the parties or their attorneys may be ordered to convene, at a time and place designated in such notice, for a prehearing conference. Unless all parties stipulate in writing to the contrary and the Commission approves the stipulation, issuance of such a written notice shall be mandatory in (i) a general rate case initiated pursuant to G.S. 62-133 and (ii) any proceeding initiated pursuant to G.S. 62-111.~~

(c) By Request. — ~~Where the Commission does not issue a written notice, any party may file a written motion requesting that a conference be ordered. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections to the motion may be filed in writing within 10 days after the date of service of the motion. The motion shall be granted by the Commission unless the Commission deems a prehearing conference inexpedient or not in the public interest. Where the motion is granted, the requesting party shall work with non-movants to schedule a conference to be held not later than 21 days before the evidentiary hearing.~~

(d) Commission Attendance. — ~~Attendance at a conference by the Commission, the presiding Commissioner or Examiner to whom a proceeding has been referred for hearing, or Commission staff is discretionary.~~

**Commented [MDY1]:** Language derived from Rule 1 of the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions.

**Commented [MDY2]:** Essentially a cut and paste of language that had been found in old subsection (a).

**Commented [MDY3]:** Language derived from Rule 7 of the General Rules of Practice for the Superior and District Courts, which rule is referenced by N.C. Gen. Stat. § 62-69(b).

**Commented [MDY4]:** Language derived from Rule 1(C).(5) of the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions.

**Commented [MDY5]:** The mandatory issuance upon request reflects (a) N.C. Gen. Stat. 62-69(b)'s reference to superior court pretrial procedures and (b) N.C. Gen. Stat. § 7A-38.1's requirement that mediated settlement conferences be implemented in all judicial districts as soon as practicable.

**Commented [MDY6]:** N.C. Gen. Stat. § 62-69 uses the phrase "expedient and in the public interest."

**Commented [MDY7]:** Language derived from Rule 7 of the General Rules of Practice for the Superior and District Courts, which rule is referenced by N.C. Gen. Stat. § 62-69(b). Changed days from "seven" to "21" to provide for additional time to negotiate as well as additional time to potentially avoid response testimony and rebuttal testimony.

**Commented [MDY8]:** N.C. Gen. Stat. § 62-69(a) does not require the presence of the Commission, the presiding Commissioner, or a Hearing Examiner.

(e) Public Staff. – For purposes of the conference, the Public Staff shall serve as a facilitator or otherwise act directly or indirectly to resolve disputes and issues involving matters within the jurisdiction of the Commission. The Public Staff shall advise all participants of any circumstances bearing on possible bias, prejudice or partiality of the Public Staff.

~~(f)~~ Facts Disclosed Privileged. — All facts disclosed during a prehearing conference shall be privileged and, unless agreed upon by the parties involved and read into the stenographic record of the proceeding, shall not be used against the participating parties either before the Commission or elsewhere unless substantiated by other evidence.

**Commented [MDY9]:** In South Carolina, the Office of Regulatory Staff is charged with this duty (i.e. to serve as facilitator) in S.C. CODE ANN. § 58-4-50(A)(9). Using identical language in an NC rule seems appropriate.

**Commented [MDY10]:** Language derived from Rule 9(C) of the Rules of the North Carolina Supreme Court Implementing the Electric Supplier Territorial Dispute Mediation Program, which stood the Public Staff up as a hearing officer. These rules were promulgated pursuant to N.C. Gen. Stat. § 7A-38.3C which was repealed by Sess. Law 2007-491, § 4.

# Exhibit B

**Rule R1-20. PREHEARING CONFERENCES.**

(a) Purpose. — In any pending proceeding, the parties or their attorneys may be directed to convene for a prehearing conference for the purpose of formulating issues and consideration of:

- (1) The simplification of issues;
- (2) The necessity or desirability of amending the pleadings either for the purpose of clarification, amplification, or limitation;
- (3) The possibility of making admissions of certain averments of fact or stipulations concerning the use by either or both parties of matters of public record, such as annual reports and the like, to the end of avoiding the unnecessary introduction of proof;
- (4) The procedure at the hearing;
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- (7) Such other matters as may aid in the simplification of the evidence and disposition of the proceeding.

This rule is designed to focus the parties' attention on stipulation and agreed settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those held pursuant to this rule.

(b) By Order. — Upon written notice by the Commission in any pending proceeding, or by the chairman of the Hearing Division or any Hearing Commissioner or Examiner to whom any such proceeding has been referred for hearing, the parties or their attorneys may be ordered to convene, at a time and place designated in such notice, for a prehearing conference. Unless all parties stipulate in writing to the contrary and the Commission approves the stipulation, issuance of such a written notice shall be mandatory in (i) a general rate case initiated pursuant to G.S. 62-133 and (ii) any proceeding initiated pursuant to G.S. 62-111.

(c) By Request. — Where the Commission does not issue a written notice, any party may file a written motion requesting that a conference be ordered. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections to the motion may be filed in writing within 10 days after the date of service of the motion. The motion shall be granted by the Commission unless the Commission deems a prehearing conference inexpedient or not in the public interest. Where the motion is granted, the requesting party shall work with non-movants to schedule a conference to be held not later than 21 days before the evidentiary hearing.

(d) Commission Attendance. — Attendance at a conference by the Commission, the presiding Commissioner or Examiner to whom a proceeding has been referred for hearing, or Commission staff is discretionary.

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participants of any circumstances bearing on possible bias, prejudice or partiality of the Public Staff.

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