

1 PLACE: Held via Videoconference  
2 DATE: Wednesday, January 13, 2021  
3 TIME: 2:00 p.m. - 3:12 p.m.  
4 DOCKET NO.: E-2, Sub 1268  
5 E-7, Sub 1245  
6 BEFORE: Chair Charlotte A. Mitchell, Presiding  
7 Commissioner ToNola D. Brown-Bland  
8 Commissioner Lyons Gray  
9 Commissioner Daniel G. Clodfelter  
10 Commissioner Kimberly W. Duffley  
11 Commissioner Jeffrey A. Hughes  
12 Commissioner Floyd B. McKissick, Jr.

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IN THE MATTER OF:  
Oral Argument  
Protest Related to Informational Filing  
by Duke Energy Carolinas, LLC, and  
Duke Energy Progress, LLC

1 A P P E A R A N C E S:

2 FOR DUKE ENERGY CAROLINAS, LLC, and

3 DUKE ENERGY PROGRESS, LLC:

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1 P R O C E E D I N G S

2 CHAIR MITCHELL: Good afternoon. Let's come  
3 to order and go on the record, please. I'm Charlotte  
4 Mitchell, Chair of the Utilities Commission, and with  
5 me today by way of remote connection are the following  
6 Commissioners. When I say your name, please announce  
7 your presence. Commissioner ToNola Brown-Bland.

8 COMMISSIONER BROWN-BLAND: (Inaudible).

9 (Audio feedback)

10 CHAIR MITCHELL: Commissioner Gray.

11 COMMISSIONER GRAY: Here.

12 CHAIR MITCHELL: I'm picking up some  
13 feedback so make sure you're on mute if you're not  
14 speaking. Okay. Commissioner Clodfelter.

15 COMMISSIONER CLODFELTER: Yes. Good  
16 afternoon.

17 CHAIR MITCHELL: Commissioner Duffley.

18 COMMISSIONER DUFFLEY: Good afternoon.

19 CHAIR MITCHELL: Commissioner Hughes.

20 COMMISSIONER HUGHES: Good afternoon.

21 Hello.

22 CHAIR MITCHELL: And Commissioner McKissick.

23 COMMISSIONER MCKISSICK: Present.

24 CHAIR MITCHELL: The Commission now calls

NORTH CAROLINA UTILITIES COMMISSION

1 for Oral Argument, Docket Numbers E-2, Sub 1268 and  
2 E-7, Sub 1245, In the Matter of Protest Related to  
3 Informational Filing by Duke Energy Carolinas and Duke  
4 Energy Progress. I will refer to Duke Energy  
5 Carolinas and Duke Energy Progress as the Companies.

6 On December 11th, 2020, the Companies filed  
7 a Joint Informational Filing in their respective  
8 company folders regarding their plans for membership  
9 and participation in the proposed Southeast Energy  
10 Exchange Market noting that the Companies'  
11 participation in SEEM will allow improved efficiency  
12 in bilateral agreements for the purchase and sale of  
13 excess power. The Companies stated their intention to  
14 file a Platform Agreement with the Federal Energy  
15 Regulatory Commission, or the FERC, on December 28th,  
16 2020.

17 On December 17th, the Sierra Club, the  
18 Southern Alliance for Clean Energy, and the North  
19 Carolina Sustainable Energy Association, whom I'll  
20 refer to as the Protestants, filed a Joint Protest  
21 contending that the Companies should have filed their  
22 Informational Filing under the advance notice  
23 provision of the Amended Regulatory Conditions that  
24 were approved by the Commission on August 24th, 2018.

1 Upon filing of the Joint Protest, the Commission  
2 transferred the Informational Filing from the Company  
3 folders into the above-captioned dockets.

4 On December 21st, 2020, the Companies filed  
5 their Joint Response in opposition to the Protest.

6 On December 23rd, 2020, the Commission  
7 issued an Order that directed the Public Staff to file  
8 a response to the Joint Protest by January 6th, 2021;  
9 directed the Companies not to file the Platform  
10 Agreement with the FERC until further Order of the  
11 Commission; and scheduled remote oral argument for  
12 this date and time, at which the parties are to  
13 address the sole issue of whether the Commission's  
14 pre-approval of the Platform Agreement is required  
15 pursuant to either Statute or the Regulatory  
16 Conditions before the Platform Agreement may be filed  
17 at the FERC.

18 On January 6th, 2021, the Public Staff filed  
19 its Response, stating that it concludes the  
20 Commission's pre-approval of the Platform Agreement is  
21 not required pursuant to 62 -- North Carolina General  
22 Statute § 62-153 or the Companies' current Regulatory  
23 Conditions prior to the Agreements being filed at the  
24 FERC.

1           On January 6th, the Companies filed a motion  
2 requesting admission pro hac vice for Molly Suda to  
3 appear on their behalf in the proceeding, which the  
4 Commission granted by Order dated January 8th, 2021.

5           Also on January 8th, 2021, the Protestants  
6 filed a motion seeking leave to reply to the Public  
7 Staff's Response, which the Commission granted by  
8 Order on January 11th, 2021.

9           In compliance with the requirements of the  
10 State Government Ethics Act, I remind all members of  
11 the Commission of their responsibility to avoid  
12 conflicts of interest, and inquire whether any member  
13 of the Commission has a conflict of interest with  
14 respect to matters coming before us this afternoon?

15                           (No response)

16           The record will reflect that no conflicts  
17 have been identified, and we will move forward with  
18 the proceeding and I call on counsel now for the  
19 parties to announce their appearances, beginning with  
20 the Companies.

21           MS. FENTRESS: Good afternoon,  
22 Commissioners. My name is Kendrick Fentress. I'm  
23 appearing on behalf of the Companies. With me --  
24 appearing with me today is Associate General Counsel,

1 Molly Suda, and Deputy General Counsel, Danielle  
2 Bennett. Thank you.

3 CHAIR MITCHELL: Good afternoon,  
4 Ms. Fentress, Ms. Suda and Ms. Bennett.  
5 Public Staff.

6 MS. CULPEPPER: Good afternoon. This is  
7 Elizabeth Culpepper with the Public Staff appearing on  
8 behalf of the Using and Consuming Public. Appearing  
9 with me is Robert Josey.

10 CHAIR MITCHELL: Good afternoon,  
11 Ms. Culpepper and Mr. Josey.

12 Protestants.

13 MR. LEDFORD: Chair Mitchell, Members of the  
14 Commission, Peter Ledford appearing on behalf of  
15 NCSEA. With me is Ben Smith.

16 MS. HUTT: Chair Mitchell, Commissioners, my  
17 name is Maia Hutt and I'm with the Southern  
18 Environmental Law Center. I'm appearing on behalf of  
19 the Sierra Club and the Southern Alliance for Clean  
20 Energy. And with me is Gudrun Thompson, also from the  
21 Southern Environmental Law Center.

22 CHAIR MITCHELL: Good afternoon, Ms. Hutt  
23 and Ms. Thompson. Ms. Hutt, you are not on camera so  
24 you need to make sure that you solve your video issue.



1 MS. HUTT: Thank you.

2 CHAIR MITCHELL: Anyone else for the  
3 Protestants?

4 (No response)

5 We will proceed. Just a few words on the  
6 procedure we will employ today. Without objection  
7 from any of the parties, we will follow -- we will  
8 proceed in the following order: We'll hear first from  
9 the Protestants, then from the Public Staff, and then  
10 from Duke. I'd ask that you all keep your arguments  
11 to under 20 minutes. Please don't simply repeat what  
12 you've already written. We've read your comments. We  
13 will read them again. Take advantage of this  
14 opportunity to clear up any confusion or to provide  
15 any additional information or support for your  
16 position that will allow us to better understand the  
17 issues.

18 MS. CULPEPPER: Chair Mitchell. Elizabeth  
19 Culpepper. We had anticipated going last. We think  
20 that Duke can clear up a lot of the questions maybe  
21 about the Platform Agreement and different issues that  
22 can be better explained by them instead of us, so we  
23 would request to go last.

24 CHAIR MITCHELL: If there are no objections,

1 then we will hear first from Protestants, then Duke,  
2 then the Public Staff.

3 MS. CULPEPPER: Thank you.

4 CHAIR MITCHELL: And it is my assumption  
5 that we will hear from only one of the Protestants,  
6 that you all will be making a joint argument, and if I  
7 am incorrect in that assumption please let me know at  
8 this point and time.

9 MR. LEDFORD: Chair Mitchell, the Joint  
10 Protesting Parties have identified a number of issues.  
11 Ms. Hutt is going to address the first two issues and  
12 then I will address the second two, the last two  
13 issues.

14 CHAIR MITCHELL: Thank you for that,  
15 Mr. Ledford. I would ask that you all do your best to  
16 keep your total time under 20 minutes. Mr. Ledford or  
17 Ms. Hutt, you all may proceed.

18 MS. HUTT: Thank you, Chair Mitchell. Good  
19 afternoon. The Protesting Parties would like to  
20 reserve five minutes for rebuttal.

21 Before I get started, I'd like to very  
22 briefly explain why we filed this Protest and why we  
23 believe that it is important for this Commission to  
24 exercise its authority on this matter.

1           To be clear, the Protesting Parties are not  
2 opposed to wholesale market coordination, and we are  
3 not trying to derail the SEEM. We are here because,  
4 along with potential benefits, arrangements like the  
5 SEEM create a real risk of undue discrimination and  
6 anticompetitive behavior and, in light of this risk,  
7 it is critical that the Commission enforce safeguards  
8 that were put in place by State Law and by the  
9 Regulatory Conditions that ensure transparency and  
10 accountability.

11           We recognize that the Commission has  
12 convened this argument to address the sole issue of  
13 whether the Commission's pre-approval of the Platform  
14 Agreement is required before the Platform Agreement is  
15 filed with the FERC. The answer to that question is  
16 yes with one qualification. The Commission has the  
17 authority and the obligation under the Regulatory  
18 Condition to require that the Companies give full  
19 notice and obtain explicit approval before filing the  
20 executed Platform Agreement with the FERC.

21           To explain this conclusion we must answer  
22 several questions. The first is what is the SEEM  
23 Platform Agreement? The second, is it the kind of  
24 agreement that this Commission has jurisdiction over?

1 Third, what does -- what do the Regulatory Conditions  
2 require? And, fourth and finally, when in time does  
3 the Commission's jurisdiction lie? I will address the  
4 first two questions and Mr. Ledford will address the  
5 second two.

6           The type of jurisdiction that this  
7 Commission has depends on the nature of the SEEM  
8 entity. The Companies are holding out SEEM as a small  
9 tweak to the existing bilateral energy market. In  
10 fact, it is far more. The SEEM is a power pool. This  
11 is significant because power pools are subject to  
12 additional regulatory oversight due to the potential  
13 for undue discrimination and anticompetitive behavior  
14 in these kinds of arrangements. It is also  
15 significant because the FERC has not claimed exclusive  
16 jurisdiction over power pools. FERC Order 888-A  
17 defines a "loose power pool" as *any multilateral*  
18 *arrangement that explicitly or implicitly contains*  
19 *discounted and/or special transmission arrangements.*  
20 In an effort to eliminate undue discrimination, the  
21 FERC purposely defined pooling arrangements in the  
22 broadest terms possible.

23           And so the SEEM Platform Agreement meets  
24 both prongs of this definition set forth by the FERC.

1 First, the Platform Agreement is inarguably a  
2 multilateral agreement. What the Agreement does is it  
3 requires members to provide each other access to their  
4 transmission system for transactions that make use of  
5 the pooled facility.

6 The facilities are pooled and included in a  
7 network map that the SEEM algorithm then uses to  
8 allocate available transmission. Essentially, the  
9 SEEM algorithm is an automated pool operator. It  
10 matches transactions that use the pooled transmission,  
11 it makes reservations for the contract path on the  
12 pooled transmission, and it tags transactions.

13 The SEEM Platform Agreement meets the second  
14 prong of FERC's definition of a "loose power pool"  
15 because it contains discounted and/or special  
16 transmission arrangements. The Platform Agreement  
17 provides that the transmission rate and rates for  
18 ancillary services are provided at a discounted rate  
19 of zero dollars per megawatt hour. The Platform  
20 Agreement also contains special terms and conditions  
21 that apply to the pooled transmission. For example,  
22 the transmission will have the lowest curtailment  
23 priority, and energy exchanges are the only qualified  
24 use of the pooled transmission facility. And for

1 these reasons, the SEEM Platform Agreement meets both  
2 prongs with the FERC definition of a loose power pool  
3 and warrants the heightened regulatory oversight on  
4 the state and federal level.

5 And as I mentioned, the fact that the SEEM  
6 is a power pool is important because the FERC has not  
7 claimed exclusive jurisdiction over power pools or  
8 utilities' participation in power pools. And, so  
9 contrary to the Companies' assertion in their filing,  
10 this Commission is empowered to take action on the  
11 SEEM Platform Agreement.

12 FERC has historically been very careful not  
13 to interfere with state regulatory authority or  
14 requirements that apply to the -- to utilities' entry  
15 into and exit from arrangements like RTOs and power  
16 pool. For example, in its update to FERC Order 888,  
17 the FERC declined to assert exclusive jurisdiction and  
18 impose any particular market structure upon utilities.  
19 FERC has also stated that it is committed to  
20 federal-state comity on RTO and other issues, and it's  
21 open to states imposing reasonable conditions on  
22 utilities' participation and arrangements of this  
23 nature. As Mr. Ledford will explain, the Regulatory  
24 Conditions as they exist today are just that, they

1 contain reasonable requirements that when enforced do  
2 not run afoul of FERC's jurisdiction.

3 In this reading of FERC precedent, it's  
4 supported by the fact that this Commission and other  
5 state commissions have regularly been required to  
6 approve utilities' entry and exit from wholesale  
7 markets and transmission arrangements. For example,  
8 in 2004, Dominion applied to this Commission to get  
9 permission to participate in PJM. In 2011, DEC and  
10 PEC came to this Commission for approval to file their  
11 Joint Dispatch Agreement, which is a pooling  
12 agreement, a pooling arrangement with the FERC. And  
13 other state commissions have been doing the same thing  
14 for many years with no objection from the FERC. In  
15 fact, just a few years back, the FERC actually  
16 enforced the condition that the Kentucky Public  
17 Utility Commission placed on utilities' entries into  
18 an EIM. And so this history demonstrates that state  
19 commissions have previously regularly exercised  
20 jurisdiction over transmission arrangements like the  
21 SEEM Platform Agreement, and this Commission is  
22 empowered to do so here.

23 And finally, I'd like to say a few words  
24 about the Orangeburg case. Public Staff asserts that

1 the D.C. Circuit's decision in Orangeburg prohibits  
2 this Commission from exercising jurisdiction over the  
3 SEEM Platform Agreement before the Companies file the  
4 Executed Agreement with the FERC. This is incorrect  
5 for two reasons: First, the D.C. Circuit's decision  
6 in Orangeburg simply doesn't apply to this issue at  
7 hand. In Orangeburg, the court held that the FERC  
8 could not justify disparate wholesale rates for  
9 interstate customers by relying on a state  
10 commissions' authority. In other words, it was the  
11 Commission's authority to regulate wholesale rates for  
12 interstate electricity sales that was at issue. This  
13 is a very different issue from what we're discussing  
14 today. Neither the D.C. Circuit nor the FERC on  
15 remand addressed this Commission's authority to  
16 exercise jurisdiction over utilities' entry into a  
17 transmission arrangement such as an RTO or power pool.

18 And so given FERC's long history of not  
19 interfering with state regulatory authorities or  
20 requirements related to entry into such arrangement,  
21 and given the reality that state commissions regularly  
22 review applications to join RTOs and power pools, we  
23 should not lightly presume that the FERC has preempted  
24 this Commission's right to have a significant input on



1 decisions related to the Companies' entry into a power  
2 pool. And second, as you know, the Regulatory  
3 Conditions were revised post Orangeburg, so the  
4 conditions that remain and which our protest relies  
5 on, have already been determined by the Public Staff  
6 and by this Commission to be compliant with the  
7 Orangeburg case.

8 And I will now turn it over to Mr. Ledford  
9 who will discuss the Regulatory Conditions and the  
10 issue of where in time the Commission should exercise  
11 its jurisdiction. Thank you.

12 MR. LEDFORD: Thank you. Madam Chair,  
13 Members of the Commission, turning now to the specific  
14 Regulatory Conditions, the protesting parties have  
15 identified four that merit the Commission's attention:  
16 Sections 3.9(b), 3.9(c), 3.9(d), and 4.10.

17 First, Regulatory Condition 3.9(b) applies  
18 because SEEM involves DEC and DEP in joint  
19 coordination and operation of transmission. Simply  
20 put, it is clear that the Platform Agreement involves  
21 DEC and DEP and how -- and impacts how they operate  
22 their transmission. As an example, under current  
23 practice or under the SEEM, if DEP wishes to sell  
24 excess energy to TVA they would have to wheel

1 electricity across DEC's transmission system.

2           Currently, in essence, DEP picks up the  
3 phone and calls DEC to see if there is transmission  
4 capacity available. However, the Platform Agreement  
5 changes how DEC operates its transmission system. DEC  
6 instead will be complying with the directives of the  
7 SEEM rather than responding to a request from DEP  
8 regarding capacity for wheeling. The SEEM Platform  
9 Agreement clearly creates a coordinated market that  
10 automates and changes how the Companies operate their  
11 transmission capacity.

12           Second, Regulatory Condition 3.9(c) has not  
13 been satisfied, because DEC and DEP have failed to  
14 file their revised Open Access Transmission Tariffs, a  
15 pool-wide OATT, or the enabling agreements between  
16 SEEM members. Regulatory Condition 3.9(c) requires  
17 that DEC, DEP, Duke Energy and other affiliates shall  
18 file notice with the North Carolina Commission for  
19 informational purposes at least 15 days prior to  
20 filing with the FERC in the Agreement, tariff, or  
21 other document, or proposed amendment that has the  
22 potential to affect DEC or DEP's retail cost of  
23 service for its system power supply resources or a  
24 transmission system, or be interpreted as involving

1 DEC or DEP in joint planning, coordination, dispatch,  
2 or operation of generation, or transmission, or  
3 otherwise have an affect on DEC or DEP's rates or  
4 services.

5 Platform Agreement Section 3.4 states that  
6 *Participating Transmission Providers shall amend their*  
7 *Tariffs to include provision of Non-Firm Energy*  
8 *Exchange Transmission Service and, if required by Law,*  
9 *shall also obtain acceptance of such provisions from*  
10 *the FERC or other such Governmental Entities having*  
11 *jurisdiction over the Tariff.*

12 In addition, the Companies have not provided  
13 this Commission with the Southeast Energy Exchange  
14 Market algorithm. The Platform Agreement defines the  
15 "algorithm" as the *mathematical equations that*  
16 *determine the matching Bids and Offers resulting in*  
17 *Energy Exchanges.* However, the FERC has previously  
18 required markets to make their algorithms publicly  
19 available.

20 A decision involving the California ISO at  
21 81 FERC 61, 122, the FERC directed the ISO to make  
22 publicly available the algorithm that it used to  
23 manage congestion saying, quote, market participants  
24 need to understand how dispatch decisions are made.

1 Simply put, this Commission doesn't even have enough  
2 information to make a decision regarding the SEEM  
3 either -- because the Companies have failed to provide  
4 numerous documents required by the Regulatory  
5 Conditions.

6 Third, Regulatory Condition 3.9(d) applies  
7 because the SEEM is comparable to an RTO. First of  
8 all, as Ms. Hutt noted, the SEEM is a power pool, and  
9 you may recall she cited FERC Orders 888 and 888-A.  
10 Those FERC orders set out the various wholesale market  
11 reforms including both power pools and Regional  
12 Transmission Organizations or RTOs. Clearly, a power  
13 pool is a comparable entity under Regulatory Condition  
14 3.9(d). And, as Ms. Hutt discussed, the FERC has long  
15 recognized that it has concurrent jurisdictions --  
16 jurisdiction with state public utilities commissions  
17 over utility participation in organized markets such  
18 as RTOs and power pools. This Commission's concurrent  
19 jurisdiction is reflected in Regulatory Condition  
20 3.9(d).

21 Fourth and finally, Regulatory Condition  
22 4.10 makes clear that Duke shall take all necessary  
23 actions to prevent the generating facilities owned or  
24 controlled by DEC or DEP from being considered by the

1 FERC to be part of a power pool. As discussed in  
2 detail, SEEM is a power pool under the FERC's  
3 definition of that term.

4           Moreover, looking at transmission, during  
5 the Duke Progress merger the Commission was concerned  
6 that the Joint Dispatch Agreement would alter DEC and  
7 DEP's transmission rights and obligations. This is  
8 reflected in Section 5.2(g) of the JDA which says that  
9 *nothing in this Agreement is intended to alter the*  
10 *parties' contractual or regulatory obligations*  
11 *including, without limitation, the following, DEC and*  
12 *PEC's respective transmission rights and obligations*  
13 *including rights and obligations under any*  
14 *transmission service agreements or transmission*  
15 *tariffs and their respective obligations to provide*  
16 *transmission services.*

17           The Platform Agreement alters the parties'  
18 obligations under their transmission tariffs. DEC and  
19 DEP admit that they will have to amend their tariffs  
20 to add the SEEM service and make the SEEM work. This  
21 is not a violation of the Joint Dispatch Agreement,  
22 but it is something that the Utilities Commission was  
23 concerned about when evaluating the JDA during the  
24 merger.

1           The Platform Agreement changes the  
2 Companies' respective obligations to provide  
3 transmission services by creating a pooling agreement  
4 in which companies no longer control all of the  
5 transmission service provided by -- provided on their  
6 system determining algorithm, and transmission  
7 reservations will be done by the algorithm.

8           And with regard to generation, under Section  
9 4.1(b) of the JDA, DEC shall act as the Joint  
10 Dispatcher and shall have responsibilities for new  
11 short-term power purchases to serve the parties native  
12 loads. There's an open question as to whether DEC  
13 will be the participant in SEEM where Duke Energy  
14 Progress sells and purchases through the SEEM  
15 Platform. How would the JDA overlay on the SEEM? It  
16 could certainly increase opacity in what is already a  
17 non-transparent structure. And the question remains  
18 whether the JDA will need to be amended so that DEP  
19 can make its own sales and purchases through the SEEM.

20           The final question in the Commission's  
21 analysis regards when in time the Commission's  
22 jurisdiction lies. Specifically, does this Commission  
23 have jurisdiction before Duke files at the FERC or  
24 after Duke files at the FERC? The answer to this

1 question is not a legal one but a factual one. The  
2 timing of this Commission's jurisdiction hinges on the  
3 timing of Duke's execution of the Platform Agreement.  
4 The Regulatory Conditions made clear that Duke cannot  
5 join SEEM without this Commission's approval.  
6 Condition 3.9(b) says absent explicit approval.  
7 Condition 3.9(d) says contingent upon state regulatory  
8 approval. So the issue of when Duke plans to execute  
9 the Platform Agreement impacts this Commission's  
10 jurisdiction. If Duke plans to execute the Platform  
11 Agreement prior to filing at the FERC, then the  
12 Commission's jurisdiction lies prior to the FERC  
13 filing. If Duke plans to execute the Platform  
14 Agreement after SEEM has been approved by the FERC,  
15 then the Commission's jurisdiction lies after the FERC  
16 filing.

17           The Protesting Parties cannot actual --  
18 answer this factual question. Duke has gone to great  
19 lengths to obfuscate when it plans to sign the  
20 Platform Agreement. The best insight is the statement  
21 in Duke's Joint Response in opposition to protest  
22 where they state that nothing in the complaint  
23 authorizes the Commission to grant the requested  
24 relief of prohibiting the Companies from entering into

1 the Platform Agreement and filing it at the FERC.

2 In terms of relief, first we request that  
3 the Commission exercise its authority under Regulatory  
4 Conditions 3.9(b), (c) and (d) and 4.10 to prevent the  
5 Companies from entering into the SEEM Platform  
6 Agreement without explicit approval from the  
7 Commission; second, we request that the Commission  
8 direct the Companies to request and receive permission  
9 from this Commission to execute the Platform  
10 Agreement; third, if the Companies plan to execute the  
11 SEEM Platform Agreement prior to it being filed with  
12 FERC, we request that the Commission require the  
13 Companies to file the necessary required information:  
14 Revised OATTs, a pool-wide OATT, and the enabling  
15 agreements between DEC, DEP and other SEEM  
16 participants.

17 Finally, if the Commission concludes that it  
18 does not have jurisdiction over whether the Companies  
19 may enter into the SEEM Platform Agreement, we ask  
20 that the Commission request that the Companies hold  
21 off on entering into the Platform Agreement until the  
22 Commission has had an opportunity to consider the  
23 impact of SEEM on ratepayers. Thank you.

24 CHAIR MITCHELL: Thank you, Mr. Ledford and



1 Ms. Hutt.

2 Ms. Fentress, you all are up.

3 MS. FENTRESS: Thank you, Chair Mitchell,  
4 and good afternoon again. The issue before this  
5 Commission today is whether its Regulatory Conditions  
6 and General Statute § 62-153 require this Commission  
7 to approve the Agreement prior to DEC and DEP filing  
8 it at the FERC. The Commission has set forth a  
9 procedure that clearly lays out the steps whenever the  
10 Companies have to make a filing at FERC, and General  
11 Statute § 62-153 sets out the procedure whenever the  
12 Companies are involved in an affiliate contract.  
13 Whether you agree with the Companies or not that this  
14 is an affiliate contract, the Companies have followed  
15 the Commission's own procedure under the Regulatory  
16 Conditions and have followed the General Assembly's  
17 own procedure under General Statute § 62-153, neither  
18 of which require or provide this Commission -- I'm  
19 sorry -- require this Commission to preapprove the  
20 Agreement prior to filing it at the FERC.

21 Because the Protestants have made -- have  
22 argued that this is a pooling agreement, I'm going to  
23 ask Ms. Suda to address that fundamental error in  
24 their argument. This is not a pooling agreement.

1 MS. SUDA: Thank you, Kendrick. And good  
2 afternoon, Commissioners. I'm Molly Suda, Associate  
3 General Counsel, on behalf of Duke Energy Carolinas  
4 and Duke Energy Progress. As Kendrick mentioned there  
5 is a fundamental error that the Protestants have made  
6 an argument that this is not a power pool arrangement.  
7 There is a broad definition that FERC has for a power  
8 pool arrangement. The key to that is some sort of  
9 joint operation, joint dispatch, joint planning; none  
10 of which is happening under the SEEM arrangement.

11 Ms. Hutt mentioned a SEEM entity. There is  
12 no SEEM entity. There is no separate legal SEEM  
13 entity. This is a multilateral arrangement or  
14 multilateral -- multi-party agreement setting up how  
15 this group of companies will build, develop and  
16 operate a platform that they can trade over. It does  
17 not allow for joint dispatch, joint planning, a joint  
18 commitment; there is no pooling of any type of  
19 generation resources, no pooling of transmission  
20 resources. And I believe there was an indication that  
21 there is some kind of directive given by SEEM to the  
22 transmission providers, that is also incorrect. So I  
23 think I would just like to take a step back and give  
24 you a more high level overview of how SEEM will

1 operate.

2           So, first of all, the Platform Agreement  
3 that is before you, it is a framework document that is  
4 addressing how again these parties will build, develop  
5 and operate the system. It dictates their roles and  
6 responsibilities in how they will make decisions about  
7 this platform. It does not -- and in doing so it  
8 outlines the platform that they intend to build in the  
9 market rules.

10           Those market rules do explain how the  
11 matching process will occur, how the platform will  
12 connect buyers and sellers in a more efficient way  
13 than happens today in the traditional market, and it  
14 also explains how transmission providers, of which  
15 Duke Energy Carolinas and Duke Energy Progress are  
16 one, will communicate said software platform their  
17 available transmission capacity. Upon the software  
18 making matches based on available transmission  
19 capacity, E-Tags will be generated and those E-Tags  
20 are ultimately what transmission providers will use to  
21 approve transactions. So no control is transferred in  
22 this. No other roles or responsibilities related to  
23 Duke Energy Carolinas or Duke Energy Progress'  
24 operations are transferred. That is actually a

1 fundamental component of what the Southeast EEM Market  
2 design is based on. The entities in the southeast  
3 came together around a principle that they would not  
4 be transferring any control of their generation or  
5 transmission resources. So this fundamentally  
6 undermines the Protestants argument that this is a  
7 power pool.

8           And -- so, with that, I would just like to  
9 turn it back with -- to Kendrick for addressing some  
10 of the Regulatory Conditions.

11           MS. FENTRESS: Thank you, Molly. I would  
12 like to address a couple of points right off the bat  
13 that the Protestants made that are also incorrect.

14           First of all, they have argued about the  
15 Orangeburg case and have indicated that the Orangeburg  
16 case does not stand for the proposition that the  
17 Commission does not have authority to approve this  
18 agreement. And I'd like to talk a little bit about  
19 Orangeburg. But first I would like to say that it is  
20 not the Companies' argument that Orangeburg controls  
21 the procedure that the Companies followed, it is the  
22 Companies argument that the Commission's own Order,  
23 the Order Amending the Regulatory Conditions controls  
24 the procedure that the Companies followed.

1           The Orangeburg decision was a decision that  
2 was -- the procedural history is rather complicated  
3 but I'll just give a brief summary. Orangeburg was a  
4 South Carolina municipality. They wanted to enter  
5 into an agreement, a wholesale sales agreement with  
6 DEC. DEC was required because of advanced notice  
7 provisions. And they also came in under a petition  
8 for declaratory judgment to give notice to the  
9 Commission that DEC did not intend to treat  
10 Orangeburg -- or did intend to treat Orangeburg as a  
11 native load customer. The North Carolina Commission  
12 took that advance notice provision to come to the  
13 decision that it disagreed with the treatment that DEC  
14 and DEP wanted to give this -- I'm sorry, that DEC  
15 wanted to give this wholesale customer, and it did not  
16 recognize that native load status. Instead, it  
17 indicated to the Company that it would set DEC's rates  
18 as if DEC was receiving the higher of incremental cost  
19 instead of system average and, therefore, because this  
20 was disadvantageous to DEC and to Orangeburg, the  
21 agreement did not go forward.

22           To move forward to the merger between Duke  
23 and Progress, Orangeburg intervened and had objections  
24 about the JDA. The objections included the regulatory

1 regime that is set out in Section 3 of the North  
2 Carolina Regulatory Requirements. And if the  
3 Commission -- I would direct the Commission's  
4 attention to Appendix A which has the redline --  
5 compare the old Regulatory Conditions with the new  
6 Regulatory Conditions. We are talking about the old  
7 Regulatory Conditions. Orangeburg had objections  
8 about those Regulatory Conditions and they ultimately  
9 appealed it to the D.C. Circuit. The D.C. Circuit,  
10 among other things, indicated that it was troubled by  
11 the FERC's decision to acquiesce to suggest that the  
12 North Carolina Commission had the authority to  
13 regulate in any way interstate wholesale sales which  
14 plainly intrudes upon FERC's authority. The D.C.  
15 Circuit remanded the case back to the FERC.

16           The FERC then opened up briefing on whether  
17 the North Carolina Commission's Regulatory Conditions  
18 impermissibly interfered with the Commission's  
19 jurisdiction over wholesale ratemaking. The FERC did  
20 not enumerate certain conditions or pick and choose  
21 which conditions it was going to look at, it just said  
22 the Regulatory Conditions. Admittedly, it did look at  
23 the Regulatory Conditions specifically dealing with  
24 wholesale customers but it appeared to be concerned

1 with the gatekeeping Regulatory Conditions, and  
2 primary among the gatekeeping Regulatory Conditions  
3 was this advance notice procedure.

4 I would also note that unnoted by the  
5 Protestants that the FERC at this time also rejected  
6 another in this case an affiliate agreement that  
7 involved sales between DEC and DEP filed at the FERC,  
8 the As-Available Capacity Sales Agreement. In that  
9 affiliate agreement DEC and DEP were selling  
10 short-term capacity to each other potentially, if the  
11 circumstances arose where they could do that, in a way  
12 that would benefit ratepayers. The Companies  
13 submitted the Agreement. The FERC acknowledged the  
14 benefits of the Agreement but then rejected it,  
15 because of concerns that the North Carolina Regulatory  
16 Conditions, some of which had been included in the  
17 body of the agreement impermissibly impinged on their  
18 authority.

19 At that point the Companies and the Public  
20 Staff, concerned that the FERC may order a complete  
21 preemption of Section 3 of the Regulatory Conditions,  
22 came together and worked together to revise the  
23 existing Regulatory Conditions to avoid that more  
24 pervasive preemption of Commission authority.

1           And the Commission ultimately approved these  
2 Regulatory Conditions in its Order Granting the Motion  
3 to Amend Regulatory Conditions. And in that Order it  
4 stated unequivocally that the existing Regulatory  
5 Conditions as they are now are unlikely to survive  
6 continued FERC review and the gatekeeping provisions  
7 that require advanced Commission proceedings to  
8 approve, reject, modify the Commission's  
9 proceedings -- the Commission's filing at the FERC  
10 should be eliminated.

11           The Commission struck a balance between  
12 preserving its ability to exercise its authority under  
13 General Statute § 62 and avoiding violating federal  
14 law. That balance was accepted by the FERC itself.  
15 In Paragraph 15 of its Order on Remand, found at  
16 166 FERC 61, 112, the FERC indicated that the  
17 Commission's revision of its Regulatory Conditions  
18 mooted the concerns of Orangeburg and the FERC, and  
19 they dismissed the appeal.

20           Therefore, I would like to move on to  
21 specifically looking at Regulatory Condition 3.1(b).  
22 3.1(b) will show that the Companies completely  
23 complied with it. Again, the Companies are not --  
24 it's the Companies' position that these Regulatory



1 Conditions and the affiliate agreement statute don't  
2 apply but, in an abundance of transparency and  
3 openness, the Companies filed the Platform Agreement  
4 under 3.1(b) and filed it under General Statute  
5 § 62-153; a point completely ignored in the  
6 Protestants' protest.

7           If you compare the old 3.1(b) and the new  
8 3.1(b), it indicates that the Commission did away with  
9 the advance notice procedure that required a lengthy  
10 filing of numerous documents; it did away with the  
11 ability to intervene; it did away with the Public  
12 Staff's requirement to file comments; and it  
13 furthermore did away with the filing requirement that  
14 this be filed in a new docket. Instead, the  
15 Informational Filing gives the Commission the ability  
16 to have advance notice of a document that may be filed  
17 at FERC to allow them to file or protest or file  
18 comments at the FERC when the Agreement is filed at  
19 the FERC.

20           I'd also like to discuss the fact that the  
21 Protestants indicated that the Companies had somehow  
22 been unclear or less than transparent with respect to  
23 when we will sign the Agreement. Nothing is further  
24 from the truth. Regulatory Condition 3.1(b) requires

1 us to file proposed affiliate agreements that we  
2 intend to file at FERC 15 days before we file them.  
3 The term "proposed" means we file them unsigned at the  
4 Commission. Again, I do not necessarily concede that  
5 this Regulatory Condition applies, but the practice  
6 has been before this Commission that after that time  
7 has passed we file the -- the Companies would sign the  
8 Agreement and file it at the FERC.

9 I'd also like to address the RTO assertion  
10 with respect to Regulatory Conditions 4.10 and 3.9(d).  
11 As Ms. Suda explained, this is not an RTO. This is  
12 not a pooling agreement. This is not a sales  
13 agreement. The Commission has had concerns in the  
14 past about the Companies entering into or I suppose  
15 withdrawing membership from RTOs. But a review of the  
16 Commission's Regulatory Conditions and prior decisions  
17 on this point reveals that the salient point that the  
18 Commission has been concerned with, with respect to an  
19 RTO, is this transfer of ownership or operation or  
20 transfer somehow of the Commission's jurisdiction over  
21 ownership and operation of generation and  
22 transmission. This is not occurring under this  
23 agreement.

24 I would also say that if -- you can look no

1 further than the Commission's decision in Docket  
2 Number E-7, Sub 795, when it first came up with the  
3 Regulatory Conditions that had to do with joining an  
4 RTO and that was what it indicated its concern was and  
5 that RTO membership concern can be found on Page 23 of  
6 the Commission's Order Approving Merger Subject to  
7 Merger Conditions and Code of Conduct. There the  
8 Commission said it was concerned with RTO membership  
9 and any proposed transfer of control, operational  
10 responsibility or ownership. None of that is  
11 occurring here and, therefore, Regulatory Conditions  
12 3.9(c) and (d), and Regulatory Condition 4.10 do not  
13 apply.

14 I'd also like to address the Protestants'  
15 assertions about this agreement and add to what  
16 Ms. Suda had to say. First of all, this is not a  
17 wholesale sales agreement. This isn't a sales  
18 agreement at all. DEC and DEP do not, contrary to  
19 Mr. Ledford's assertion, have an enabling agreement  
20 between them. There is no enabling agreement between  
21 them to file at the Commission. They cannot transact  
22 under this wholesale platform agreement. Instead,  
23 this Platform Agreement will allow for the more rapid  
24 matching of buyers and sellers under the Agreement and

1 that will allow them to, pursuant to pre-existing  
2 bilateral agreements which are subject to the  
3 jurisdiction of FERC, buy and sell unused capacity.  
4 Also unmentioned by the Protestants is the fact that  
5 this more rapid matching of buyers and sellers of this  
6 unused transmission capacity will result in cost  
7 savings for North Carolina, for DEC's ratepayers, for  
8 DEP's ratepayers, for the ratepayers of NCEMC, for the  
9 ratepayers of the munis and for ratepayers across the  
10 southeast affecting this more efficient transfer of  
11 pre-existing bilateral agreements which allow for the  
12 sale of unused transmission capacity. I'm sorry. The  
13 button popped up.

14 Because this is not the pooling agreement  
15 that the Protestants claim that it is and because the  
16 Companies have followed, as the Public Staff has  
17 stated, the process put out by the Commission, the  
18 procedure established by the Commission in its Order  
19 on amending the Regulatory Conditions in 2018, the  
20 Companies believe that this Commission does not --  
21 those following those procedures do not provide for  
22 the Commission to have to preapprove this agreement  
23 prior to filing it at the FERC.

24 With that, the Companies would respectfully

1 request that, because they have followed these  
2 procedures, again in an effort to be transparent and  
3 an effort to be open, that in following these  
4 procedures that the Commission recognize that it does  
5 not need to approve this agreement before it files at  
6 FERC.

7           There was one more Regulatory Condition that  
8 I believe that the Protestants asserted and that is  
9 this joint planning, joint coordination and dispatch.  
10 Again, that is not occurring here. DEC and DEP with  
11 respect to joint planning, coordination and dispatch  
12 will be in no different position than they are today  
13 with respect to SEEM.

14           With that, unless Ms. Suda or Ms. Bennett  
15 have anything to add, I will conclude my argument.

16           MS. SUDA: Nothing to add.

17           CHAIR MITCHELL: Thank you, Ms. Fentress and  
18 Ms. Suda.

19           Ms. Culpepper, we will hear from you.

20           MS. CULPEPPER: Yes, ma'am. The Regulatory  
21 Conditions set forth commitments made by Duke Energy  
22 Corporation and its public utility subsidiaries - Duke  
23 Energy Carolinas, Duke Energy Progress and Piedmont  
24 Natural Gas - as a precondition of approval of the

1 Merger Application of Duke Energy and Piedmont.  
2 Section 3 of the Regulatory Conditions is intended to  
3 protect the jurisdiction of the Commission as a result  
4 of the merger including risks related to agreement and  
5 transactions among the Companies and any of their  
6 affiliates.

7 The Public Staff stands on the Response we  
8 filed but we are willing to answer any questions.  
9 Thank you.

10 CHAIR MITCHELL: Thank you, Ms. Culpepper.  
11 Ms. Hutt, you may proceed with your  
12 response.

13 MS. HUTT: Thank you. Mr. Ledford and I  
14 will split our five minutes. I'd like to start by  
15 responding to Ms. Suda's statements about the SEEM not  
16 being a power pool. I'd like to point out that  
17 Ms. Suda did not address the fact that FERC Order  
18 888-A very clearly defines what a loose power pool is.  
19 And a loose power pool is an explicit -- well, it's a  
20 multilateral arrangement that explicitly or implicitly  
21 contains discounted and/or special transmission  
22 arrangements. It doesn't matter what the SEEM looks  
23 like from far away, because when you get into this on  
24 a technical level it does exactly that. And I would

1 refer the Commission to Appendix B of the Southeast  
2 Energy Exchange Market rules, and there it lies out  
3 very clearly that this is about the pooling of  
4 transmission. And I'm happy to walk through any of  
5 that if that would be helpful. But another  
6 clarification I would like to make is that we are  
7 asserting that this -- that the SEEM would be pooling  
8 generation; it's pooling transmission and that's what  
9 makes it a power pool.

10 Then the second point I'd like to make is  
11 that regarding Orangeburg, looking just at the remand  
12 back to FERC of the Orangeburg case, it shows that the  
13 real concern that the D.C. Circuit had was about what  
14 they found to be the Commission's usurping of  
15 exclusive FERC jurisdiction over setting wholesale  
16 rates, not participation in a transmission pooling  
17 arrangement. Nothing of that nature. I'm happy to  
18 walk through that. But at Page 3 it makes very clear  
19 that this is about FERC's exclusive jurisdiction over  
20 wholesale rates. At Page 9 of that same decision,  
21 footnote 27, it says this is an issue about  
22 disparities in retail not wholesale rates. Again at  
23 Page 6, Paragraph 11 of that decision, this is about  
24 the Commission's jurisdiction over wholesale

1 ratemaking. And so the gatekeeping issue that the  
2 D.C. Circuit was concerned about in that instance was  
3 when state commissions get involved in wholesale  
4 ratemaking. And this is -- that couldn't be further  
5 from what we're dealing with here. I'll let  
6 Mr. Ledford add what he has to say.

7 MR. LEDFORD: Thank you, Ms. Hutt. Again, I  
8 want to point out that we're not arguing about advance  
9 notice of the filing but whether the Commission has  
10 jurisdiction over the execution of the SEEM. The  
11 amendments to Regulatory Conditions 3.9(b) and (c)  
12 that Ms. Fentress discussed changed the prefiling  
13 requirements, period. They did. But they did not  
14 change the Commission's jurisdiction over the  
15 execution of this type of agreement. So Ms. Fentress  
16 is completely correct that there's not clear procedure  
17 for how something like this should come before the  
18 Commission. But there is clear jurisdiction. This  
19 Commission has jurisdiction over the issue. FERC has  
20 decided over and over again that there is concurrent  
21 jurisdiction with State PUCs.

22 And I'd also point out that on remand the  
23 FERC just plain did not address the issues related to  
24 the Regulatory Conditions. As Ms. Fentress noted, it



1 decided that those issues were moot because the  
2 Commission had already amended the Regulatory  
3 Conditions. So we're not making our argument based on  
4 the Regulatory Conditions that existed pre-Orangeburg.

5 And, finally, with Ms. Suda's assertion that  
6 because there is no SEEM entity the Commission cannot  
7 have any sort of jurisdiction, that's entirely  
8 incorrect. If you look to Automated Power Exchange,  
9 Inc., v FERC, and in the D.C. Circuit, 204 F.3d 1144,  
10 the Commission found that an algorithm was sufficient  
11 to be an operator in that case of a power exchange,  
12 and so that same precedent would apply here.

13 Thank you, Chair Mitchell and Members of the  
14 Commission.

15 CHAIR MITCHELL: Thank you, Mr. Ledford and  
16 Ms. Hutt.

17 We will now take questions from  
18 Commissioners. I will check in with each of you to  
19 see if you have questions, beginning with Commissioner  
20 Brown-Bland.

21 COMMISSIONER BROWN-BLAND: (Inaudible).

22 CHAIR MITCHELL: Commissioner Brown-Bland,  
23 we are -- I'm having -- we didn't hear you. You have  
24 no questions?

1 COMMISSIONER BROWN-BLAND: (Inaudible).

2 CHAIR MITCHELL: We lost audio with  
3 Commissioner Brown-Bland.

4 COMMISSIONER BROWN-BLAND: (Indicating).

5 CHAIR MITCHELL: Okay. Commissioner  
6 Brown-Bland has no questions. All right.  
7 Commissioner Gray.

8 COMMISSIONER GRAY: No questions.

9 CHAIR MITCHELL: Thank you, sir.  
10 Commissioner Clodfelter.

11 COMMISSIONER CLODFELTER: Yes.

12 Ms. Fentress, I cannot see you on my screen.  
13 Are you there?

14 MS. FENTRESS: I am. I'm sorry. I'm not as  
15 quick with my fingers as I need to be.

16 COMMISSIONER CLODFELTER: You're fine. I've  
17 found you now. I wasn't sure exactly what I was  
18 hearing from the Protestors on one point so I'll ask  
19 you a fairly straight-forward question and then we'll  
20 see if we have anything else to explore.

21 Will the SEEM Platform Agreements require  
22 any amendments to or modification of procedures under  
23 the Joint Dispatch Agreement between Duke Carolinas  
24 and Duke Progress?

1 MS. FENTRESS: Commissioner Clodfelter, I am  
2 going to allow or I'm going to ask if Ms. Suda may be  
3 allowed to respond to that question.

4 COMMISSIONER CLODFELTER: That's fine.  
5 Thank you.

6 MS. FENTRESS: Thank you.

7 MS. SUDA: Sure. Thanks, Commissioner. No,  
8 there are no changes that are required to the JDA in  
9 order for Duke Energy Carolinas or Duke Energy  
10 Progress to participate. But the JDA and the  
11 As-Available Capacity Sales Agreement, which this  
12 Commission has previously reviewed and approved, those  
13 will remain in place as is. The SEEM is merely an  
14 extension of the bilateral market that DEC and DEP  
15 participate in today, and the JDA and As-Available  
16 Capacity Agreement are components of that SEE Market  
17 as well.

18 COMMISSIONER CLODFELTER: No amendments to  
19 the Agreement and no changes in operating protocols  
20 under the Agreement, correct?

21 MS. SUDA: Not that we're aware of. Right.

22 COMMISSIONER CLODFELTER: Thank you. That's  
23 all I have.

24 Thank you, Madam Chair.

1 CHAIR MITCHELL: Commissioner Duffley.

2 COMMISSIONER DUFFLEY: No questions.

3 CHAIR MITCHELL: Commissioner McKissick.

4 I'm sorry. Commissioner Hughes. Forgive me.

5 COMMISSIONER HUGHES: No questions.

6 CHAIR MITCHELL: Okay. And Commissioner  
7 McKissick.

8 COMMISSIONER MCKISSICK: No questions, Madam  
9 Chair.

10 CHAIR MITCHELL: All right. I have a few  
11 questions for the parties. Bear with me one minute  
12 here while I get organized. I am going to -- I will  
13 direct these to particular parties. I'm going to  
14 start with you, Ms. Culpepper. One question for you.

15 Focusing in here for a minute on this  
16 question of whether a contract is an affiliate  
17 contract as contemplated by 62-153 and the Regulatory  
18 Conditions. Does the Public Staff apply a different  
19 standard when it's dealing -- when it's adjudging  
20 whether a contract is an affiliate agreement or an  
21 affiliate contract when it's looking at 153 or the  
22 Regulatory Conditions?

23 MS. CULPEPPER: I'm not sure what you mean  
24 by "a different standard".

1           CHAIR MITCHELL: I mean, is an affiliate  
2 agreement or affiliate contract the same whether  
3 you're considering the Regulatory Conditions or the  
4 Statute? Is there -- go ahead.

5           MS. CULPEPPER: It would be the same. And  
6 there's a definition of affiliate contract in the  
7 Regulatory Conditions, but I would say we'd apply it  
8 uniformly.

9           CHAIR MITCHELL: Okay. That's my question.  
10 You apply that -- you apply the definition that's set  
11 forth in the Regulatory Conditions uniformly when  
12 you're dealing with the Statute or the Conditions?

13          MS. CULPEPPER: Yes.

14          CHAIR MITCHELL: Thank you. You answered my  
15 question more artfully than I asked it, so thank you.

16          Ms. Fentress, just as sort of a quick  
17 clarification for you, will the Companies be treated  
18 as a single member under the Platform Agreement or  
19 will they be treated as separate members?

20          MS. FENTRESS: Absolutely not a single  
21 member. The operating companies remain two individual  
22 members of the SEEM Platform Agreement. It is as if  
23 they are -- they are not transacting with each other.  
24 There are not enabling agreements between them. They

1 cannot transact with each other. They each bear their  
2 own separate pieces of the operating cost as required,  
3 but they are in no way integrated or one single  
4 participant.

5 CHAIR MITCHELL: Okay. Thank you,  
6 Ms. Fentress. Another question for you following up  
7 on the comments that you made during the argument. I  
8 just want to make sure I heard you correctly, I  
9 believe I heard you to say that the planning - that  
10 there will be no joint planning and coordination  
11 pursuant to the Companies' entry into this agreement  
12 or participation in this agreement - the planning and  
13 the coordination that goes on subsequent to entry into  
14 the Agreement will be the same as it is now. Did I  
15 hear you correctly?

16 MS. FENTRESS: That is correct, that nothing  
17 is going to change with respect to how we -- how the  
18 Companies plan or coordinate or dispatch generation or  
19 transmission as to what exists now. And as Ms. Suda  
20 indicated, there are no changes to the JDA, no changes  
21 to the As-Available Capacity Agreement; no changes.

22 And I might ask Ms. Bennett, I believe that  
23 there was some question about a transmission, about  
24 this being a pooling of transmission services. If

1 relevant to your question, I would ask Ms. Bennett to  
2 address that as well.

3 CHAIR MITCHELL: Ms. Bennett, I see you now.  
4 You have appeared on my screen. Do you have anything  
5 further to add or elucidate based on the conversation  
6 that Ms. Fentress and I have been having?

7 MS. BENNETT: Yes Commissioner. There was a  
8 comment made that we were pooling transmission and I  
9 think that's just a misunderstanding of how service is  
10 provided currently, transmission service, under the  
11 Open Access Transmission Tariff. Today and in the  
12 future, when someone wants to purchase transmission  
13 service in order to transfer energy that they are  
14 purchasing, they have a service agreement under the  
15 OATT, the FERC jurisdictional OATT for DEC and DEP,  
16 that's the -- for the Companies that's the Joint OATT.  
17 And when you go to purchase you have a service  
18 agreement and then you put in reservations when you  
19 want to reserve transmission service, and that is  
20 reserved using E-Tags. You heard Ms. Suda reference  
21 those earlier, that we use E-Tags. That process  
22 is all very public. We have our own OASIS page where  
23 your available transmission capacity is posted. And  
24 when someone wants to reserve transmission, if they

1 have a service agreement in place, if there is  
2 available transmission capacity, then a tag is created  
3 and the transmission provider can approve that.  
4 That's how it works today and that's the same way that  
5 it will work with SEEM.

6           So there seems to be this misunderstanding  
7 that we are somehow pooling our transmission. The  
8 Companies, both Duke Energy Carolinas and Duke Energy  
9 Progress, are still separate transmission providers.  
10 They have separate available transmission capacity  
11 available under their OATT. If someone wishes to  
12 utilize that transmission they still have to have  
13 a service agreement, they still have -- there still  
14 has to be available transmission capacity available,  
15 and then those tags are approved, if there is  
16 available transmission capacity. So that's not  
17 changing with SEEM. We are not pooling our  
18 transmission for use by others. We will continue to  
19 offer FERC jurisdictional transmission service. And  
20 part of the reason that the Platform Agreement is even  
21 being filed with FERC is because this new transmission  
22 service is being created that has no cost. And  
23 because of that new transmission service there will  
24 now be a new service offered under the OATT that



1 people can apply for. But we're not pooling our  
2 transmission service. Everyone remains kind of  
3 separate providers and operators.

4 I think Mr. Ledford referred to we would  
5 pick up the phone and call the other company if we  
6 wanted to wheel transmission across the system.  
7 That's not the way transmission service works. You  
8 have a service agreement for service and you put in a  
9 request through OASIS for that service. And that's  
10 how it works for affiliates and non-affiliates. That  
11 doesn't change. There is no pick -- and we're not  
12 handing that over to the SEEM Platform so that the  
13 Platform can now determine whether you can purchase  
14 service. What the Platform will do to expedite  
15 matters, the Platform will actually issue the E-Tag.  
16 If it goes out to the OASIS of the different  
17 transmission providers and checks to make sure there  
18 is available transmission capacity available then a  
19 tag is issued. So we're not pooling transmission at  
20 all.

21 CHAIR MITCHELL: Thank you, Ms. Bennett.

22 MS. FENTRESS: Commissioner Mitchell, may I  
23 just follow up very briefly on a question?

24 CHAIR MITCHELL: Yes.

1 MS. FENTRESS: You had asked if we were  
2 entering -- if we were -- I'm sorry, if we were  
3 becoming members of this regional collective as one  
4 entity. I would note that our Code of Conduct  
5 prohibits us from acting -- our Code of Conduct  
6 requires us rather to act independently of each other.  
7 And if we were to try to join up as one entity I would  
8 be back in front of this Commission with a request to  
9 waive the Code of Conduct with respect to that.  
10 That's all. Thank you.

11 CHAIR MITCHELL: Thank you, Ms. Fentress and  
12 Ms. Bennett.

13 Let's see, I'm looking through my questions  
14 for the Protestants. You all have answered some of  
15 them.

16 Mr. Ledford, Ms. Hutt, with respect to your  
17 reading of one -- 62-153, so North Carolina General  
18 Statute § 62-153, in your -- in the Joint Protest that  
19 was filed on the 17th, I'm looking at Paragraph 7, you  
20 all state that 62-153 requires utilities to obtain the  
21 Commission approval of contracts with their  
22 affiliates. What is the -- help me understand the  
23 basis for that position? And just to expound on our  
24 question here, doesn't the fact that 62-153(b)

1 provides a subset or a category of affiliate contracts  
2 for which Commission approval must be obtained  
3 necessarily imply that there are other affiliate  
4 contracts for which notice must be given but for which  
5 Commission approval isn't required? Either one of you  
6 all or both of you all can answer that one.

7 MR. LEDFORD: Chair Mitchell, I'll attempt  
8 to address that.

9 CHAIR MITCHELL: Okay.

10 MR. LEDFORD: In our view 62-153, similar to  
11 the Public Staff, is essentially implemented in the  
12 Regulatory Conditions, almost like a rule-making  
13 proceeding. Those are the rules to implement 62-153.  
14 So we see some greater detail in the Regulatory  
15 Conditions about how to implement 62-153. In  
16 particular, when it comes to affiliate contracts it  
17 may be in this case that DEC and DEP will never sell  
18 anything between each other; however, the fact that  
19 there's a third party to a contract that involves DEC  
20 and DEP does not render it to no longer be an  
21 affiliate contract. They are still signatories to the  
22 same document. In terms of whether the Subsection B  
23 changes anything, I don't believe that it does.

24 In this case there are as Duke has made very

1 clear that there's not any payment of fees or anything  
2 like that, so I think that it's still appropriate for  
3 the Commission to issue -- for the Commission to  
4 exercise its general jurisdiction that it has under  
5 the Regulatory Conditions regarding these other  
6 aspects. Even if it's outside the issue of an  
7 affiliate contract, there are still aspects of the  
8 Regulatory Conditions involving transmission pooling  
9 and the like.

10 CHAIR MITCHELL: I understand those points  
11 that you all have made today and I've heard those.  
12 But my question really is, pertains to 153 and  
13 specifically -- I mean, I read your protest to say 153  
14 requires Commission approval of affiliate agreements,  
15 affiliate contracts, and I just want to make sure I  
16 understand your interpretation, your reading of that  
17 correctly as 153(b) seems to require approval for only  
18 a certain subset of or of the category of affiliate  
19 agreements. And so I'm just hoping you could expound  
20 on, confirm my reading, or my understanding of your  
21 position or your client's position and then expound on  
22 that. And if you've already done so just -- you can  
23 say that.

24 MR. LEDFORD: No. I would also just --

1           CHAIR MITCHELL: And also I directed my  
2 follow up to you, Mr. Ledford; Ms. Hutt can also jump  
3 in, too, if she would like. I didn't mean to leave  
4 her out.

5           MR. LEDFORD: I will just make one point and  
6 then if Ms. Hutt has anything to add. In 53 -- 153(a)  
7 it distinctly says that *the Commission may disapprove,*  
8 *after a hearing, any such contract if it's found to be*  
9 *unjust and unreasonable.* I think we would welcome the  
10 opportunity to have an evidentiary hearing about  
11 whether the SEEM contract is just and reasonable but,  
12 in light of these current circumstances, we're here  
13 for oral arguments. I do think that that would be an  
14 appropriate step. And in the event that the  
15 Commission disagrees with our interpretation of  
16 62-153, there's a number of other Regulatory  
17 Conditions related to pooling of transmission  
18 resources and entering into wholesale markets that we  
19 believe are also appropriate.

20           CHAIR MITCHELL: Thank you, Mr. Ledford.  
21 Just one more follow up for you. So if no party  
22 challenges a contract under (a), 153(a), is it you  
23 all's position that it's incumbent on the Commission  
24 to take the issue up sua sponte?

1 MR. LEDFORD: I think it depends on how  
2 these contracts they've presented to the Commission.  
3 So the Commission cannot address anything that they  
4 don't have notice of. And as was made clear in the  
5 cover letter, Duke did not believe that this was an  
6 affiliate contract under 62-153. Whether that  
7 represents an administrative burden on the Commission  
8 I think is for the Commission to decide and recognize.

9 CHAIR MITCHELL: Well, I'm less concerned  
10 about administrative burden here and just more  
11 concerned about what the Statute says, doesn't say or  
12 requires of us.

13 Ms. Hutt, anything to add to Mr. Ledford's  
14 response?

15 MS. HUTT: I don't have anything to add.

16 CHAIR MITCHELL: Okay. Any additional  
17 questions from Commissioners? Giving y'all one last  
18 chance.

19 COMMISSIONER BROWN-BLAND: Can you hear me?

20 CHAIR MITCHELL: I can hear you.

21 COMMISSIONER BROWN-BLAND: All right.

22 CHAIR MITCHELL: Commissioner Brown-Bland,  
23 you may proceed.

24 COMMISSIONER BROWN-BLAND: Ms. Fentress, I

1 did have one question. Is it, in fact, the Companies'  
2 current position that the fact that the Companies  
3 aren't the only parties to the Platform Agreement  
4 means that there's not a transaction between or among  
5 affiliates?

6 MS. FENTRESS: That is not at all our  
7 position, Commissioner Brown-Bland. Our position is  
8 that it is not an affiliate agreement because the two  
9 affiliates are each individual members of a regional  
10 collective. They are not exchanging goods, services,  
11 employees, data, assets or liabilities. We have --  
12 the Companies have had agreements numerous times with  
13 other parties to them and have filed them as affiliate  
14 agreements. I will note one. The process I would say  
15 for filing affiliate agreements under General Statute  
16 § 62-153 is long established. The Commission is very  
17 familiar with it.

18 I noted some affiliate agreements that the  
19 Companies have filed in the past two years under  
20 62-153(a) that the Commission did not approve. That  
21 process goes all the way back a decade or so. And I  
22 will highlight an affiliate agreement that the  
23 Companies filed in 2009, it was a sales agreement by  
24 DEC. It was filing -- selling materials to its

1 midwest affiliates, a number of them, to aid with  
2 storm restoration. That was filed in Docket Number  
3 E-7, Sub 913. Because the Agreement was not for the  
4 provision of services, the Agreement was for the  
5 exchange of assets, it was filed under 62-153(a) and  
6 the Commission was not required to take any action.  
7 And we have also filed in the past two years -- one  
8 moment, please. I apologize. I have the Agreements.  
9 We have filed Dynamic Power Exchange Agreements that  
10 had -- sorry. Right here. Sorry about that. We have  
11 filed -- I'm sorry. We have filed Dynamic Power  
12 Exchange Agreements where DEC, DEP and another party  
13 were on it, but the other party was not an affiliate.  
14 It was -- I believe it was a city. And I apologize, I  
15 can get that site for you after the argument. It's  
16 just not where I thought it was going to be. But we  
17 have done that. We have filed agreements that had  
18 affiliates and other parties on it.

19 COMMISSIONER BROWN-BLAND: Okay.

20 MS. FENTRESS: In 62-153(a).

21 COMMISSIONER BROWN-BLAND: So I thank you  
22 for that, because I wanted to be sure that I had your  
23 position correct. I appreciate that.

24 No further questions.



1           CHAIR MITCHELL: I'll give Commissioners one  
2 last opportunity and if I hear nothing then we have  
3 come to the conclusion of the proceeding.

4           I appreciate everyone's time and preparation  
5 for today and responsiveness to the question posed in  
6 the Order.

7           With that, we are adjourned. Let's go off  
8 the record, please.

9           (The proceedings were adjourned)

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C E R T I F I C A T E

I, KIM T. MITCHELL, DO HEREBY CERTIFY that  
the Proceedings in the above-captioned matter were  
taken before me, that I did report in stenographic  
shorthand the Proceedings set forth herein, and the  
foregoing pages are a true and correct transcription  
to the best of my ability.

Kim T. Mitchell\_\_\_\_\_

Kim T. Mitchell  
Court Reporter