

**STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH**

DOCKET NO. E-2, SUB 1268  
DOCKET NO. E-7, SUB 1245

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of  
Protest Related to Informational Filing by ) PUBLIC STAFF  
Duke Energy Carolinas, LLC, and Duke ) RESPONSE  
Energy Progress, LLC )

NOW COMES THE PUBLIC STAFF – North Carolina Utilities Commission (Public Staff), by and through its Executive Director, Christopher J. Ayers, and respectfully submits its response in accordance with the Order Scheduling Oral Argument and Requiring Response by Public Staff issued in these dockets on December 23, 2020 (Order Scheduling Oral Argument).

1. On December 11, 2020, Duke Energy Progress, LLC (DEP), and Duke Energy Carolinas, LLC (DEC; together, the Companies), filed a Joint Informational Filing in DEP’s and DEC’s company folders (Informational Filing) regarding their plans to join and participate in the proposed Southeast Energy Exchange Market (SEEM). The proposed SEEM Agreement (Platform Agreement) was included in the Informational Filing.

2. On December 17, 2020, the Sierra Club, Southern Alliance for Clean Energy, and North Carolina Sustainable Energy Association (together, Protestants) filed a Joint Protest (Joint Protest) in which they contend that the Companies should have filed their Informational Filing under the advance notice provision set forth in the Commission’s Order Granting Motion to Amend

Regulatory Conditions issued August 24, 2018, in Docket Nos. E-2, Sub 1095A; E-7, Sub 1100A; and G-9, Sub 682A (the aforementioned order is hereinafter referred to as the “Order Amending Regulatory Conditions” and the amended regulatory conditions are hereinafter referred to as the “Amended Regulatory Conditions”).

3. On December 21, 2020, the Companies filed their Joint Response in Opposition to Protest.

4. On December 22, 2020, the following parties filed a joint letter outlining their views on the Informational Filing, SEEM and the Platform Agreement: the Advanced Energy Economy, Carolina Utility Customers Association, Ceres Business for Innovative Climate and Energy Policy, North Carolina Clean Energy Business Alliance, Renewable Energy Buyers Alliance, and Solar Energy Industries Association.

5. The Order Scheduling Oral Argument states that:

the Chair finds good cause to issue this order requiring response by the Public Staff and scheduling oral argument for the limited purposes of receiving additional information for the Commission’s consideration on the threshold issue raised by the Joint Protest, specifically whether the Commission’s preapproval of the Platform Agreement is required pursuant to either N.C.G.S. § 62-153 or the Regulatory Conditions<sup>1</sup> before the Platform Agreement is filed with the FERC [Federal Energy Regulatory Commission].

Order Scheduling Oral Argument, page 2.

6. In its Order Amending Regulatory Conditions, the Commission opined that revisions to the Regulatory Conditions approved by the Commission in its Order Approving Merger Subject to Regulatory Conditions and Code of Conduct

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<sup>1</sup> These conditions are referred to as the “Amended Regulatory Conditions” in this filing.

issued September 29, 2016, in Docket Nos. E-2, Sub 1095, E-7, Sub 1100, and G-9, Sub 682 (Merger Order), were warranted as a direct result of the D.C. Circuit's opinion in *Orangeburg v. FERC*, 862 F.3d 1071 (D.C. Cir. 2017) (*Orangeburg*) and the FERC's *Order Rejecting As-Available Capacity Sales Agreement*, 161 FERC ¶ 61,026 (2017) (As-Available Capacity Order). The Commission stated that revisions to the Regulatory Conditions should be narrowly tailored to achieve the overall goals of reducing potential violations of federal law and avoiding a more pervasive preemption of Commission authority. The Commission found:

this balance is best achieved by (1) eliminating the “gatekeeping” provisions that require advance Commission proceedings to approve, reject or modify the Companies’ filings at FERC, and (2) eliminating provisions that require the Companies to waive certain federal rights, including provisions prohibiting the Companies from taking any action or making any assertion that the NCUC’s actions are preempted by Federal Law or are otherwise not within the NCUC’s jurisdiction.

Order Amending Regulatory Conditions, page 11.

The Commission concluded that by eliminating such provisions from the Regulatory Conditions, the Commission would be resolving the issues and concerns presented by the D.C. Circuit in *Orangeburg* and FERC in the As-Available Capacity Order surrounding preferential treatment, violations of the Federal Power Act, preemption, and the Commerce Clause. As a result, the Commission found it appropriate to revise and amend the Regulatory Conditions approved in the Merger Order.

7. The following is a summary of the revisions to the Regulatory Conditions relevant to these dockets:

(a) The preamble to Section III of the Regulatory Conditions was revised to delete the language stating that it was intended to protect the Commission against the risk of federal preemption as a result of the merger, financing transactions involving DEC or DEP, participation in the wholesale market by DEC or DEP, and filings with federal regulatory agencies.

(b) Regulatory Condition 3.1(a) was revised to delete the language requiring formal advance notice to the Commission pursuant to Regulatory Condition 13.2 regarding affiliate agreements to be filed with FERC.

(c) Regulatory Condition 3.1(b), which required specific provisions in affiliate contracts, was deleted in its entirety.

(d) Regulatory Condition 3.1(c), which provided for procedures regarding preapproval of affiliate agreements required or intended to be filed with FERC, was deleted in its entirety.

(e) Regulatory Condition 3.1(d), which required certifications regarding filings at FERC and other federal regulatory agencies, was deleted in its entirety.

(f) Regulatory Condition 3.1(e), which provided that in the event FERC or any other federal regulatory agency required modification of a proposed affiliate contract to omit any of the provisions required by Regulatory Condition 3.1(b) as a condition of acceptance or approval by that agency, DEC or DEP would remain bound by those provisions for state regulatory purposes, was deleted in its entirety.

(g) A new regulatory condition was added as 3.1(b), which provides as follows:

In addition to the requirements of Regulatory Condition 3.1(a), for any contract requiring filing with FERC, DEC, DEP, or Piedmont

shall file, for informational purposes, a copy of a proposed Affiliate Contract, a contract with a proposed Affiliate, or an amendment to an existing Affiliate Contract with the Commission at least 15 days prior to filing with FERC.

(h) Regulatory Condition 3.8(c), which sets out additional provisions regarding wholesale contracts entered into by DEC or DEP as sellers, was revised to add an acknowledgement by DEC and DEP that the Commission retains full authority under Chapter 62 to ascertain whether such costs are used and useful in a future Commission retail proceeding in which cost recovery is at issue. The language regarding the Commission's full authority to disallow such costs and allocate, impute, or assign costs was deleted.

(i) Regulatory Conditions 3.8(d) and (e), which prohibited assertions in other forums, were deleted in their entirety.

(j) Regulatory Condition 3.9(b) was revised to delete language requiring no filing being made with FERC by or on behalf of DEC or DEP that (i) committed DEC or DEP to, or involved either of them in, joint planning, coordination, dispatch or operation of generation, transmission, or distribution facilities with each other or with one or more other affiliates, or (ii) otherwise altered DEC's or DEP's obligations with respect to the Regulatory Conditions, absent explicit approval of the Commission.

(k) Regulatory Condition 3.9(c) was revised to delete the requirement for DEC and DEP to file notice with the Commission at least 30 days prior to filing with FERC any agreement, tariff, or other document or any proposed amendments, modifications, or supplements to any such document that had the potential to (i) affect DEC's or DEP's retail cost of service for system power

supply resources or transmission system; (ii) reduce the Commission's jurisdiction with respect to transmission planning or any other aspect of the Commission's planning authority; (iii) be interpreted as involving DEC or DEP in joint planning, coordination, dispatch, or operation of generation or transmission facilities with one or more Affiliates; or (iv) otherwise have an Effect on DEC's or DEP's Rates or Service (as the term is defined by the Regulatory Conditions). Regulatory Condition 3.9(c) was further revised to delete the requirement that the provisions set forth in Regulatory Condition 13.2 applied to these notices. Language was added requiring DEC and DEP to file notice with the Commission for informational purposes at least 15 days prior to making such filings with FERC.

(l) Regulatory Condition 3.9(g) was revised to delete provisions prohibiting DEC and DEP from asserting that certain actions by the Commission were preempted by federal law and for DEC and DEP to bear the full risk of any preemptive effects of federal law.

(m) A new regulatory condition was added as 3.9(h) in which DEC and DEP are required to acknowledge the risk of any possible preemptive effects of federal law with respect to any contract, transaction, or commitment entered into or made or proposed to be entered into or made by DEC or DEP, or which may otherwise affect DEC's or DEP's operations, service, or rates, and shall take all actions as may be reasonably necessary and appropriate to hold North Carolina ratepayers harmless from rate increases, foregone opportunities for rate decreases, or any other adverse effects of such preemption.

(n) Regulatory Condition 13.2 was revised to remove Regulatory Conditions 3.1(c), 3.7(c), and 3.9(c) from the advance notice filing requirement.

8. While the preapproval requirements were eliminated to comply with *Orangeburg*, the Amended Regulatory Conditions provide the Public Staff and Commission with an informal, advanced review of agreements prior to their filing at FERC. The intent of the advanced review is to provide an opportunity for informal input and feedback with respect to filings to be made by DEC or DEP at FERC. The informal review is designed to identify issues that the Public Staff or Commission believes the Companies should consider, and possibly incorporate, prior to making the filing at FERC.

9. The Companies provided the Platform Agreement to the Public Staff for informal review on November 20, 2020 (21 days before it was filed with the Commission). The Public Staff reviewed the Platform Agreement in conjunction with the Amended Regulatory Conditions and N.C. Gen. Stat. § 62-153 and determined that it had no feedback or input with respect to the Platform Agreement prior to its filing at FERC. In this respect, the Amended Regulatory Conditions functioned as intended.

10. The Public Staff notes that the issue of whether the Platform Agreement is an affiliate agreement or otherwise requires Commission approval prior to execution thereof remains an open question. The Public Staff has not developed a position on those issues at this time. The Public Staff does note that if the Platform Agreement is deemed an affiliate agreement, the Companies will have met their obligation under Amended Regulatory Condition 3.1(b) by providing

the agreement to the Public Staff for informational review. Furthermore, the Companies will have complied with N.C.G.S. § 62-153(a) by making the Informational Filing.

11. For the foregoing reasons, the Public Staff concludes the Commission's preapproval of the Platform Agreement is not required pursuant to either N.C.G.S. § 62-153 or the Amended Regulatory Conditions before the Platform Agreement is filed with FERC.

12. The Public Staff believes the answer to the preapproval question posed by the Commission in its Order Scheduling Oral Argument is sufficiently straightforward based upon *Orangeburg* and the Amended Regulatory Conditions to render oral arguments unnecessary. Accordingly, the Public Staff respectfully requests that the Commission cancel the oral argument scheduled for 2:00 p.m. on January 13, 2021.

Respectfully submitted, this the 6<sup>th</sup> day of January, 2021.

PUBLIC STAFF

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Executive Director

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Electronically submitted  
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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served a copy of the foregoing upon each of the parties of record in this proceeding or their attorneys of record by emailing them an electronic copy or by causing a paper copy of the same to be hand-delivered or deposited in the United States Mail, postage prepaid, properly addressed to each.

This the 6<sup>th</sup> day of January, 2021.

Electronically submitted  
/s/ Elizabeth D. Culpepper