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December 21, 2020

**VIA ELECTRONIC FILING**

Ms. Kimberley A. Campbell  
Chief Clerk  
North Carolina Utilities Commission  
4325 Mail Service Center  
Raleigh, North Carolina 27699-4300

**Re: Duke Energy Carolinas, LLC's and Duke Energy Progress, LLC's  
Joint Response in Opposition to Protest  
Docket Nos. E-7, Sub 1245 and E-2, Sub 1268**

Dear Ms. Campbell:

Enclosed for filing in the above-referenced dockets is the Joint Response of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC in Opposition to Protest.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Kendrick C. Fentress

Enclosure

cc: Parties of Record  
Dianna Downey (Public Staff)

OFFICIAL COPY

Dec 21 2020

**BEFORE THE NORTH CAROLINA UTILITIES COMMISSION**

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

In the Matter of:	)	
	)	
Protest to Informational Filing by Duke	)	<b>JOINT RESPONSE OF DUKE</b>
Energy Progress, LLC and Duke Energy	)	<b>ENERGY CAROLINAS, LLC AND</b>
Carolinas, LLC	)	<b>DUKE ENERGY PROGRESS, LLC IN</b>
	)	<b>OPPOSITION TO PROTEST</b>
	)	

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NOW COME Duke Energy Carolinas, LLC (“DEC”) and Duke Energy Progress, LLC (“DEP” and together with DEC, “Duke” or the “Companies”) and respond in opposition to the Protest filed in these dockets by Sierra Club, Southern Alliance for Clean Energy, and North Carolina Sustainable Energy Association (collectively, “Protestants”) on December 17, 2020. In this Joint Response, the Companies demonstrate that the Protest ignores that the Companies’ filing was an informational filing that does not require Commission action, ignores specific portions of the Companies’ Informational Filing, fails to acknowledge that the Platform Agreement extends an already existing wholesale bilateral energy market, and falsely claims that DEC and DEP are committing to jointly plan, coordinate, dispatch, or operate their generation, transmission, or distribution facilities under the Platform Agreement.

**BACKGROUND**

On December 11, 2020, the Companies made an informational filing in their respective Company folders, E-2, and E-7 (“Informational Filing”), that described the Southeast Energy Exchange Market (“SEEM”) Platform Agreement (“Platform Agreement”). SEEM is expected to achieve cost savings for customers in the Southeast region of the country through two incremental changes to the existing wholesale bilateral energy market—the creation of an automated, intra-hour platform to match buyers and sellers of wholesale energy and the establishment of a new

zero-cost transmission service product to support and facilitate the wholesale energy sales matched through the platform. As such, the Platform Agreement relates to interstate transmission service and is subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission (“FERC”). The Informational Filing stated that, although DEC and DEP both independently intended to sign the Platform Agreement, they will not transact with each other under the Platform Agreement as affiliates or otherwise. Therefore, the Companies explained that they did not consider the Platform Agreement to be an affiliate contract as contemplated by N.C. Gen. Stat. § 62-153. As such, it was likewise not subject to Regulatory Condition No. (“Reg. Con.”) 3.1(b), which requires the Companies to make an informational filing of FERC-jurisdictional affiliate agreements at least 15 days in advance of the FERC filing. To ensure transparency with the Commission, however, the Companies offered in their Informational Filing that:

If the Commission determines that the Platform Agreement is an affiliate contract required to be filed under N.C. Gen. Stat. § 62-153, the Companies respectfully submit it for informational purposes 15 days in advance of filing it at the FERC and concurrently file it pursuant to N.C. Gen. Stat. § 62-153(a).

### **RESPONSE**

- A. **If the Commission determines that the Platform Agreement is an Affiliate Contract, the Companies have Complied with Regulatory Condition 3.1(b) and N.C. Gen. Stat. § 62-153(a).**

In their attempt to obstruct the Companies from entering into and filing the Platform Agreement at the FERC, the Protestants have seized upon one portion of the Companies’ Informational Filing that explains that because DEC and DEP do not transact or exchange energy, goods, or services with each other under the Platform Agreement, there is no affiliate transaction or affiliate contract. The Protestants first claim that because the Platform Agreement is an affiliate agreement, the Companies have failed to make their Informational Filing under their Regulatory

Conditions and N.C. Gen. Stat. § 62-153.<sup>1</sup> This is patently false. The Protestants have completely ignored the Companies' alternative assertion in the Informational Filing that if the Commission believed the Platform Agreement was an affiliate agreement, they were submitting it under Reg. Con. 3.1 and N.C. Gen. Stat. § 62-153. Despite the unfounded implications of the Protest, the Companies have in no way attempted to evade the Commission or their Regulatory Conditions and have proceeded transparently, properly, and in good faith in making the Informational Filing.

First, the Companies made the Informational Filing even though they do not agree that the Platform Agreement is an affiliate agreement. Contrary to the Protestants' assertions, the Platform Agreement is not a wholesale power sales contract *between* DEC and DEP or among DEC and DEP and other affiliates. Specifically, with respect to the Platform Agreement, despite Protestants' allegations, there will be no wholesale power sales *between* DEC and DEP as a result of their participation in SEEM or the Platform Agreement. DEC and DEP will each be bound by the Platform Agreement's terms and conditions, but they are not bound to transact with each other; in fact, just the opposite is true. They cannot transact with each other under the Platform Agreement for the reasons explained in the Informational Filing. The Protestants also assert that the mere fact that DEC and DEP will have financial obligations, albeit not to each other, through SEEM results in an affiliate contract. That DEC and DEP each separately and independently pay operating costs, dues, and fees for SEEM is not determinative. They are not paying fees to each other or in any way subsidizing each other through the Platform Agreement. Taken to its logical conclusion, Protestants' claims would result in an affiliate contract any time that DEC and DEP each separately paid dues or fees to the same entity.<sup>2</sup> DEC and DEP must annually report their affiliate transactions

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<sup>1</sup> Protest at 3, ¶6.

<sup>2</sup> For example, under N.C. Gen. Stat. § 62-302, for the purpose of defraying the cost of regulating public utilities, every public utility subject to the jurisdiction of the Commission pays a quarterly regulatory fee, in addition to all other fees and taxes, as provided in this section. The fees collected shall be used only to pay the expenses of the

to the Commission. Reg. Con. 5.7.<sup>3</sup> There will be no affiliate transactions under the Platform Agreement to report, however. Thus, the Protestants' claim that the Companies will seek to evade Commission jurisdiction over actual affiliate agreements in the future by simply adding other non-affiliated parties to those agreements is pure, and misleading, hyperbole.

Even assuming the Platform Agreement is an affiliate agreement under the Protestants' unrealistically broad definition, the Companies have fully complied with Reg. Con. 3.1 and N.C. Gen. Stat. § 62-153. First, the Companies provided the Public Staff of the North Carolina Utilities Commission a copy of both the Informational Filing letter and the Platform Agreement on November 20, 2020 for its informal review more than 15 days before they filed it at the Commission, as required by Reg. Con. 3.1(a). Next, they have complied with Reg. Con. 3.1(b), which provides that

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 the 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.

(emphasis added.) Significantly, the Commission amended Reg. Con. 3.1(b) in 2018 in its *Order Granting Motion to Amend Regulatory Conditions* in Dockets Nos. E-2, Sub 1095A, E-7, Sub 1100A, G-9, Sub 682A, on August 24, 2018 (“Amendment Order”). Prior to the Amendment Order, the Companies were required to provide 30-days advance notice of any affiliate agreement they intended to file at the FERC.<sup>4</sup> The procedure for doing so required that the Companies file the advance notice in a “new, separate Sub docket” and allowed for interested parties to object 15

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Commission and the Public Staff in regulating public utilities in the interest of the public. DEC's and DEP's separate obligations to remit their regulatory fee to the Commission, however, do not result in an affiliate transaction under N.C. Gen. Stat. § 62-153.

<sup>3</sup> *Order Granting Motion to Amend Regulatory Conditions* in Dockets Nos. E-2, Sub 1095A, E-7, Sub 1100A, G-9, Sub 682A, issued on August 24, 2018, Appendix A, p. 23.

<sup>4</sup> See former Reg. Con. No. 3.1(c), *Order Approving Merger Subject to Regulatory Conditions and Code of Conduct*, Docket Nos. E-2, Sub 1095, E-7, Sub 1100, G-9, Sub 682, issued Sept. 29, 2016, Appendix A, p. 7.

days before the 30-day advance notice expired. *See* Reg. Con. 13.2 (outlining the procedure for certain advance notices).<sup>5</sup> Because of the FERC’s concerns with the Commission’s “gatekeeping” policies and practices before the Companies made filings at the FERC under the FERC’s jurisdiction, however, the Commission eliminated the 30-day advance notice procedures for advance notice of affiliate contracts to be filed at the FERC. Amendment Order at 11.<sup>6</sup> Reg. Con. 3.1(b) now requires an informational filing, with no new Sub docket and no 30-day procedure. Moreover, Reg. Con. 3.1(b) no longer requires the Commission to take any action on a 15-day informational filing prior to the filing being made at the FERC.

The Companies have also complied with N.C. Gen. Stat. § 62-153(a), to the extent it applies to the Platform Agreement. The Protestants appear to argue that the Commission must “approve” the Platform Agreement before the Companies may enter it and file it at the FERC. This, again, is false, and they have confused N.C. Gen. Stat. § 62-153(a) with (b). N.C. Gen. Stat. § 62-153(a) requires that “all public utilities shall file with the Commission copies of contracts with any affiliated or subsidiary holding, managing, operating, constructing, engineering, financing or purchasing company and, when requested by the Commission, copies of contracts with any person selling service of any kind.” N.C. Gen. Stat. § 62-153(b) is more specific and pertains to a discrete subset of affiliate agreements; it provides that

*No public utility shall pay any fees, commissions or compensation of any description whatsoever to any affiliated or subsidiary holding, managing, operating, constructing, engineering, financing, or purchasing company or agency for services rendered or to be rendered, without first filing copies of all proposed agreements and contracts with the Commission and obtaining its approval.*

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<sup>5</sup> Amendment Order at Appendix A, p. 41.

<sup>6</sup> Prior to the Amendment Order, decisions by the DC Circuit Court of Appeals, *Orangeburg v. FERC*, 862 F.3d 1071 (D.C. Cir. 2017), and the FERC, *Order Rejecting As-Available Capacity Sales Agreement*, 161 FERC ¶ 61,029, October 10, 2017, had raised questions on the validity of some of the Regulatory Conditions pertaining to assertion of the Commission’s jurisdiction over certain wholesale and affiliate agreements and other filings made at the FERC. These decisions were the reason for the Amendment Order.

(emphasis added.) In this case, DEC and DEP have filed the Platform Agreement under N.C. Gen. Stat. § 62-153(a) because N.C. Gen. Stat. § 62-153(b) does not apply. Significantly, the Platform Agreement leverages existing practices and obligations (that are beyond the scope of this Commission’s jurisdiction) and essentially automates the matching of buyers and sellers. The Platform Agreement does not require DEC or DEP to perform any services or make any payments to each other. Therefore, the Companies did not file the Platform Agreement under N.C. Gen. Stat. § 62-153(b). The Commission is not required to “pre-approve” an affiliate contract filed under N.C. Gen. Stat. § 62-153(a).<sup>7</sup> The Commission may *disapprove* an affiliate contract under subsection (a), after hearing, if it is found to be “unjust or unreasonable, and made for the purpose or with the effect of concealing, transferring, or dissipating the earnings of the public utility.” Tellingly, other than their conclusory assertion that the Commission must prevent the Companies from entering the Platform Agreement simply because they have not followed their Reg. Cons., Protestants have not alleged (nor could they) that the Platform Agreement is unjust or unreasonable or made with the purpose or effect of concealing, transferring or dissipating the earnings of either DEC or DEP.<sup>8</sup> To the extent that Protestants are simply opposed to the Platform Agreement, the FERC has jurisdiction over, and is the appropriate forum for, their objections. Therefore, if the Commission believes that the Platform Agreement should be treated like an affiliate contract, the Commission may accept it for filing under N.C. Gen. Stat. § 62-153(a). The Commission is very familiar with the long-standing practice of the Companies filing affiliate agreements under N.C.

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<sup>7</sup> Cf. *Order Allowing Agreement to Become Effective*, Docket No. G-9, Sub 711, issued July 10, 2018 (Accepting Public Staff’s recommendation that, under N.C. Gen. Stat. § 62-153(b), the Commission authorize the payment of compensation by DEC to Piedmont Natural Gas Company where Piedmont Natural Gas Company was providing redelivery service to DEC.)

<sup>8</sup> Although the Companies do not contend that the Platform Agreement is an affiliate agreement, assuming *arguendo* that it was, the North Carolina Supreme Court has made clear that there is no presumption of impropriety that arises from the mere fact that an agreement is between two affiliated entities. *State ex rel. Utilities Com. v. Intervenor Residents of Bent Creek/Mt. Carmel Subdivisions*, 305 N.C. 62, 286 S.E.2d 770 (1982).

Gen. Stat. § 62-153(a) as informational filings without the need for comment or Commission order.<sup>9</sup> In short, N.C. Gen. Stat. § 62-153(a) does not require the Commission to take any additional action or issue any order on the filed Platform Agreement.<sup>10</sup>

B. Regulatory Condition 3.9 Does Not Apply to the Platform Agreement.

Protestants next claim that Reg. Con. No. 3.9(b) dictates that the Commission must approve the Platform Agreement before DEC and DEP may join it. This claim is also false. Reg. Con. 3.9(b) states that:

No agreement shall be entered into by or on behalf of DEC or DEP, that (i) commits DEC or DEP to, or involves either of them in, joint planning, coordination, dispatch or operation of generation, transmission, or distribution facilities *with each other or one or more Affiliates*, or (ii) otherwise alters DEC's or DEP's obligations with respect to these Regulatory Conditions, absent explicit approval of the Commission.

(emphasis added). Protestants allege that the Platform Agreement commits DEC or DEP to or involves either of them in joint coordination of transmission and commits DEC or DEP to, or involves either of them in coordination, dispatch, or operation of generation. Finally, they argue that the Platform Agreement inherently changes how DEC and DEP dispatch and operate their generation resources.<sup>11</sup>

Conspicuously absent from the Protestants' allegations, however, is any citation to the actual Platform Agreement in support, even though the Companies provided the Protestants with copies of the Platform Agreement more than 15 days before they filed it at the Commission.

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<sup>9</sup> For examples of affiliate agreements filed for advance notice under Reg. Con. 3.1 and for information under N.C. Gen. Stat. § 62-153(a) without comment or Commission action, *see e.g.*, DEC/DEP Joint Advance Notices and Filing of Affiliate Agreements in Docket Nos. E-2, Sub 1202, E-7, Sub 1200; DEP/Piedmont Natural Gas Company Contract to Sell and Purchase Real Estate, filed November 9, 2020 in Docket Nos. E-2, Sub 1260, G-9, Sub 773; DEC/DEP Agreement No. 385 for Short-Term Non-Firm Point-to-Point Transmission Service, filed January 22, 2020 in Docket Nos. E-7, Sub 1208 and E-2, Sub 1212.

<sup>10</sup> *See* also Reg. Con. 3.1(a), which provides that if a proposed affiliate agreement does not require action by the Commission under N.C. Gen. Stat. § 62-153(a), the Companies may execute the agreement subject to *later* disapproval and voidance by the Commission if necessary pursuant to N.C. Gen. Stat. § 62-153(a). (emphasis added.)

<sup>11</sup> Protest at 6, ¶ 10.



Instead, the Platform Agreement itself refutes their contentions. It expressly states that Participating Transmission Providers who will provide this new zero-cost transmission service product (referred to as Non-Firm Energy Exchange Transmission Service within the Platform Agreement) are not obligated to “plan, construct, or maintain its transmission system for the benefit of any Participant.”<sup>12</sup> Moreover, Reg. Con. 3.9(b) is not relevant to the Platform Agreement because DEC and DEP are not jointly planning, coordinating, dispatching, or operating their generation, transmission, or distribution facilities *with each other* as a result of the Platform Agreement. First, as noted in the Informational Filing, the Platform Agreement is simply an extension of *the existing bilateral non-firm energy trading market*. This market is not subject to the Commission’s jurisdiction. As noted above, the two incremental changes to the existing bilateral non-firm energy trading market enabled by SEEM and the Platform Agreement are the automated platform and the new zero-cost transmission service product. With these two incremental changes, neither of which is relevant to the Commission’s jurisdiction, SEEM will create, to put it bluntly, a type of “speed-dating” to pair buyers and sellers in this market, facilitating wholesale non-firm energy sales in 15-minute increments. These are sales that could theoretically occur in today’s existing market, but are in reality do not occur because in the existing wholesale bilateral market in the Southeast, buyers and sellers must discover one another, negotiate the terms of the sale, arrange and pay for transmission service across all utilized transmission systems, and schedule the delivery of energy. All of this is done with “traditional” methods of communication, by phone and electronically, thus creating transactional friction and fewer opportunities for efficient and economic sales that can produce savings for customers. The automation provided by SEEM is intended to remove this transactional friction, unlocking greater

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<sup>12</sup> See Section 1.1 (definition of Non-Firm Energy Exchange Transmission Service).

opportunities for economic bilateral energy sales. By signing the Platform Agreement to become SEEM Members, DEC and DEP will in no way be committing to jointly plan, coordinate, dispatch, or operate their generation, transmission, or distribution facilities. They are merely joining a consortium of like-minded regional entities to create a more efficient wholesale energy trading platform and make more efficient use of otherwise unused transmission capacity.

Moreover, nothing in the Platform Agreement would require DEC or DEP to make capital investments in generation or transmission (joint or otherwise). The Platform Agreement does not alter DEC's or DEP's existing roles as independent balancing authorities, transmission owners, transmission operators, transmission planners, generation owners, and generation operators. Even under the Platform Agreement, DEC and DEP will continue to maintain separate NERC compliance responsibilities, including the obligation to manage Area Control Error in their separate balancing authority areas.

Additionally, contrary to Protestants' unfounded assertions, DEC's and DEP's participation in SEEM as a buyer or seller does not amount to or enable joint operation or joint dispatch or "dispatch down" of their generation resources. For example, DEP may elect to offer generation on the SEEM platform to help economically manage net demand ramping within the DEP balancing authority area, particularly when solar output begins to ramp up. This would enable Energy Exchanges with other SEEM Participants, but not with DEC for the reasons explained in the Informational Filing. This would capture benefits for DEP customers and help to avoid potential curtailment of solar generation. However, this action would be independent of any DEC operations or the management of the DEC's balancing authority area Area Control Error.

Finally, to the extent the Protestants have claimed in their filing made at the Commission in Docket No. E-100, Sub 171 on December 18, 2020, that the Commission must approve DEC

and DEP signing the Platform Agreement under Reg. Con. 3.9(d), which states that “[a]ny contract or filing regarding DEC’s and DEP’s membership in or withdrawal from an RTO or comparable entity must be contingent upon state regulatory approval”, their contention is irrelevant to the Platform Agreement and SEEM. SEEM is not an RTO or comparable “entity.”<sup>13</sup> The Platform Agreement does not “create markets for the exchange of electricity between utilities by utilizing excess transmission capacity.” It is, as described above, a contractual agreement among members and participants that facilitates wholesale non-firm energy sales that could theoretically occur in today’s existing market by automating the existing and more traditional forms of communication between buyers and sellers. In other words, it is “leveraging existing bilateral trading processes.”<sup>14</sup>

### CONCLUSION

The Protestants have failed to cite any Commission precedent, general statute, or Reg. Con. that authorizes the Commission to grant their requested relief of prohibiting the Companies from entering into the Platform Agreement and filing it at the FERC on or about December 28, 2020. Based on the foregoing, the Protestants have alleged no reason or justification for this Commission to issue any order prohibiting the Companies from proceeding to enter into the Platform Agreement and filing it at the FERC on or about December 28, 2020. As noted, if the Commission determines that the Platform Agreement is an affiliate agreement, the Companies have fully complied with Reg. Con. 3.1(b) and N.C. Gen. Stat. § 62-153(a). The Commission may accept the Platform Agreement without issuing an Order, and the Commission is not required to take further action on the Informational Filing advance notice.<sup>15</sup> Furthermore, if the Commission

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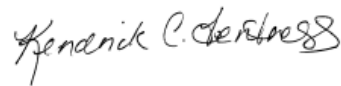
<sup>13</sup> Petition for Investigation and Rulemaking to Implement N.C. Gen. Stat. § 62-154, filed in Docket No. E-100, Sub 171, at p. 5.

<sup>14</sup> *Id.* at Exhibit A, Fact Sheet, p. 2.

<sup>15</sup> *See supra* fn. 9. (listing advance notices and affiliate agreements filed at the Commission without need for comment or Commission order.)

agrees that there is no basis for the Protest, the Protestants, and any other interested party, will have the opportunity to raise objections about the Platform Agreement when the Companies file this Platform Agreement at the FERC. Moreover, the Commission will be kept apprised of the FERC docket under Reg. Con. 3.10, which requires the Companies to keep the Commission informed of their activities in active FERC dockets.

Respectfully submitted, this the 21<sup>st</sup> day of December 2020.



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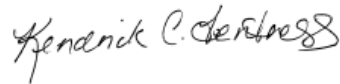
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*Attorney for Duke Energy Carolinas, LLC and Duke Energy Progress, LLC*

CERTIFICATE OF SERVICE

I certify that a copy of Joint Response of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC in Opposition to Protest, in Docket No. E-7, Sub 1245 and E-2, Sub 1268, has been served by electronic mail, hand delivery, or by depositing a copy in the United States Mail, 1<sup>st</sup> Class Postage Prepaid, properly addressed to parties of record.

This the 21<sup>st</sup> day of December, 2020.



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