KEYES&FOX LLP

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October 30, 2017

Ms. Martha Lynn Jarvis, Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4325

RE: E-2, Sub 1142, Application of Duke Energy Progress, LLC for Adjustment of Rates and Charges Applicable to Electric Service in North Carolina; **NCSEA Response to Motion to Strike Direct Testimony of Michael Murray**

Dear Ms. Jarvis,

Please find enclosed for filing in the above-captioned docket *North Carolina Sustainable Energy Association's Response to Duke Energy Progress, LLC's Motion to Strike the Direct Testimony of Michael Murray*. Please let me know if you have any questions or if there are any issues with this filing.

Respectfully yours,

/s/

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Enclosures

cc: Parties of Record

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1142

In the Matter of	)	NORTH CAROLINA
	)	SUSTAINABLE ENERGY
Application of Duke Energy Progress, LLC for	)	ASSOCIATION'S RESPONSE
Adjustment of Rates and Charges Applicable	)	TO DUKE ENERGY PROGRESS,
to Electric Service in North Carolina	)	LLC'S MOTION TO STRIKE THE
	)	DIRECT TESTIMONY
	)	OF MICHAEL MURRAY

NOW COMES North Carolina Sustainable Energy Association ("NCSEA"), through its undersigned legal counsel, to respond to *Duke Energy Progress, LLC's* ("Company") *Motion to Strike Direct Testimony of Michael Murray* ("*Motion*"), filed in the above-captioned docket with the North Carolina Utilities Commission ("Commission") on Friday, October 27, 2017. NCSEA asks the Commission to reject the Company's motion, as the Company: (i) seeks to strike testimony that is directly relevant to material aspects of the Company's application for adjustment of rates and charges applicable to electric service in North Carolina ("Application"); and (ii) inappropriately asks the Commission, without a legal basis, to preclude NCSEA or its witness, Mr. Murray, from raising recommendations regarding best practices in customer access to electricity usage data that have been raised across multiple Commission dockets. The Company's motion lacks legal merit and should be rejected.

I. ARGUMENT

The Company's motion alleges two primary grounds for striking the entirety of Mr. Murray's testimony. First, the Company argues that Mr. Murray's testimony is irrelevant and "[a]t no point … does he address facts or circumstances that would assist the Commission in determining whether the Company's cost of service, rate design, or tariffs are reasonable and appropriate." *Motion* at 6. The Company continues: "the Commission should strike Mr. Murray's testimony in its entirety on the grounds that his testimony has no bearing on any fact that is of consequence to the determination of this action." *Id.* Second, the Company argues that the Commission should now preclude NCSEA from raising recommendations that it brought forward in another docket (Smart Grid Technology Plans ("SGTP") in Docket No. E-100, Sub 147) because the Commission declined to adopt NCSEA's recommendations at that time. For this argument, the Company primarily relies on a previous decision by the Commission to strike the testimony of a Greenpeace witness in a Duke Energy Carolinas, LLC general rate case. In the Greenpeace example, the Commission struck portions of the witnesses testimony questioning the previous granting of a Certificate of Public Convenience and Necessity ("CPCN") and struck a testimonial exhibit that was deemed to be within the scope of an Integrated Resource Plan ("IRP") docket and not within the scope of the general rate case.

Both prongs of the Company's attack crumble upon an examination of the relevance of Mr. Murray's testimony to the Company's Application and of the distinguishing factors between the current circumstances and the Greenpeace example.

A. Mr. Murray's Testimony Is Directly Relevant to the Prudency of the Company's Interrelated and Interdependent Proposals to Upgrade Its

Customer Information System ("CIS") Now and to Deploy Advanced Metering Infrastructure ("AMI") Later.

NCSEA takes no issue with the Company's recitation of the legal standard for relevance in relation to a motion to strike before the Commission. To add to the Company's recitation, NCSEA notes that North Carolina Rule of Evidence 402 provides that, unless barred by specific limitations, **all** relevant evidence is admissible. North Carolina Rule of Evidence 401 provides that evidence is considered relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The trier of fact is given wide latitude to admit evidence "if it has *any* logical tendency to prove any fact that is of consequence." *State v. Wallace,* 104 N.C. App. 498, 502 (1991) (emphasis in original). Faced with the Company's motion, the Commission has wide discretion to allow Mr. Murray's testimony to stand, should it find that it bears any logical connection to whether the Company's Application can withstand the various underlying legal standards, including the prudency of utility test-period investments or the justness and reasonableness of the ultimate rates approved for electric service.

In the current context, the Company appears to agree with this principle that evidence in a general rate case is relevant and presents a "fact of consequence" if it tends to assist the Commission in "determining whether the Company's cost of service, rate design, or tariffs are reasonable and appropriate." *Motion* at 6. However, it is worth noting that N.C. Gen. Stat. § 62-133 makes no reference to cost of service, rate design, or tariffs; rather, N.C. Gen. Stat. § 62-133 directs the Commission in fixing rates to "[a]scertain the *reasonable* original cost of the public utility's property used and

useful . . .” (emphasis added). Mr. Murray’s testimony speaks precisely to the question of whether the Company’s investment in AMI and CIS is reasonable.

Additionally, in discussing the Greenpeace example in Duke Energy Carolinas 2013 general rate case, the Company notes that the Commission did not strike the portions of the Greenpeace witness’s testimony that “pertained to the reasonableness of the utility’s decision-making at the time it incurred test period costs and expenses, matters properly before the Commission in a general rate case.” *Motion* at 4 (citing *In re Application of Duke Energy Carolinas, LLC for Adjustments of Rates and Charges Applicable to Electric Service in North Carolina,* Order Granting in Part and Denying in Part Motion to Strike at 4-5, Docket No. E-7, Sub 1026 (July 3, 2013) (“*2013 DEC Rate Case Motion to Strike Order*”)). NCSEA and the Company fundamentally do not disagree on the underlying legal principles governing relevance or the fact that those principles are dispositive here.

In the instant case, Mr. Murray’s testimony is relevant in light of the Company’s pre-filed testimony and based on the fact that it raises questions of prudency and the Company’s decision-making in approaching the interrelated and interrelated investments in CIS and AMI. The entirety of Mr. Murray’s direct testimony comes together at a single fulcrum point to shine a light on one aspect of the prudency of the Company’s investment in CIS. Mr. Murray’s testimony suggests that the Company, while it decides on a specific CIS investment, should also have a contemporaneous detailed vision for providing customers the electricity usage data that they will need to support future desired functionality:

Q. WHY DO YOU BELIEVE YOUR RECOMMENDATIONS ARE TIMELY?

> A. I believe my recommendations are timely because DEP seeks to embark on two large infrastructure projects that directly affect customers' ability to manage their energy use with detailed consumption data: AMI deployment and a Customer Information System ("CIS"). The Company states that AMI is expected to cost approximately $276.4 million and the CIS cost related to AMI is expected to be approximately $20.4 million. These investments can, if built with energy information applications in mind, be "future-proof" and facilitate customer benefits for a long period of time. However, if DEP embarks on an expensive information technology upgrade without accommodating my recommendations, then it will be much more difficult and costly to make such changes in the future. *Direct Testimony of Michael Murray* at 7:5-15.

Mr. Murray's central thesis presented here is a classic regulatory assertion in a general rate case: if the utility is not exercising foresight and acting on or informed by the best available information in its decision-making process, its investment decision could rightfully be questioned as imprudent. Mr. Murray presents examples of best practices across multiple jurisdictions throughout his testimony, providing evidence that there are prevailing practices around data access that the utility should be aware of as it seeks to make a long-term investment in an integrated system of smart meters and an advanced, upgraded CIS to deliver enhanced functions to its customers. This evidence speaks directly to a prong of prudent utility decision-making: what the utility knew or should have known at the time it made the investment decision.

The Company's own testimony bears out the direct relevance of Mr. Murray's testimony on the interrelation and interdependence of the AMI and CIS investments.

Table 1. Selections from Company Testimony Addressing Interrelatedness and Interdependence of CIS and AMI Investments

COMPANY WITNESS	PAGE(S): LINE(S)	
Fountain	p.36:3-6	"Further, once smart meters are deployed and working in tandem with our grid and billing system, the Company will be able to offer a suite of programs, enabled by smart meters, to give customers enhanced convenience, transparency, choice and control."
Hunsucker	p.9:17-19	"Customer information systems, just like any other software solution, periodically require replacement to deliver on capabilities required by business operations, and more importantly, customers."
Simpson	pp.28:3-8	"While the current AMR system provided operational savings and efficiencies over visiting and reading each meter manually, its single monthly meter readings provided limited energy usage information. […] Finally, the one-way communications do not supply customers or Company with expanded capabilities for enhanced customer products and services."
Wheeler	p.9:17-23	"Metering installed for the majority of current customers doesn't provide the interval level data that is required to bill these innovative designs. DE Progress has plans to deploy [AMI] beginning in 2018 that offers this level of meter sophistication. The Rate Design Team is working closely with the billing and metering projects to ensure that they will support the types of rate designs that our customers will need in the future."

These selections show a consistent and concerted acknowledgement throughout the Company's testimony that the value of the CIS and AMI investments to customers are interrelated and interdependent. Mr. Murray's central thesis speaks to the interdependence of the investments and how a lack of planning on one aspect (the functionality of data access) could increase overall costs in the long run and threaten the prudency of the currently contemplated investment in CIS.

Accordingly, Mr. Murray's testimony is directly relevant to a material aspect of the Company's Application and intersects with multiple Company witnesses' pre-filed

direct testimony. The motion to strike Mr. Murray's testimony, in its entirety, upon relevance grounds should be completely rejected in light of this record.

B. The Company Fails to Cite Any Legal Basis that Provides for Precluding NCSEA or Its Witness from Raising an Issue that Is Relevant and Properly Raised Within the Scope of this Case.

As it concerns Mr. Murray's recommendation in direct testimony to "provide expanded third party access to customers' energy usage data," the Company suggests that the Commission has the authority to preclude presentation of those recommendations at this time because it recently rejected those same or largely similar recommendations in a previous docket (the 2016 SGTP proceeding within Docket No. E-100, Sub 147). *Motion* at 4. Beyond making this naked assertion, the Company fails to cite any legal basis for precluding this evidence other than an erroneous insinuation that NCSEA is engaged in an impermissible collateral attack on a final commission order. *Motion* at 6 ("Thus, just as the Commission determined it appropriate to strike Greenpeace's attempts to re-litigate IRP issues in the 2013 DEC general rate case, the Commission should likewise preclude NCSEA's attempts by striking Mr. Murray's testimony."). In the Greenpeace example, the Commission did strike the testimony of a witness that criticized and attacked the Commission's earlier decision in a CPCN docket. *2013 DEC Rate Case Motion to Strike Order* at 3-4. The Commission also excluded a Greenpeace testimonial exhibit that addressed issues considering renewable resources in the context of of long-term resource planning. *Id.* at 4. In that respect, the Commission determined that Greenpeace's exhibit was clearly unrelated to test year expenses.

But the Company's point that the Commission rejected the IRP-related exhibit on the basis that Greenpeace was attempting to re-litigate the issue is plainly wrong. The

IRP-related material in the Greenpeace example was stricken on the basis that the contested material was more appropriate in the scope of an IRP and was irrelevant to the scope of a general rate case. The Commission's discussion in that order never even used the word "re-litigate" or "litigate" as the Company insinuates, as that term was only used in the portion of the order summarizing Duke Energy Carolinas' own argument. Thus, the Company's argument that NCSEA should be precluded from attempting to "re-litigate" an SGTP-related issue—by analogy to the order on the Greenpeace example—is a swing and a miss.

In fact, the 2016 SGTP Order that the Company cites to in its *Motion* as the instance where NCSEA previously litigated these "recommendations" expressly disclaims (on page 1 of the Order) any binding effect of the Commission's consideration of the SGTP plans on the prudency review of such investments:

> The Commission stated in the 2015 Order that smart grid proceedings are intended to be informative, and the Commission does not anticipate using them to order utilities to make specific smart grid investments, nor are they a means by which utilities should seek to secure advance prudency reviews of smart grid investments. *Order Accepting Smart Grid Technology Plans*, Docket No. E-100, Sub 147 (March 29, 2017).

Clearly, the record upon which NCSEA made its recommendation in Docket No. E-100, Sub 147 and the current record are significantly and qualitatively different. Here, Mr. Murray's testimony and recommendations in this case go directly to the application of the prudency standard to the integrated whole of the Company's unified vision of CIS, AMI and its resulting suite of customer options. Even if NCSEA is offering the same or similar recommendations to the Commission, the context in which they are offered here

is entirely appropriate, relevant, and within the scope of the case.[1] The Company's reliance on the Greenpeace example is therefore erroneous and unavailing.

II. CONCLUSION

WHEREFORE, for the reasons stated herein, the Commission should reject the Company's inappropriate attempt to preclude NCSEA from presenting evidence and recommendations that are directly relevant to the Company's interrelated and interdependent CIS and AMI investments.

Respectfully submitted this 30th day of October, 2017.

/s/ THADEUS B. CULLEY

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[1] *See Order Denying Motion*, Docket No. E-100, Sub 148 (Jan. 18, 2017) ("The Commission's ratemaking decisions are made pursuant to its delegated legislative authority, and do not constitute res judicata or even stare decisis. . . . The foregoing shows that NCSEA's argument that these issues were 'fully litigated' is misplaced.")

CERTIFICATE OF SERVICE

I hereby certify that all persons on the service list for Docket No. E-2, Sub 1142 have been served true and accurate copies of the foregoing NORTH CAROLINA SUSTAINABLE ENERGY ASSOCIATION'S RESPONSE TO DUKE ENERGY PROGRESS, LLC'S MOTION TO STRIKE THE DIRECT TESTIMONY OF MICHAEL MURRAY by hand delivery, first class mail deposited in the U.S. Mail, postage pre-paid, or email transmission with the party's consent.

Dated October 30, 2017, at Cary, North Carolina.

/s/ THADEUS B. CULLEY

Thadeus B. Culley