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adjudicatory proceeding, "the substantial rights of the parties must be preserved."[1] *Spartanburg v. Parris*, 251 S.C. 187, 190, 161 S.E.2d 228, 229 (1968). "It is generally held that these rights include a reasonable opportunity to cross examine the important witnesses against a party when their credibility is challenged." *Id.*

Section 58-41-20(I) of Act 62 directs that "[a]ny conclusions [of the consultant] based on the evidence in the record and included in the report are intended to be used by the commission along with all other evidence submitted during the proceeding to inform its ultimate decision setting the avoided costs for each electrical utility." Because this provision clearly envisions that the third-party's report will be offered into evidence, the Commission's rules of practice and procedure mandate that the report "shall be subject to appropriate and timely objection." S.C. Code Ann. Regs. 103-849. Further, the South Carolina Administrative Procedures Act mandates that, in a contested proceeding, any information offered for inclusion into the record must be subject to objection and cross-examination and otherwise comply with the rules of evidence. *See* S.C. Code Ann. § 1-23-330. Moreover, with respect to the Commissioners' reliance on the third-party consultant's or expert's report, the Companies would note that Act 62 expressly limits the Commission's consideration of the report to "[a]ny conclusions based on the evidence in the record." § 58-41-20(I).

As described in detail in their joint comments filed in Docket No. 2019-289-A, which are incorporated herein by reference and attached for the Commission's convenience, the Companies urge the Commission to adopt an approach consistent with Rule 706 of the Federal Rules of Evidence, which outlines the process whereby a federal judge may appoint an independent expert witness. The rule requires the court to inform the expert of his duties, which may be done in writing or orally at a conference where the parties have an opportunity to participate. The rule also directs the expert to advise the parties of any findings and confirms the expert may be deposed by any party, called to testify by the court or any party, and cross-examined by any party, including the party who called the expert. Although the Companies acknowledge that may not be feasible for the Commission to adopt Rule 706, verbatim, the Companies submit that promulgating a regulation that includes similar provisions could alleviate many of the procedural uncertainties and evidentiary issues that have arisen in the current avoided cost proceedings. To that end, the Companies urge the Commission to promulgate a proposed rule that permits the utilities and intervenors to issue discovery related to the consultant's or expert's report; allows for cross-examination of the consultant or expert; provides a meaningful opportunity for the parties to respond to the consultant's or expert's report; addresses the timing of the report; and prohibits ex parte communications between the consultant or expert and the parties, as well as ex parte communications between the consultant or expert and the Commission.

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BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2019-289-A

IN RE:

Rulemaking for the Public Service Commission's Procedure to Employ, through Contract or Otherwise, Third-Party Consultants or Experts	**JOINT COMMENTS OF DUKE ENERGY CAROLINAS, LLC AND DUKE ENERGY PROGRESS, LLC**

Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP") (collectively "Duke Energy" or the "Companies"), pursuant to Rule 103-818 of the Rules and Regulations of the Public Service Commission of South Carolina (the "Commission"), hereby submit these joint comments in the above-referenced rulemaking proceeding, which concerns the Commission's process for engaging qualified independent third-party consultants and experts.

I. Background

On May 16, 2019, Governor Henry McMaster signed into law the South Carolina Energy Freedom Act ("Act 62" or the "Act"), which, in part, addresses South Carolina's implementation of the requirements of the Public Utility Regulatory Policies Act of 1978 ("PURPA"). Relevant here, Act 62 directs the Commission to review each South Carolina electric utility's avoided cost rates and PURPA implementation every two years beginning six months from the Act's effective date, specifically including approving the utility's "standard offer, avoided cost methodologies, form contract power purchase agreements, commitment to sell forms, and any other terms or conditions necessary to implement this section." S.C. Code Ann. § 58-41-20(A).

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Act 62 also requires the Commission to retain an independent third-party consultant to issue a report on the utilities' calculation of avoided costs under S.C. Code Ann. § 58-41-20(A).

Section 58-41-20(I) provides, in part:

> The commission is authorized to employ, through contract or otherwise, third-party consultants and experts in carrying out its duties under this section, including, but not limited to, evaluating avoided cost rates, methodologies, terms, calculations, and conditions under this section. The commission is exempt from complying with the State Procurement Code in the selection and hiring of a third-party consultant or expert authorized by this subsection. The commission shall engage, for each utility, a qualified independent third party to submit a report that includes the third party's independently derived conclusions as to that third party's opinion of each utility's calculation of avoided costs for purposes of proceedings conducted pursuant to this section. The qualified independent third party is subject to the same ex parte prohibitions contained in Chapter 3, Title 58 as all other parties. The qualified independent third party shall submit all requests for documents and information necessary to their analysis under the authority of the commission and the commission shall have full authority to compel response to the requests. The qualified independent third party's duty will be to the commission.

With respect to the third party's report, the statute provides that "[a]ny conclusions based on the evidence in the record and included in the report are intended to be used by the commission along with all other evidence submitted during the proceeding to inform its ultimate decision setting the avoided costs for each electrical utility." S.C. Code Ann. § 58-41-20(I). Act 62 also grants the third party the right to submit requests for documents and information to the parties under the authority of the Commission and directs the utilities to be "responsive in providing all documents, information, and items necessary for the completion of the report." *Id*. Additionally, "[t]he independent third party shall also include in the report a statement assessing the level of cooperation received from the utility during the development of the report and whether there were any material information requests that were not adequately fulfilled by the electrical utility." *Id*.

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Notably, Section 58-41-20(A)(2) also mandates that the "[p]roceedings shall include an opportunity for intervention, discovery, filed comments or testimony, and an evidentiary hearing."

Act 62 also authorizes the Commission and the Office of Regulatory Staff ("ORS") to initiate an independent renewable energy integration study and to engage a consultant to assist with the study. Specifically, § 58-37-60 provides as follows:

> (A) The commission and the Office of Regulatory Staff are authorized to initiate an independent study to evaluate the integration of renewable energy and emerging energy technologies into the electric grid for the public interest. An integration study conducted pursuant to this section shall evaluate what is required for electrical utilities to integrate increased levels of renewable energy and emerging energy technologies while maintaining economic, reliable, and safe operation of the electricity grid in a manner consistent with the public interest. Studies shall be based on the balancing areas of each electrical utility. The commission shall provide an opportunity for interested parties to provide input on the appropriate scope of the study and also to provide comments on a draft report before it is finalized. All data and information relied on by the independent consultant in preparation of the draft study shall be made available to interested parties, subject to appropriate confidentiality protections, during the public comment period. The results of the independent study shall be reported to the General Assembly.
>
> (B) The commission may require regular updates from utilities regarding the implementation of the state's renewable energy policies.
>
> (C) The commission may hire or retain a consultant to assist with the independent study authorized by this section. The commission is exempt from complying with the State Procurement Code in the election and hiring of the consultant authorized by this subsection.

II. Third Party Experts in Other Contexts

In preparing these comments, the Companies have examined the use of third-party experts in South Carolina courts, in proceedings before other state utility commissions, and in federal courts. For the Commission's consideration, the Companies have provided a general overview below.

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A. The Federal Approach

The Companies believe Rule 706 of the Federal Rules of Evidence is particularly instructive given the Commission's quasi-judicial role. Rule 706 outlines the process whereby a federal judge may appoint an independent expert witness, either on its own or on the motion of any party. The rule requires the court to inform the expert of his duties, which may be done in writing or orally at a conference where the parties have an opportunity to participate. The rule also directs the expert to advise the parties of any findings and confirms the expert may be deposed by any party, called to testify by the court or any party, and cross-examined by any party, including the party who called the expert.

In *Reilly v. United States*, 863 F.2d 149 (1st Cir. 1988), the court considered the application of Rule 706 in the context of a medical malpractice action and evaluated the distinction between a court-appointed expert witness and an informal technical advisor. Liability had been conceded in that case, and the district court held a trial on damages following the completion of discovery. After the trial, but prior to supplemental evidentiary hearings, the judge attempted to enlist an economist to assist him with respect to certain technical aspects pertinent to the calculation of the damages award. The judge did not inform the parties of his search, and the government only became aware when the assistant United States Attorney ("AUSA") contacted an economist in the course of preparing for the supplemental hearings, and the economist disclosed that the judge had contacted him. The AUSA requested a chambers conference, and the judge informed the parties that he intended to hire an economist as a technical advisor. Importantly, the government voiced no contemporaneous objection to the procedure, did not ask the name of the economist whom the court intended to retain, did not ask that the court's instructions or the expert's advice be reduced to writing, and did not request an opportunity to question him.

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After the supplemental evidentiary hearings, the court issued an order awarding substantial damages to the plaintiffs. The government subsequently appealed the district court's decision, alleging numerous errors. Most relevant here, the government contended the district judge erred in appointing a technical advisor in a manner inconsistent with Rule 706. Although the government conceded the court has the inherent ability to appoint an expert as a technical advisor, the government argued that such power is strictly circumscribed by Rule 706 of the Federal Rules of Evidence.

The First Circuit examined the government's arguments and concluded Rule 706 is "confined to court-appointed expert witnesses; the rule does not embrace expert advisors or consultants." The court reasoned:

> The rule establishes a procedural framework for nomination and selection of an expert witness and for the proper performance of his role after an appointment is accepted (e.g., advising the parties of his findings, submitting to depositions, being called to testify, being cross-examined). By and large, these modalities – though critically important in the realm customarily occupied by an expert witness – have marginal, if any, relevance to the functioning of technical advisors. Since an advisor, by definition, is called upon to make no findings and to supply no evidence . . . provisions for depositions, cross-questioning, and the like are inapposite.

Reilly, 863 F.2d at 156. The court ultimately concluded: "Rule 706, while intended to circumscribe a court's right to designate expert witnesses, was not intended to subsume the judiciary's inherent power to appoint technical advisors." *Id*. In discussing the differing roles of technical advisors and experts, the court referred to a "pure technical advisor" as someone who has not been asked to testify or to receive evidence and make findings.[1]

[1] *See also Fed. Trade Comm'n v. Enforma Nat'l Prods., Inc.*, 362 F.3d 1204, 1213 (9th Cir. 2004) ("Technical advisors, acting as such, are not subject to the provisions of Rule 706, which govern court-appointed expert witnesses. A court-appointed expert is a witness subject to Rule 706 if the expert is called to testify or if the court relies on the expert as an independent source of evidence."); *TechSearch, L.L.C. v. Intel Corp.*, 286 F.3d 1360, 1380 (Fed. Cir.), *cert denied*, 537 U.S. 995 (2002) (trial court did not err in refusing to allow depositions of technical advisor to the court because Rule 706 does not apply to such advisors).

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Because S.C. Code Ann. § 58-41-20(I) provides for the third-party expert to operate under the authority of the Commission, expressly subjects the third party to the ex parte communication restrictions contained in Chapter 3, Title 58 and permits the third-party expert to conduct discovery and submit a report that may be accepted as evidence, the statute clearly envisions the third party engaged by the Commission will act as an independent expert and not as an informal technical advisor. Moreover, because § 58-41-20(A)(2) mandates that the proceedings shall include an opportunity for intervention, discovery, filed comments or testimony, and an evidentiary hearing, the Companies submit that Regulation 103-811 should reflect this distinction and urge the Commission to adopt an approach consistent with Rule 706.[2]

B. South Carolina

Although South Carolina has not adopted Rule 706, several reported cases discuss the testimony of court-appointed experts.

- See S.C. Code Ann. § 44-48-80(D) (permitting the circuit court to appoint an expert to evaluate "whether the person is a sexually violent predator"); *In re Thomas S.*, 402 S.C. 373, 376, 741 S.E.2d 27, 28 (2013) (cross-examination permitted).
- *Ballard v. Roberson*, 2015 S.C. App. Unpub. LEXIS 443 (Ct. App. 2015) (court appointed expert to estimate fair value of business in shareholder oppression action) (cross-examination permitted).
- *Gandy v. Gandy*, 297 S.C. 411, 377 S.E.2d 312 (1989) (court appointed expert witness in custody action; expert testified at trial).
- *State v. Downs*, 369 S.C. 55, 631 S.E.2d 79 (2006) (A court-appointed expert in forensic psychiatry testified at the competency hearing. The hearing judge ruled the State could

[2] The Companies' proposed revisions to the draft regulation are attached in Exhibit A.

present the expert at the evidentiary hearing, and the defense would be able to cross-examine witness at a later date).

- *State v. Reese*, 2005 S.C. App. Unpub. LEXIS 82 (Ct. App. 2005) (court-appointed psychiatrist testified at trial).

C. Connecticut

This issue has been previously addressed as related to the Connecticut Public Utilities Regulatory Authority, formerly the Department of Public Utilities Control. In *Conn. Light & Power Co. v. Conn. Dep't of Pub. Util. Control*, 2010 Conn. Super. LEXIS 321 (Conn. Super. Ct. Feb. 4, 2010), plaintiff electric distribution companies appealed a decision by the Connecticut Department of Public Utility Control (the "Department") denying their applications for incentive payments for the year 2004. During the proceedings, the Department retained a consulting firm specializing in energy procurement to assist it in examining various proposed adjustments, assessing the specific measurement problems associated with these adjustments, and to make recommendations concerning the statistical margin of error calculation. The statute granting the Department this authority provided: "The department may, as it deems necessary, retain a third party entity with expertise in energy procurement to assist with the development of such incentive plan." Conn. Gen. Stat. § 16-244c(b)(4)(B).

The Department informed the parties it was taking administrative notice of the expert's report; however, the report was not to be admitted as evidence. Although the incentive proceeding was a contested case, and the sole focus of the final stage of the proceeding was to determine whether a margin of error calculation was appropriate, the Department ruled the author of the report would not attend the hearing and not be subject to cross-examination. Connecticut Light & Power objected to the Department's ruling on the basis that it violated Conn. Gen. Stat. § 4-177c(a)

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(providing each party the right to cross-examine the witnesses in a contested case), and § 4-178(5) (providing that a party and the agency may conduct cross-examinations required for a full and true disclosure of the facts).

On appeal, the court concluded the Department's right to retain an expert to prepare a report did not, in and of itself, give the Department the right to restrict cross-examination of that expert: "By the Department denying cross-examination of the author of the Christensen report, it violated §§ 4-177c and 4-178(5)." The court also ruled the Department violated § 4-178(6) by improperly taking administrative notice of the expert's report because "[t]he statistical method of computing a margin of error was not within the Department's specialized knowledge, as indicated by its hiring an expert for that purpose. Moreover it was contested by the Companies' expert and very much in dispute."

III. Proposed Regulation 103-811

On September 4, 2019, Commission staff filed a Notice of Drafting Regarding Rulemaking for the Public Service Commission's Procedure to Employ, Through Contract or Otherwise, Third-Party Consultants or Experts. Commission staff subsequently filed draft language for Regulation 103-811 on September 30, 2019. In the Companies' view, the draft regulation appropriately outlines the procedure by which the Commission will hire third-party consultants and experts. However, the draft regulation does not address the practical and procedural questions that will almost certainly arise once the Commission engages a third-party expert for PURPA implementation proceedings under § 58-41-20(A). The Companies believe that the scope of the rulemaking should be broadened to address the following additional issues:

- Whether the expert's report will be entered into the formal record of the proceedings.
- Whether the expert will be subject to discovery, deposition, and cross-examination.

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- When, during the proceedings, the expert's report must be submitted.
- Transparency of communications with the Commission and the parties.

IV. Recommendations

The Companies propose a number of substantive amendments to the draft regulation to address various procedural issues that will inevitably arise in future proceedings under S.C. Code Ann. § 58-41-20.[3]

A. The Third Party's Report Should be Entered into the Evidentiary Record of the Proceedings.

Act 62 directs the qualified independent third party to "submit a report that includes the third party's independently derived conclusions as to that third party's opinion of each utility's calculation of avoided costs." The statute also provides that "[a]ny conclusions based on the evidence in the record and included in the report are intended to be used by the commission along with all other evidence submitted during the proceeding to inform its ultimate decision setting the avoided costs for each electrical utility." § 58-41-20(I).

To avoid reversal on appeal, it is well settled that "an administrative body must make findings which are sufficiently detailed to enable [the reviewing court] to determine whether the findings are supported by the evidence and whether the law has been applied properly to those findings." *Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 295, 300, 422 S.E.2d 118, 121 (1992). Reviewing courts employ "a deferential standard of review when reviewing a decision of the Public Service Commission and will affirm that decision when substantial evidence supports it."

[3] The Companies are cognizant that the Commission is considering Act 62's requirements for the first time in Dockets 2019-184-E (Dominion), 2019-185-E (DEC), 2019-186-E (DEP). In the course of those proceedings, the Commission and the parties have encountered numerous procedural issues in light of the November 15, 2019 deadline by which the Commissions must act on the PURPA Implementation and Administration Provisions. Notwithstanding the procedures established solely for purposes of those proceedings, the Companies believe these comments establish the proper procedures going forward.

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Duke Power Co. v. Pub. Serv. Comm'n of S.C., 343 S.C. 554, 558, 541 S.E.2d 250, 252 (2001) (citing *Porter v. S.C. Pub. Serv. Comm'n*, 333 S.C.12, 507 S.E.2d 328 (1998)).

South Carolina courts have defined substantial evidence as "relevant evidence that, considering the record as a whole, a reasonable mind would accept to support an administrative agency's action." *Porter*, 333 S.C. at 20–21, 507 S.E.2d at 332. "Substantial evidence exists when, if the case were presented to the jury, the court would refuse to direct a verdict because the evidence raises questions of fact for the jury. It is more than a mere scintilla of evidence, but is something less than the weight of the evidence." *Porter*, 333 S.C. at 20–21, 507 S.E.2d at 332. However, this deferential standard of review "does not mean . . . that the Court will accept an administrative agency's decision at face value without requiring the agency to explain its reasoning." *Porter*, 333 S.C. at 21, 507 S.E.2d at 332. Although the substantial evidence standard does not require the Commission to cite to specific facts in the record, it does require "that the evidence is contained in the record as a whole." *Hamm v. AT&T*, 302 S.C. 210, 218, 394 S.E.2d 842, 846 (1990); *see also Porter*, 333 S.C. at 26–27, 507 S.E.2d at 335 ("We conclude the circuit court erred in affirming PSC's decision on this issue because the record does not contain any testimony or other substantial evidence supporting PSC's conclusion."). Commission Rule 103-804(E) defines the term "formal record" as "[t]he documentation pertaining to a proceeding before the Commission, including . . . all memoranda or data submitted to the hearing officer or members of the Commission in consideration of a proceeding."

Because the Commission will use the report, along with "all other evidence submitted during the proceeding to inform its ultimate decision setting the avoided costs for each electrical utility," the substantial evidence standard undoubtedly demands that the expert's report be entered into the evidentiary record. Once entered into the evidentiary record is filed and proposed to be

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included in the evidentiary record, the report is properly subject to objection, discovery, deposition, and cross-examination in accordance with the Commission's Rules and Regulations governing practice and procedure.

B. The Regulation Should Expressly Recognize the Parties' Rights to Conduct Discovery, Including Written Requests and Depositions. The Regulation Should Also Provide the Parties a Meaningful Opportunity for Response and Cross-Examination.

Given the statute's express requirement that the "[p]roceedings shall include an opportunity for intervention, discovery, filed comments or testimony, and an evidentiary hearing," the regulation should similarly recognize the parties' procedural due process rights with respect to a qualified independent third-party engaged by the Commission to issue a report pursuant to § 58-41-20(I). Specifically, the regulation should recognize the parties' rights to request written discovery from and depose the expert. The regulation should also provide for a meaningful opportunity for cross-examination and response to the expert's report.

Due process mandates that the parties have notice and an opportunity to be heard. Article I, Section 22 of the South Carolina Constitution provides:

> **SECTION 22. Procedure before administrative agencies; judicial review.** No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

The South Carolina Supreme Court has held that this provision applies to the fundamental requirements of due process to administrative proceedings including, "notice, an opportunity to be heard in a meaningful way and judicial review." *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008).

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Moreover, in a quasi-judicial or adjudicatory proceeding, "the substantial rights of the parties must be preserved." *Spartanburg v. Parris*, 251 S.C. 187, 190, 161 S.E.2d 228, 229 (1968). "It is generally held that these rights include a reasonable opportunity to cross examine the important witnesses against a party when their credibility is challenged." *Id.* In *Parris*, the South Carolina Supreme Court concluded that in an administrative hearing concerning the respondent's discharge from employment, the admission of an affidavit and subsequent denial of respondent's right to cross-examine his accuser constituted reversible error warranting a rehearing. The Court relied, in part, on the following authority in reaching its decision:

> The right to cross-examine witnesses in quasi-judicial or adjudicatory proceedings is a right of fundamental importance which, in regard to serious matters, exists even in the absence of express statutory provision, as a requirement of due process of law or the right to a hearing, and no one may be deprived of such right even in an area in which the Constitution would permit if there is no explicit authorization therefore. 2 Am. Jur. 234, Administrative Law, Sec. 424.

Id. at 191, 161 S.E.2d at 229.

Section 58-41-20(I) provides that "[a]ny conclusions based on the evidence in the record and included in the report are intended to be used by the commission along with all other evidence submitted during the proceeding to inform its ultimate decision setting the avoided costs for each electrical utility." Because the Commission will consider and rely on the third party's report as evidence in issuing its decision, due process requires that the parties be afforded the opportunity to conduct discovery on the expert's report, including both written discovery requests and depositions, as well as a meaningful opportunity to respond to and cross-examine the expert. Furthermore, in a contested proceeding, the South Carolina Administrative Procedures Act mandates that any information offered for inclusion into the record should be subject to objection

and cross-examination and otherwise comply with the rules of evidence. S.C. Code Ann. § 1-23-330.

C. The Regulation Should Reference the Ex Parte Communication Rules Contained in Chapter 3, Title 58.

Section 58-41-20(I) also subjects the qualified independent third party "to the same ex parte prohibitions contained in Chapter 3, Title 58 as all other parties." Except as provided in § 58-3-260, the Commissioners and Commission employees are bound by the Code of Judicial Conduct, contained in Rule 501 of the South Carolina Appellate Court Rules. *See* S.C. Code Ann. § 58-3-30(B). Applying Rule 501 to the Commission pursuant to S.C. Code Ann. § 58-3-30(B) would mean that Commissioners and Commission staff are prohibited from initiating, permitting, or considering communications from the third-party expert "outside the presence of the parties concerning a pending or impending proceeding," except as provided in S.C. Code Ann. § 58-3-260. That section governs the conduct of communications between the Commission and parties:

> Except as otherwise provided herein or unless required for the disposition of ex parte matters specifically authorized by law, a commissioner, hearing officer, or commission employee shall not communicate, directly or indirectly, regarding any issue that is an issue in any proceeding or can reasonably be expected to become an issue in any proceeding with any person without notice and opportunity for all parties to participate in the communication, nor shall any person communicate, directly or indirectly, regarding any issue that is an issue in any proceeding or can reasonably be expected to become an issue in any proceeding with any commissioner, hearing officer, or commission employee without notice and opportunity for all parties to participate in the communication.

S.C. Code Ann. § 58-3-260(B). Moreover, South Carolina courts have consistently held that "[w]hen presiding over a ratemaking proceeding, the PSC takes on a quasi-judicial role." *Utils. Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 105, 708 S.E.2d 755, 760 (2011).

In light of the above, except as provided by the statutory allowable ex parte provisions, ex parte communications between the third-party expert and the Commission or its staff are

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prohibited. At the same time, given Act's 62 directive that the third party's duty will be to the Commission and that the third party will operate under the authority of the Commission, the third-party expert will be, to some extent, acting on behalf of the Commission. This presents a unique relationship as between the expert and other parties in the proceeding that must be carefully managed. For these reasons, the Companies propose that all communications between any party and the qualified independent third party be contemporaneously communicated to all parties.

Also relevant to this rulemaking proceeding is S.C. Code Ann. § 58-3-260(C), which exempts several categories of communication from the prohibitions of subsection B. Subsection C specifically provides that commissioners, hearing officers, and commission employees may "receive aid from commission employees *if the commission employees providing aid do not . . . furnish, augment, diminish, or modify the evidence in the record*." S.C. Code Ann. § 58-3-260(C)(8)(b) (emphasis added). Because the third-party consultant operates under the authority of the Commission, the regulation should make clear that the third-party consultant is prohibited from supplementing or modifying the record with any evidence that has not been properly subject to objection, discovery, and cross-examination.

D. The Regulation Should Address the Timing for Submission of the Third Party's Report.

The timing of the third party's report is important to both the Commission and all parties to the proceeding. The Companies submit that the third party's report should be produced with sufficient notice to permit discovery, deposition, and a meaningful opportunity for the parties to respond in pre-filed testimony and before the Commission in the evidentiary hearing.

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V. Conclusion

The Companies submit that the foregoing recommendations comprehensively address certain issues that are likely to arise in future proceedings under § 58-41-20, where the Commission engages a third-party consultant to review a utility's calculation of avoided costs and help inform the Commission's consideration of the utility's future costs to be avoided by purchasing power from QFs. The Companies believe these proposed amendments to the draft regulation will both address the parties' procedural due process concerns and allow for the creation of a clear and complete evidentiary record for the Commission to consider in issuing its decision.

Dated this 8th day of November 2019.

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Document No.
PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
CHAPTER 103
Statutory Authority: 1976 Code Section 58-3-140, 58-37-60 (2019 Supplement), and 58-41-20 (2019 Supplement)

103-811. Procedure to Employ, through Contract or Otherwise, Qualified, Independent Third-Party Consultants or Experts.

Preamble:
The Public Service Commission of South Carolina proposes to add a regulation which provides a process for the Commission to engage qualified independent third-party consultants or experts. The proposed regulation is necessary to provide a documented and transparent public process for employing, through contract or otherwise, qualified independent third-party consultants or experts for the Commission. The Notice of Drafting regarding this regulation was published on September 27, 2019, in the *State Register, Volume 43, Issue 9.*

Section-by-Section Discussion

103-811. This section, when it becomes effective, covers the Commission's procedures for hiring qualified, independent third-party consultants or experts by utilizing a Request for Proposals process.

Notice of Public Hearing and Opportunity for Public Comment:

Interested persons may submit written comments to the Public Service Commission, Clerk's Office, 101 Executive Center Drive, Suite 100, Columbia, South Carolina 29210. Please reference Docket Number 2019-289-A. To be considered, comments must be received no later than 4:45 p.m. on Friday, December 27, 2019. Interested members of the public and the regulated community are invited to make oral or written comments on the proposed regulation at a public hearing to be conducted by the Public Service Commission on **Wednesday, January 29, 2020, at 2:30 p.m.** in the Commission's Hearing Room, 101 Executive Center Drive, Columbia, South Carolina 29210.

Preliminary Fiscal Impact Statement:

The Commission anticipates utilizing its current resources to handle the Request for Proposals process outlined in the proposed regulation. However, the Commission anticipates incurring additional costs related to the compensation and related costs for the employment, through contract or otherwise, of the qualified, independent third-party consultants or experts. At the time of the filing of the proposed regulation, the Commission's initial contract to hire a qualified, independent third-party consultant or expert pursuant to S.C. Code Ann. Section 58-41-20 (l) included estimated compensation of $175,000.

Statement of Need and Reasonableness:

This statement of need and reasonableness was determined pursuant to S.C. Code Ann. Section l-23-115(C)(l) through (3) and (9) through (11).

DESCRIPTION OF REGULATION:
103-811. Procedure to Employ, through Contract or Otherwise, Qualified, Independent Third-Party Consultants or Experts

Purpose: Act 62 of 2019, or the South Carolina Energy Freedom Act, was signed by Governor

Henry McMaster on May 16, 2019. At least two sections of Act 62 reference the Commission's ability to hire external consultants or experts to assist in fulfilling the requirements of the law. S.C. Code Ann. Section 58-41-20 (I) states, in part, "The commission is authorized to employ, through contract or otherwise, third-party consultants or experts in carrying out its duties under this section, including, but not limited to, evaluating avoided cost rates, methodologies, terms, calculations, and conditions under this section. The commission is exempt from complying with the State Procurement Code in the selection and hiring of a third-party consultant or expert authorized by this subsection. The commission shall engage, for each utility, a qualified independent third party to submit a report that includes the third party's independently derived conclusions as to that third party's opinion of each utility's calculation of avoided costs for purposes of proceedings conducted pursuant to this section. The qualified independent third party is subject to the same ex parte prohibitions contained in Chapter 3, Title 58 as all other parties." Also, S.C. Code Ann. Section 58-37-60 states:

(A) The commission and the Office of Regulatory Staff are authorized to initiate an independent study to evaluate the integration of renewable energy and emerging energy technologies into the electric grid for the public interest. An integration study conducted pursuant to this section shall evaluate what is required for electrical utilities to integrate increased levels of renewable energy and emerging energy technologies while maintaining economic, reliable, and safe operation of the electricity grid in a manner consistent with the public interest. Studies shall be based on the balancing areas of each electrical utility. The commission shall provide an opportunity for interested parties to provide input on the appropriate scope of the study and also to provide comments on a draft report before it is finalized. All data and information relied on by the independent consultant in preparation of the draft study shall be made available to interested parties, subject to appropriate confidentiality protections, during the public comment period. The results of the independent study shall be reported to the General Assembly.

(B) The commission may require regular updates from utilities regarding the implementation of the state's renewable energy policies.

(C) The commission may hire or retain a consultant to assist with the independent study authorized by this section. The commission is exempt from complying with the State Procurement Code in the selection and hiring of the consultant authorized by this subsection."

The proposed regulation provides a documented procedure including, but not limited to, accepting applications from prospective consultants or experts, public interviews, and final decisions made by Commissioners related to the pool of applicants.

Legal Authority: S.C. Code Ann. Section 58-3-140, 58-37-60 (2019 Supplement), and 58-41-20 (2019 Supplement)

Plan for Implementation: The proposed regulation will take effect upon approval by the General Assembly and publication in the *State Register.* Additionally, the approval of the proposed regulation will provide a public and transparent process of the Commission's hiring of qualified, independent third- party consultants or experts.

DETERMINATION OF NEED AND REASONABLENESS OF THE PROPOSED REGULATION BASED ON ALL FACTORS HEREIN AND EXPECTED BENEFITS:

The proposed Regulation 103-811 is needed and is reasonable as it provides a documented, transparent procedure for interested persons' awareness of how the Commission will hire qualified, independent third-party consultants or experts and how interested persons can participate in the Request for Proposals process.

DETERMINATION OF COSTS AND BENEFITS:

The Commission opines that it can absorb the administrative process expenditures related to the hiring of qualified, independent third-party consultants or experts. The initial estimate of $175,000 is related to one contract executed by the Commission and a qualified, independent third-party consultant or expert hired pursuant to S.C. Code Ann. Section 58-41-20 (I).

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UNCERTAINTIES OF ESTIMATES:
None.

EFFECT ON ENVIRONMENT AND PUBLIC HEALIB:
None.

DETRIMENTAL EFFECT ON THE ENVIRONMENT AND PUBLIC HEALTH IF THE REGULATION IS NOT IMPLEMENTED:

The regulation will have no detrimental effect on the environment or public health if the regulation is not implemented.

STATEMENT OF RATIONALE:

The purpose for Regulation 103-811 is to add a process for the Commission to issue Request for Proposals for qualified, independent third-party consultants or experts. Adoption of this Regulation will result in a documented, public, and transparent process of the Commission's hiring of qualified, independent third-party consultants or experts. There was no scientific or technical basis relied upon in the development of this regulation.

~~Indicates Matter Stricken~~
Indicates New Matter

Text:

103-811. Procedure to Employ, through Contract or Otherwise, Qualified, Independent Third-Party Consultants or Experts.

The Public Service Commission shall use a formal Request for Proposals process to hire, through contract or otherwise, external qualified, independent third-party consultants or experts.

A. Request for Proposals

External qualified, independent third-party consultants or experts shall be procured via Request for Proposals (RFP). Any proposed RFP shall be addressed by the Commission at a publicly noticed meeting where the Commission will determine whether an RFP must be released and shall state the reason(s) for the RFP. Thereafter, the Commission Staff shall prepare and publish the RFP in accordance with the Commission Directive.

B. Process for Opening Sealed Responses to Request for Proposals

All Request for Proposals submissions or filings to the Commission must be filed in a sealed envelope. Such submissions by prospective external qualified, independent third-party consultants or experts will remain sealed until a publicly noticed meeting. At this meeting, at the direction of the Chairman, the sealed submissions will be opened and. the name(s) of the filer(s) and other relevant information as requested by the Commissioners will be revealed. The relevant information regarding the filer(s) and other general information about the filing(s) will become a part of the record for the meeting. During this meeting, the Commissioners shall approve a schedule to review the submission(s), including, but not limited to, instructing the Commission Staff to file the response(s) to the RFP in the appropriate docket on the Docket Management System; scheduling public interviews which are livestreamed or publicly video broadcasted;

scheduling deadlines for the parties in the affected dockets to submit questions for the prospective external qualified, independent third-party consultants or experts; scheduling deadlines for the parties in the relevant dockets to file feedback, comments, etc. regarding post- interview issues; scheduling deadlines for the prospective external qualified, independent third- party consultants or experts to submit a written conflicts check letter; scheduling deadlines for the Commission to provide the prospective external qualified, independent third-party consultants or experts with proposed questions from the Commissioners.

C. Process for Publication of Request for Proposals

The process for RFPs shall include issuance of written Request for Proposals indicating, at a minimum, in general terms that which is sought to be procured and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities, specifications, or qualifications that will be required. Proposals may be solicited using the following tools: social media, the Commission's website, local media, NARUC, and national job websites.

D. Additional Information Regarding the RFP Process

During the public interview, the external qualified, independent third-party consultants or experts shall be encouraged to elaborate on their qualifications and performance data or employee/staff expertise pertinent to the proposed project, as well as alternative concepts. Proprietary information from competing prospective external qualified, independent third-party consultants or experts shall not be disclosed to the public or to competitors. The Commissioners shall decide to hire external qualified, independent third-party consultants or experts at a publicly noticed meeting. If the terms and conditions for multiple awards are included in the RFP, the Commission may award contracts to more than one qualified, independent third-party consultant or expert.

E. Bonds on Professional Services

The Public Service Commission may require performance bonds for contracts for external qualified, independent third-party consultants or experts if provided in the RFP.

F. Role of Qualified, Independent Third-Party Consultants or Experts Necessary to Effectuate § 58-41-20(I) of the "SC Energy Freedom Act" (also referred to as Act 62)

(1) Commissioners and Commission employees are bound by the Code of Judicial Conduct, as contained in Rule 501 of the South Carolina Appellate Court Rules. The qualified, independent third-party consultant or expert is subject to the same ex parte prohibitions contained in Chapter 3, Title 58 as all other parties. The qualified, independent third-party consultant or expert shall submit all requests for documents and information necessary to conduct its analysis under the authority of the Commission, and the Commission shall have full authority to compel responses from parties to the requests. The qualified, independent third-party consultant or expert's duty will be to the Commission.

(2) The qualified, independent third-party consultant or expert is prohibited from furnishing, augmenting, diminishing, or modifying the evidence in the record, pursuant to S.C. Code Ann. § 58-3-260(C)(8)(b).

(3) All communications between any party and the qualified, independent third-party

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consultant or expert must be communicated to all parties contemporaneous with the original communication.

(4) Upon retention by the Commission, the qualified, independent third-party consultant or expert shall sign an acknowledgement of the ex parte prohibitions in Chapter 3, Title 58.

(5) The qualified, independent third-party consultant or expert shall submit a proposed procedural schedule for the timing of the development and issuance of its report and its intended approach to complying with the ex parte prohibition provisions in carrying out its responsibilities to the Commission.

G. <u>Procedure for Effectuating S.C. Code Ann. § 58-41-20(I)</u>

The qualified, independent third-party consultant or expert:

(1) Shall notify the parties to a proceeding of any recommendations or conclusions made by the qualified, independent third-party consultant or expert and provide a reasonable explanation of the bases for such recommendations or conclusions;

(2) May be deposed by any party pursuant to S.C. Code Regs. Ann. § 103-834;

(3) May be called to testify by the Commission or any party;

(4) May be cross-examined by any party, including the party that called the qualified, independent third-party consultant or expert to testify; and

(5) May be required to respond to Written Interrogatories and Requests for Production of Documents and Things pursuant to S.C. Code Regs. Ann. § 103-833.

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Document No.
PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
CHAPTER 103
Statutory Authority: 1976 Code Section 58-3-140, 58-37-60 (2019 Supplement), and 58-41-20 (2019 Supplement)

103-811. Procedure to Employ, through Contract or Otherwise, Qualified, Independent Third-Party Consultants or Experts.

Preamble:
The Public Service Commission of South Carolina proposes to add a regulation which provides a process for the Commission to engage qualified independent third-party consultants or experts. The proposed regulation is necessary to provide a documented and transparent public process for employing, through contract or otherwise, qualified independent third-party consultants or experts for the Commission. The Notice of Drafting regarding this regulation was published on September 27, 2019, in the *State Register, Volume 43, Issue 9.*

Section-by-Section Discussion

103-811. This section, when it becomes effective, covers the Commission's procedures for hiring qualified, independent third-party consultants or experts by utilizing a Request for Proposals process.

Notice of Public Hearing and Opportunity for Public Comment:

Interested persons may submit written comments to the Public Service Commission, Clerk's Office, 101 Executive Center Drive, Suite 100, Columbia, South Carolina 29210. Please reference Docket Number 2019-289-A. To be considered, comments must be received no later than 4:45 p.m. on Friday, December 27, 2019. Interested members of the public and the regulated community are invited to make oral or written comments on the proposed regulation at a public hearing to be conducted by the Public Service Commission on **Wednesday, January 29, 2020, at 2:30 p.m.** in the Commission's Hearing Room, 101 Executive Center Drive, Columbia, South Carolina 29210.

Preliminary Fiscal Impact Statement:

The Commission anticipates utilizing its current resources to handle the Request for Proposals process outlined in the proposed regulation. However, the Commission anticipates incurring additional costs related to the compensation and related costs for the employment, through contract or otherwise, of the qualified, independent third-party consultants or experts. At the time of the filing of the proposed regulation, the Commission's initial contract to hire a qualified, independent third-party consultant or expert pursuant to S.C. Code Ann. Section 58-41-20 (l) included estimated compensation of $175,000.

Statement of Need and Reasonableness:

This statement of need and reasonableness was determined pursuant to S.C. Code Ann. Section l-23-115(C)(l) through (3) and (9) through (11).

DESCRIPTION OF REGULATION:
103-811. Procedure to Employ, through Contract or Otherwise, Qualified, Independent Third-Party Consultants or Experts

Purpose: Act 62 of 2019, or the South Carolina Energy Freedom Act, was signed by Governor

Henry McMaster on May 16, 2019. At least two sections of Act 62 reference the Commission's ability to hire external consultants or experts to assist in fulfilling the requirements of the law. S.C. Code Ann. Section 58-41-20 (I) states, in part, "The commission is authorized to employ, through contract or otherwise, third-party consultants or experts in carrying out its duties under this section, including, but not limited to, evaluating avoided cost rates, methodologies, terms, calculations, and conditions under this section. The commission is exempt from complying with the State Procurement Code in the selection and hiring of a third-party consultant or expert authorized by this subsection. The commission shall engage, for each utility, a qualified independent third party to submit a report that includes the third party's independently derived conclusions as to that third party's opinion of each utility's calculation of avoided costs for purposes of proceedings conducted pursuant to this section. The qualified independent third party is subject to the same ex parte prohibitions contained in Chapter 3, Title 58 as all other parties." Also, S.C. Code Ann. Section 58-37-60 states:

(A) The commission and the Office of Regulatory Staff are authorized to initiate an independent study to evaluate the integration of renewable energy and emerging energy technologies into the electric grid for the public interest. An integration study conducted pursuant to this section shall evaluate what is required for electrical utilities to integrate increased levels of renewable energy and emerging energy technologies while maintaining economic, reliable, and safe operation of the electricity grid in a manner consistent with the public interest. Studies shall be based on the balancing areas of each electrical utility. The commission shall provide an opportunity for interested parties to provide input on the appropriate scope of the study and also to provide comments on a draft report before it is finalized. All data and information relied on by the independent consultant in preparation of the draft study shall be made available to interested parties, subject to appropriate confidentiality protections, during the public comment period. The results of the independent study shall be reported to the General Assembly.

(B) The commission may require regular updates from utilities regarding the implementation of the state's renewable energy policies.

(C) The commission may hire or retain a consultant to assist with the independent study authorized by this section. The commission is exempt from complying with the State Procurement Code in the selection and hiring of the consultant authorized by this subsection."

The proposed regulation provides a documented procedure including, but not limited to, accepting applications from prospective consultants or experts, public interviews, and final decisions made by Commissioners related to the pool of applicants.

Legal Authority: S.C. Code Ann. Section 58-3-140, 58-37-60 (2019 Supplement), and 58-41-20 (2019 Supplement)

Plan for Implementation: The proposed regulation will take effect upon approval by the General Assembly and publication in the *State Register*. Additionally, the approval of the proposed regulation will provide a public and transparent process of the Commission's hiring of qualified, independent third- party consultants or experts.

DETERMINATION OF NEED AND REASONABLENESS OF THE PROPOSED REGULATION BASED ON ALL FACTORS HEREIN AND EXPECTED BENEFITS:

The proposed Regulation 103-811 is needed and is reasonable as it provides a documented, transparent procedure for interested persons' awareness of how the Commission will hire qualified, independent third-party consultants or experts and how interested persons can participate in the Request for Proposals process.

DETERMINATION OF COSTS AND BENEFITS:

The Commission opines that it can absorb the administrative process expenditures related to the hiring of qualified, independent third-party consultants or experts. The initial estimate of $175,000 is related to one contract executed by the Commission and a qualified, independent third-party consultant or expert hired pursuant to S.C. Code Ann. Section 58-41-20 (I).

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UNCERTAINTIES OF ESTIMATES:
None.

EFFECT ON ENVIRONMENT AND PUBLIC HEALIB:
None.

DETRIMENTAL EFFECT ON THE ENVIRONMENT AND PUBLIC HEALTH IF THE REGULATION IS NOT IMPLEMENTED:

The regulation will have no detrimental effect on the environment or public health if the regulation is not implemented.

STATEMENT OF RATIONALE:

The purpose for Regulation 103-811 is to add a process for the Commission to issue Request for Proposals for qualified, independent third-party consultants or experts. Adoption of this Regulation will result in a documented, public, and transparent process of the Commission's hiring of qualified, independent third-party consultants or experts. There was no scientific or technical basis relied upon in the development of this regulation.

~~Indicates Matter Stricken~~
Indicates New Matter

Text:

103-811. Procedure to Employ, through Contract or Otherwise, Qualified, Independent Third-Party Consultants or Experts.

The Public Service Commission shall use a formal Request for Proposals process to hire, through contract or otherwise, external qualified, independent third-party consultants or experts.

A. Request for Proposals

External qualified, independent third-party consultants or experts shall be procured via Request for Proposals (RFP). Any proposed RFP shall be addressed by the Commission at a publicly noticed meeting where the Commission will determine whether an RFP must be released and shall state the reason(s) for the RFP. Thereafter, the Commission Staff shall prepare and publish the RFP in accordance with the Commission Directive.

B. Process for Opening Sealed Responses to Request for Proposals

All Request for Proposals submissions or filings to the Commission must be filed in a sealed envelope. Such submissions by prospective external qualified, independent third-party consultants or experts will remain sealed until a publicly noticed meeting. At this meeting, at the direction of the Chairman, the sealed submissions will be opened and. the name(s) of the filer(s) and other relevant information as requested by the Commissioners will be revealed. The relevant information regarding the filer(s) and other general information about the filing(s) will become a part of the record for the meeting. During this meeting, the Commissioners shall approve a schedule to review the submission(s), including, but not limited to, instructing the Commission Staff to file the response(s) to the RFP in the appropriate docket on the Docket Management System; scheduling public interviews which are livestreamed or publicly video broadcasted;

scheduling deadlines for the parties in the affected dockets to submit questions for the prospective external qualified, independent third-party consultants or experts; scheduling deadlines for the parties in the relevant dockets to file feedback, comments, etc. regarding post- interview issues; scheduling deadlines for the prospective external qualified, independent third- party consultants or experts to submit a written conflicts check letter; scheduling deadlines for the Commission to provide the prospective external qualified, independent third-party consultants or experts with proposed questions from the Commissioners.

C. Process for Publication of Request for Proposals

The process for RFPs shall include issuance of written Request for Proposals indicating, at a minimum, in general terms that which is sought to be procured and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities, specifications, or qualifications that will be required.

Proposals may be solicited using the following tools: social media, the Commission's website, local media, NARUC, and national job websites.

D. Additional Information Regarding the RFP Process

During the public interview, the external qualified, independent third-party consultants or experts shall be encouraged to elaborate on their qualifications and performance data or employee/staff expertise pertinent to the proposed project, as well as alternative concepts. Proprietary information from competing prospective external qualified, independent third-party consultants or experts shall not be disclosed to the public or to competitors.

The Commissioners shall decide to hire external qualified, independent third-party consultants or experts at a publicly noticed meeting.

If the terms and conditions for multiple awards are included in the RFP, the Commission may award contracts to more than one qualified, independent third-party consultant or expert.

E. Bonds on Professional Services

The Public Service Commission may require performance bonds for contracts for external qualified, independent third-party consultants or experts if provided in the RFP.

F. Role of Qualified, Independent Third-Party Consultants or Experts Necessary to Effectuate § 58-41-20(I) of the "SC Energy Freedom Act" (also referred to as Act 62)

(1) Commissioners and Commission employees are bound by the Code of Judicial Conduct, as contained in Rule 501 of the South Carolina Appellate Court Rules. The qualified, independent third-party consultant or expert is subject to the same ex parte prohibitions contained in Chapter 3, Title 58 as all other parties. The qualified, independent third-party consultant or expert shall submit all requests for documents and information necessary to conduct its analysis under the authority of the Commission, and the Commission shall have full authority to compel responses from parties to the requests. The qualified, independent third-party consultant or expert's duty will be to the Commission.

(2) The qualified, independent third-party consultant or expert is prohibited from furnishing, augmenting, diminishing, or modifying the evidence in the record, pursuant to S.C. Code Ann. § 58-3-260(C)(8)(b).

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(3) All communications between any party and the qualified, independent third-party consultant or expert must be communicated to all parties contemporaneous with the original communication.

(4) Upon retention by the Commission, the qualified, independent third-party consultant or expert shall sign an acknowledgement of the ex parte prohibitions in Chapter 3, Title 58.

(5) The qualified, independent third-party consultant or expert shall submit a proposed procedural schedule for the timing of the development and issuance of its report and its intended approach to complying with the ex parte prohibition provisions in carrying out its responsibilities to the Commission.

G. Procedure for Effectuating S.C. Code Ann. § 58-41-20(I)

The qualified, independent third-party consultant or expert:

(1) Shall notify the parties to a proceeding of any recommendations or conclusions made by the qualified, independent third-party consultant or expert and provide a reasonable explanation of the bases for such recommendations or conclusions;

(2) May be deposed by any party pursuant to S.C. Code Regs. Ann. § 103-834;

(3) May be called to testify by the Commission or any party;

(4) May be cross-examined by any party, including the party that called the qualified, independent third-party consultant or expert to testify; and

(5) May be required to respond to Written Interrogatories and Requests for Production of Documents and Things pursuant to S.C. Code Regs. Ann. § 103-833.

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February 5, 2020

VIA ELECTRONIC FILING

The Honorable Jocelyn Boyd
Chief Clerk / Executive Director
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

Re: **Rulemaking for the Public Service Commission's Procedure to Employ, Through Contract or Otherwise, Third-Party Consultants or Experts Docket No. 2019-289-A**

Dear Ms. Boyd:

On November 8, 2019, Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP," together with DEC, the "Companies" or "Duke") filed joint comments in the above-referenced docket concerning draft proposed Rule 103-811, which outlines the process for the Public Service Commission of South Carolina (the "Commission") to engage qualified, independent third-party consultants and experts. In their joint comments, the Companies proposed that the Commission broaden the scope of the rulemaking to address various aspects of the consultant or expert's role in proceedings under S.C. Code Ann. § 58-41-20(A). Consistent with their joint comments, the Companies also proposed amending the draft regulation to add sections (F) and (G), which outline the role of the qualified, independent third-party consultant or expert and set forth the applicable procedural rules governing the involvement of a third-party consultant or expert in proceedings under S.C. Code Ann. § 58-41-20(A). Commission staff subsequently incorporated the Companies' proposed changes and filed the amended proposed Rule 103-811 with the South Carolina Legislative Council. The comment period for Docket No. 2019-289-A expired on December 27, 2019.

On November 25, 2019, the Commission established Docket No. 2019-362-A, *A Rulemaking for the Public Service Commission to Create a New Regulation 103-811.5 Role of the Qualified, Independent Third-Party Consultant or Expert and the Commissioners' Reliance on the Contents of the Qualified, Independent Third-Party Consultant's or Expert's Report*. The Commission has not yet filed a proposed rule in this docket, and comments on the notice of drafting are due by February 13, 2020.

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The Commission held a public hearing on proposed Rule 103-811 on January 29, 2020. At the hearing, Commission staff proposed removing sections (F) and (G) from proposed Rule 103-811 in light of the Commission's establishment of Docket No. 2019-362-A for the purpose of addressing the role of the qualified, independent third-party consultant or expert and the Commissioners' reliance on the consultant's or expert's report. As stated at the public hearing, the Companies agree with Commission staff that sections (F) and (G) are more appropriately considered in Docket No. 2019-362-A, which was opened subsequent to the Companies' earlier filing, and therefore concur with Commission staff's decision to remove those sections from proposed Rule 103-811. The Companies believe that those sections, once removed, provide a good starting point for a proposed rule to be considered in Docket No. 2019-362-A and the Company plans to participate in that docket as well.

As noted at the public hearing, the Companies believe it is imperative that the Commission promulgates a regulation concerning the hiring of a third-party consultant or expert that clearly communicates the purpose for which the consultant or expert is being hired. To assist in providing that information we propose that subsection (A) of proposed Rule 103-811 be revised to add a sentence as shown below in bold and underlined:

> A. Request for Proposals External qualified, independent third-party consultants or experts shall be procured via Request for Proposals (RFP). Any proposed RFP shall be addressed by the Commission at a publicly noticed meeting where the Commission will determine whether an RFP must be released and shall state the reason(s) for the RFP. Thereafter, the Commission Staff shall prepare and publish the RFP in accordance with the Commission Directive. **<u>An RFP issued pursuant to this rule will include a reference to any applicable rules or regulations that govern the role of the consultant.</u>**

We think that adding this language to Rule 103-811 will then require that any RFPs issued pursuant to that rule will include a reference to the rules and procedures that the Commission eventually adopts as Rule 103-811.5. Because of the order in which the dockets were opened, the Companies believe this approach provides a way to ensure that future RFPs include a reference to the rules governing the role of the third-party consultant or expert.

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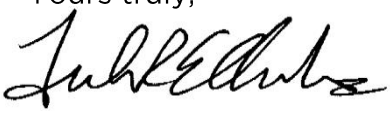
Thank you for your consideration of our views on these issues.

Yours truly,



Frank R. Ellerbe, III

FRE:tch

cc: Parties of Record (via email)
Heather Shirley Smith, Deputy General Counsel (via email)
Katie M. Brown, Counsel (via email)