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October 13, 2021

VIA ELECTRONIC FILING

Jocelyn G. Boyd, Esquire
Chief Clerk & Administrator
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, South Carolina 29210

RE: Applications of Duke Energy Progress, LLC and Duke Energy Carolinas, LLC for Approval of Smart $aver Solar as Energy Efficiency Program
Docket Nos. 2021-143-E and 2021-144-E

Dear Ms. Boyd:

Attached please find the South Carolina Office of Regulatory Staff's Motion To Strike Certain Testimony for filing in your office.

Should you need anything further, please do not hesitate to contact me.

Sincerely,

Benjamin P. Mustian

cc: All Parties of Record (via E-mail)
C. Jo Anne Wessinger Hill, Esquire (via E-mail)
David Butler, Esquire (via E-mail)

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BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NOS. 2021-143-E AND 2021-144-E

IN RE: Application of Duke Energy Progress, LLC for Approval of Smart $aver Solar as Energy Efficiency Program Application of Duke Energy Carolinas, LLC forApproval of Smart $aver Solar as Energy Efficiency Program	)	**SOUTH CAROLINA OFFICE OF REGULATORY STAFF'S MOTION TO STRIKE CERTAIN TESTIMONY**

Pursuant to S.C. Code Ann. Regs. §§ 103-829, -845, -846, and -849, and Rule 702 of the South Carolina Rules of Evidence, the South Carolina Office of Regulatory Staff ("ORS"), by and through counsel, hereby moves that the Public Service Commission of South Carolina ("Commission") issue an order striking the identified portions of the October 5, 2021, rebuttal testimony filed by Leigh C. Ford and Lon Huber on behalf Duke Energy Progress, LLC ("DEP") and Duke Energy Carolinas, LLC ("DEC") (collectively referred to herein as the "Companies"). In support thereof, ORS would respectfully show as follows:

ARGUMENT

I. Improper Legal Opinion Testimony

Pursuant to S.C. Code Ann. Reg. § 103-846, the South Carolina Rules of Evidence shall be followed in proceedings before the Commission. According to Rule 702 of the South Carolina Rules of Evidence expert opinion testimony is allowed "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" when the witness is "qualified as an expert by knowledge, skill, experience, training, or

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education." However, "[e]xpert testimony on issues of law is inadmissible" in South Carolina. *Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003). The Supreme Court of South Carolina has held that expert opinions on legal arguments are not designed to assist the trier of fact understand facts and fall outside the scope of SCRE Rule 702. *See, e.g., Green v. State*, 351 S.C. 184, 198, 569 S.E.2d 318, 325 (2002) (excluding expert testimony because it was not designed to assist the court's understanding of certain facts, but, rather, was legal argument as to why the court should rule, as a matter of law, on the legal question before it); *Kirkland v. Peoples Gas Co.*, 269 S.C. 431, 434, 237 S.E.2d 772, 773 (1977) (affirming the circuit court's exclusion of expert testimony interpreting Department of Transportation Regulations that "constituted conclusions of law reserved to the province of the court").

These exact problems exist with portions of Witness Ford's and Witness Huber's pre-filed testimonies. While the stated purpose of Witness Ford's testimony is to address distinctions between lost revenues associated with the Companies' DER programs and net lost revenues in the Companies' energy efficiency ("EE")/demand side management ("DSM") mechanisms approved in Order Nos. 2021-32 and 2021-33,[1] she makes various legal conclusions regarding the meaning of aspects of Act 62. In particular, Witness Ford makes a legal conclusion when she asserts that, despite the plain language of the statute, S.C. Code Ann. § 58-40-20(I) "specifically and exclusively addresses DER Program costs...."[2] Additionally, Witness Ford asserts, "[l]ost revenues, as referenced in Order No. 2015-194 and in S.C. Code Ann. § 58-40-20(I) of Act 62 refer to those revenues associated with providing the 1:1 retail rate credit for Act 236 NEM Customers."[3] Similarly, Witness Huber attempts to advance a legal opinion through his rebuttal

[1] *See* Ford Rebuttal, p. 3, ll. 17-20.

[2] Ford Rebuttal, p. 4, ll. 15-17.

[3] Ford Rebuttal, p. 5, ll. 16-18.

testimony by asserting a legal interpretation of the Commission's opinions regarding the function of solar as an EE measure and the purpose behind the Solar Choice Tariffs.[4]

The determination of how S.C. Code Ann. § 58-40-20 applies in this proceeding lies solely within the province of the Commission and the Companies' attempt to interject Witnesses Ford and Huber's unqualified legal opinions in this matter is impermissible. Accordingly, allowing Witnesses Ford and Huber to provide these legal opinions would violate the South Carolina Rules of Evidence and well-established Supreme Court precedent and would constitute reversible error if considered by the Commission. As a result, the following portions of Witness Ford and Huber's rebuttal testimony should be stricken, should not be considered by the Commission, and should not be permitted to be entered into the record of evidence:

1) Ford Rebuttal, p. 4, ll. 15-17;
2) Ford Rebuttal, p. 5, ll. 16-18; and
3) Huber Rebuttal, p. 7, ll. 4-6.

II. Issues Improperly Raised in Rebuttal Testimony for the First Time

In addition, the Companies improperly attempt to raise new issues for the first time through the rebuttal testimony of Witness Huber. Specifically, Witness Huber identifies for the first time in his rebuttal testimony that the Companies conducted a survey of its customers and hired a third party to hold focus groups to hear from customers about the Programs.[5] Witness Huber suggests that this information is offered in response to ORS Witness Horii's direct testimony in which he discusses the Programs and states that the Companies' customers (solar and non-solar) will fund the additional costs, incentives, shareholder benefits, and lost revenue recoveries.[6] However, none

[4] Huber Rebuttal, p. 7, ll. 4-6.

[5] Huber Rebuttal, p.7, l. 21 – p. 8, l. 9.

[6] Horii Direct, p. 12, ll. 1-14.

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of the information presented by Witness Huber concerning the Companies' claimed surveys and focus groups[7] relates in any manner to the issues discussed by ORS Witness Horii or any other parties' witnesses.

Rebuttal testimony of an applicant is only appropriate for replying to issues raised by ORS or other parties of record and should not be used to raise new issues for the Commission's consideration. *See State v. Huckabee*, 388 S.C. 232, 242, 694 S.E.2d 781, 786 (Ct. App. 2010) ("Reply testimony should be limited to rebuttal of matters raised by the defense, rather than to complete the plaintiff's case-in-chief."). Because this testimony of Witness Huber does not respond to ORS or intervenor testimony, the Commission should not abide the Companies' attempt to lay in wait by previously withholding issues more appropriate for direct testimony and then inserting it in rebuttal testimony that is unresponsive to the issues raised by the other parties. Accordingly, ORS submits that the following portions of Witness Huber's testimony should be stricken, should not be considered by the Commission, and should not permitted to be entered into the record of evidence:

1) Huber Rebuttal, p.7, l. 21 – p. 8, l. 9.

[7] Notably, Witness Huber's testimony regarding the focus groups is based upon improper surmise and speculation and the Companies fail to provide any information regarding when the surveys or focus groups were conducted, response rate, or any other information surrounding these events, which begs the question, if this information was truly so supportive of the Programs, why was it not included with the Companies' Applications or direct testimony?

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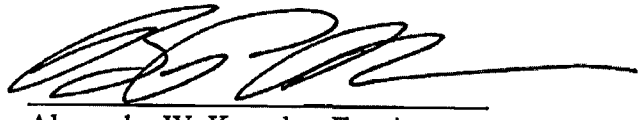
CONCLUSION

For the foregoing reasons, ORS respectfully moves that the Commission issue an order striking the aforementioned sentences from Witness Ford's and Witness Huber's rebuttal testimony, which was filed by the Companies on October 5, 2021, and for such other relief as the Commission may deem necessary and appropriate.

Respectfully submitted,



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BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2021-143-E and 2021-144-E

IN RE:	Application of Duke Energy Progress, LLC for Approval of Smart $aver Solar as Energy Efficiency Program Application of Duke Energy Carolinas, LLC for Approval of Smart $aver Solar as Energy Efficiency Program	**CERTIFICATE OF SERVICE**

This is to certify that I, Vicki L. Watts, have this date served one (1) copy of the **South Carolina Office of Regulatory Staff's Motion to Strike Certain Testimony** in the above-referenced matter to the person(s) named below by causing said copy to be electronically mailed, addressed as shown below:

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s/ Vicki L. Watts
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October 13, 2021
Columbia, South Carolina