STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-7, SUB 1134
DOCKET NO. E-7, SUB 1276

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-7, SUB 1134 In the Matter of Application of Duke Energy Carolinas, LLC for Approval to Construct a 402 MW Natural Gas-Fired Combustion Turbine Electric Generating Facility in Lincoln County DOCKET NO. E-7, SUB 1276 In the Matter of Application of Duke Energy Carolinas, LLC, for Adjustment of Rates and Charges Applicable to Electric Service in North Carolina and Performance-Based Regulation	**NOTICE OF APPEAL AND EXCEPTIONS OF BLUE RIDGE EMC, HAYWOOD EMC, PIEDMONT EMC, AND RUTHERFORD EMC**

To the Honorable Supreme Court of North Carolina:

Pursuant to Appellate Rule 18 and N.C.G.S. § 7A-29(b), Blue Ridge Electric Membership Corporation, Haywood Electric Membership Corporation, Piedmont Electric Membership Corporation, and Rutherford Electric Membership Corporation (collectively, the "EMCs") hereby give notice of appeal to the Supreme Court of North Carolina from (1) the 15 December 2023 Order Accepting Stipulations, Granting Partial Rate Increase, Requiring Public Notice, and Modifying Lincoln CT CPCN Conditions ("Order") entered by the North Carolina Utilities Commission; (2) the 23

October 2023 Order Denying Motion to Strike and Reconvening Hearing ("First Evidentiary Order") entered by the North Carolina Utilities Commission; and (3) the 24 October 2023 Order Responding to Second Motion to Strike and Establishing Hearing Procedures ("Second Evidentiary Order") entered by the North Carolina Utilities Commission.

Pursuant to N.C.G.S. § 62-90(a), the EMCs take exception to the Order on the following grounds, which the EMCs contend are unlawful, unjust, unreasonable, and/or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; in excess of the Commission's statutory authority; arbitrary and capricious; in violation of the due process rights of the EMCs as parties to the docket; and/or an abuse of discretion:

EXCEPTION 1

Finding of Fact 36 and the underlying Evidence and Conclusions supporting that finding are unjust, unreasonable, unlawful, and/or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; in excess of the Commission's statutory authority; and/or arbitrary and capricious.

In the Order, the Commission approved the Transmission Cost Allocation ("TCA") Stipulation entered into between DEC, the Public Staff, and an affiliated public utility which was not a party to the instant proceeding, "agree[ing] to a pro forma adjustment of approximately $20 million to increase the revenue requirement

in the instant proceeding and a corresponding decrease to the revenue requirement in the [affiliated public utility's rate case]." (Order at 131). An increase or decrease in a public utility's approved revenue requirement generally translates directionally and proportionally to increased or decreased base rates, respectively.

The Commission's ratemaking authority is not unlimited, and approval of the TCA Stipulation exceeds the Commission's ratemaking authority under both N.C.G.S. § 62-133 and N.C.G.S. § 62-133.16, inasmuch as the Commission has allowed two parties to the instant proceeding, together with a third non-party to the proceeding, to agree to include a $20 million pro forma adjustment to increase the revenue requirement of DEC (and to decrease the revenue requirement of the public utility that actually owns and operates the assets at issue). In other words, by approving the TCA Stipulation, the Commission has partially fixed rates based upon ascertaining the reasonable original cost or fair value of property that neither (1) is owned by DEC; nor (2) is used and useful in the provision of electric service to DEC's customers.

The Commission has only that authority granted to it by the General Assembly. *E.g., Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 736, 309 S.E.2d 209, 216 (1983). Neither the Commission, nor any party to the instant proceeding, identified any sound legal basis to allow the Commission to include in DEC's approved revenue requirement a portion of the costs of assets not owned or operated by DEC in the provision of electric service to DEC's customers.

The Commission thus erred when it approved the TCA Stipulation because doing so exceeded the authority delegated to it.

EXCEPTION 2

Findings of Fact 41–42 and 69, and the underlying Evidence and Conclusions supporting those findings[1] are unjust, unreasonable, unlawful, and/or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; in excess of the Commission's statutory authority; and/or arbitrary and capricious.

The Commission failed to comply with the statutory constraints imposed on the Commission's authority to engage in performance-based regulation as set forth in N.C.G.S. § 62-133.16 ("PBR Statute"), which enabled the Commission to engage in performance-based regulation ("PBR"), as that term is defined by N.C.G.S. § 62-133.16(a)(7). *See* S.L. 2021-165. More specifically, the Commission impermissibly concluded that a 10% reduction in interclass subsidies satisfies N.C.G.S. § 62-133.16(b). Under N.C.G.S. § 62-133.16(b), the Commission may approve a PBR application only if the approved PBR plan minimizes interclass subsidies to the "greatest extent practicable" by the conclusion of the multi-year rate plan ("MYRP") period. Before the introduction of PBR in 2021,[2] the Company

[1] The Evidence & Conclusions supporting Findings of Fact 41-42 are presented in the Order together with the Evidence & Conclusions supporting Findings of Fact 43-47.

[2] *See* An Act to Authorize the Utilities Commission to (I) Take All Reasonable Steps to Achieve a Seventy Percent Reduction in Emissions of Carbon Dioxide from Electric Public Utilities from 2005 Levels by the Year 2030 and Carbon Neutrality by the Year 2050, (II) Authorize Performance-Based

routinely requested—and the Commission routinely approved—interclass subsidy reductions of 25%. Even so, in this proceeding—which, along with the Commission's decision *In the Matter of: Application of Duke Energy Progress, LLC for Adjustment of Rates and Charges Applicable to Electrical Service in North Carolina and Performance Based Regulation*, Docket No. E-2, Sub 1300, are the first two electric general rate cases with PBR applications since the advent of PBR in North Carolina—the PBR plan proposed by the Company and approved by the Commission achieves only a 10% reduction in interclass subsidies over the MYRP period.

Given the Commission's historical practice of adjudicating general rate cases with 25% interclass subsidy reductions, the Commission's approval of only a 10% interclass subsidy reduction by the conclusion of the MYRP period, and N.C.G.S. § 62-133.16(b)'s mandate that the Commission reduce interclass subsidies to the greatest extent practicable by the conclusion of the three-year MYRP period, the MYRP approved by the Commission is impermissible as a matter of law.

EXCEPTION 3

Regulation of Electric Public Utilities, (III) Proceed with Rulemaking on Securitization of Certain Costs and Other matters, and (IV) Allow Potential Modification of Certain Existing Power Purchase Agreements with Eligible Small Power Producers, S.L. 2021-165, Part II § 4.(a), which added a new section to Article 7 of Chapter 62 of the General Statutes entitled "Authorize Performance-Based Regulation of Electric Utilities."

Findings of Fact 41–42 and 69, and the underlying Evidence and Conclusions supporting those findings[3] are unjust, unreasonable, unlawful, and/or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; in excess of the Commission's statutory authority; and/or arbitrary and capricious.

The Commission impermissibly concluded that a 10% reduction in interclass subsidies satisfies N.C.G.S. § 62-133.16(b) and further violated N.C.G.S. § 62-133.16(b) by allocating DEC's total revenue requirement among customer classes in a manner that did not comply with the cost causation principle, as that term is defined by N.C.G.S. § 62-133.16(a)(1). Under N.C.G.S. § 62-133.16(b), the Commission may engage in PBR only if in doing so it will satisfy as a threshold issue a few non-discretionary requirements, including (1) minimizing interclass subsidies to the "greatest extent practicable" by the conclusion of the MYRP period; and (2) allocating the utility's revenue requirement in accordance with the cost causation principle. Before the introduction of PBR in 2021, the Company routinely requested—and the Commission routinely approved—interclass subsidy reductions of 25%. Even so, in this proceeding—which, along with the Commission's decision *In the Matter of: Application of Duke Energy Progress, LLC for Adjustment of Rates and Charges Applicable to Electrical Service in North Carolina and Performance Based*

[3] The Evidence & Conclusions supporting Findings of Fact 41-42 are presented in the Order together with the Evidence & Conclusions supporting Findings of Fact 43-47.

Regulation, Docket No. E-2, Sub 1300, are the first two electric general rate cases with PBR applications since the advent of PBR in North Carolina—the PBR plan proposed by the Company and approved by the Commission achieves only a 10% reduction in interclass subsidies over the MYRP period.

To reach its conclusion, the Commission relied heavily on the testimony of DEC witness Morgan Beveridge. (Order at 145–48). Even so, the Commission failed to adequately explain why witness Beveridge's testimony was credible when (1) witness Beveridge acknowledged that other customer classes have historically subsidized residential ratepayers; and (2) such a subsidy persisted even when DEC previously sought, and the Commission previously approved, a 25% reduction in interclass subsidies before the introduction of the PBR Statute, which requires that any such interclass subsidy be reduced to the "greatest extent practicable" by the conclusion of the MYRP. *See* N.C.G.S. § 62-133.16(b). As a result, the Commission failed to adequately explain why it approved DEC's proposed revenue apportionment among customer classes.

EXCEPTION 4

The Commission's First Evidentiary Order and Second Evidentiary Order denying the joint motions to strike and the Commission's decision to admit Public Staff witness David Williamson's supplemental direct testimony and exhibits, errata testimony, and corrected exhibits over the objections of the EMCs and another party

were unjust, unreasonable, and unwarranted; arbitrary and capricious; an abuse of discretion; and in a manner inconsistent with applicable Commission Rules.

On 19 July 2023, the Public Staff timely filed the direct testimony of witness David Williamson. In witness Williamson's pre-filed direct testimony, however, witness Williamson announced—without the Public Staff having first sought leave from the Commission or otherwise having sought permission from the Commission—that he would be filing supplemental testimony, "illustrat[ing] the impacts associated with revenue apportionment and rate design based on the Public Staff's proposed revenue requirement in this proceeding." (Tr. vol. 13 at 42).

On 1 August 2023, the Public Staff filed a letter in these dockets, notifying other parties and the Commission—without having first moved for leave or permission from the Commission—that it would be filing its supplemental testimony "no sooner than the start of the hearing on August 28, 2023."

On 21 August 2023, a Commission staff attorney emailed counsel for all parties for the purpose of scheduling a pre-hearing conference call. A pre-hearing conference call was subsequently held on 23 August 2023. During the pre-hearing conference call, the Commission staff attorney informed counsel for all parties that, among other things, it was the expectation of the Commission that any supplemental pre-filed testimony be filed in advance of the respective witness taking the stand to provide live testimony during the evidentiary hearing in the above-captioned matter.

The evidentiary hearing in this matter was held beginning on 28 August 2023 and concluding on 5 September 2023.

In spite of Commission staff's admonishment to counsel for all parties, as conveyed during the 23 August 2023 pre-hearing conference call, the Public Staff had still not pre-filed witness Williamson's supplemental testimony regarding the issue of revenue apportionment when he took the witness stand to provide live testimony on 31 August 2023. Counsel for the EMCs immediately brought this issue to the Presiding Commissioner's attention. (Tr. vol. 13 at 68-76).

On 11 October 2023, the parties filed Proposed Orders and Briefs (POBs) in the above-captioned docket.

On 13 October 2023, 46 days after the expert witness hearing of this matter began and 86 days after intervenor testimony was due to be filed in this proceeding, the Public Staff caused to be filed in these dockets the supplemental testimony and exhibits of witness Williamson. On October 20, 2023, 53 days after the expert witness hearing of this matter began and 93 days after intervenor testimony was due to be filed in this proceeding, the Public Staff caused to be filed in these dockets an errata sheet and corrected supplemental exhibits of witness Williamson.

In response to the supplemental filings of witness Williamson, the EMCs in turn joined a motion to strike on 17 October 2023, followed by a second joint motion to strike on 23 October 2023. By denying these motions and admitting the supplemental and corrected supplemental testimony and exhibits of witness

Williamson over the repeated and renewed objections of the EMCs and another party, the Commission deprived the EMCs of essential components of its due process rights.

Moreover, Findings of Fact 41-42 and the Evidence & Conclusions in support of those findings contained in the Order are in error due to the Order's reliance upon Public Staff witness David Williamson's supplemental testimony, given that such evidence that was not competent and should not have been admitted into the record.

The North Carolina Supreme Court has held that, where the Commission permits the proffer of evidence post-hearing, opposing parties have the right to demand that the hearing be reopened to allow for (1) cross-examination of witnesses regarding the information presented; and (2) presentation of rebuttal evidence. *State ex rel. Utilities Com. v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 269, 148 S.E.2d 100, 109-110 (1966).

CONCLUSION

For the reasons set forth above, the Commission's Order, First Evidentiary Order, and Second Evidentiary Order are unlawful, unjust, unreasonable, and/or unwarranted; in excess of the Commission's statutory authority or jurisdiction; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; arbitrary or capricious; and/or an abuse of discretion. The Order, First Evidentiary Order, and Second Evidentiary Order should therefore be reversed as to the Exceptions set forth herein.

Respectfully submitted this the 13th of February 2024.

WARD AND SMITH, P.A.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing Notice of Appeal and Exceptions of Blue Ridge EMC, Haywood EMC, Piedmont EMC, and Rutherford EMC upon all parties of record by email transmission with the parties' consent.

This the 13th of February 2024.

/s/ Chris Edwards
Christopher S. Edwards

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