

**STATE OF NORTH CAROLINA
UTILITES COMMISSION
RALEIGH**

DOCKET NO. E-7, SUB 1282

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Application of Duke Energy Carolinas,)
LLC Pursuant to G.S. § 62-133.2 and) THE PUBLIC STAFF'S
NCUC Rule R8-55 Relating to Fuel) MOTION AND RESPONSE TO
and Fuel-Related Charge Adjustments) DEC'S MOTION
for Electric Utilities)

NOW COMES the Public Staff of the North Carolina Utilities Commission (Public Staff), by and through its Executive Director, Christopher J. Ayers, and hereby respectfully responds to the "Motion To Strike the Public Staff's Supplemental Testimony and Request for Relief in the Alternative" filed July 6, 2023 (Motion) by Duke Energy Carolinas, LLC (DEC) and further moves and petitions as set forth herein.

I. NOTICE OF THE PUBLIC STAFF'S INTENT TO FILE SUPPLEMENTAL TESTIMONY

As shown below, in the direct testimony and exhibits of Public Staff witness Evan D. Lawrence filed May 9, 2023 (Direct Testimony), and in the live testimony of Mr. Lawrence at the hearing held on May 31, 2023, the Public Staff provided notice to the North Carolina Utilities Commission (Commission) and the parties of its intent to file supplemental testimony in this proceeding regarding its review of plant performance.

The Public Staff believed a motion for leave to file supplemental testimony was unnecessary because the Commission and all the parties understood that additional testimony would be filed by the Public Staff. The filing of supplemental testimony was discussed several times. Witness Lawrence references in his Direct Testimony that Public Staff will make “a supplemental filing.” Tr. vol. 2, 276. Further, witness Lawrence testified: “[A]s I stated in my initial testimony, I still plan to file supplemental testimony on this issue as soon as possible.” Tr. vol. 2, 246.

Later, the Presiding Commissioner asked witness Lawrence “about the supplemental filing that you talked about that the Public Staff is going to be making...” Tr. vol. 2, 324-25. These discussions addressed a variety of topics, including procedural issues, as follows:

- Q. [by the Presiding Commissioner]: And just to make sure that I'm clear about how it's going to work from a procedural standpoint. So the evidentiary hearing will presumably will be finished today and you will be providing a supplemental report or supplemental testimony. Are you asking that your recommendation to be deferred until the next fuel proceeding or to be incorporated so that your recommendations in regard to the April 22nd, 2022 outage and the August 2022 outage. What will you be asking the Commission to do? To consider it in this fuel proceeding or in the next?
- A. [by witness Lawrence]: Well, I believe I would be, of course, open to whatever the Commission preferred that approach be.

Tr. vol. 2, 326.

For these reasons, the Public Staff respectfully requests that the Commission enter into the record and consider the supplemental testimony and exhibits of Mr. Lawrence filed on June 30, 2023 (Supplemental Testimony).

II. SCHEDULING ORDER

DEC argues the Supplemental Testimony should be stricken because it was filed after the time set forth in the Commission's Order Scheduling Hearing, Requiring Filing of Testimony, Establishing Discovery Guidelines, and Requiring Public Notice (Scheduling Order), and that the Scheduling Order does not allow discovery on rebuttal testimony for the purpose of introducing new adjustments.¹ Neither of these arguments should persuade the Commission. First, DEC incorrectly quoted the Scheduling Order, adding the language "[t]he discovery is not to permit the introduction of new adjustments"² to the Scheduling Order. Nothing in the Scheduling Order prohibits adjustments being made after discovery on the Company's rebuttal testimony. DEC's rebuttal testimony caused new discovery to be issued which uncovered new evidence on the outage at issue. Therefore, the Public Staff was obligated to inform the Commission of the new information and nothing in the Scheduling Order suggests that additional adjustment cannot be made to the Company's application if the rebuttal discovery reveals new evidence making a new adjustment appropriate. Second, the Commission allows the modification of scheduling orders to permit the filing of supplemental testimony "when good cause is shown by the party requesting the modification and when no prejudice will result to the parties or the proceedings as a result of the modification." Order Allowing Supplemental and Supplemental Rebuttal Testimony, and Providing for Limited Discovery, Docket No. W-1300, Sub

¹ Motion at 3.

² *Id.* at 3 "quoting" the Scheduling Order at 2, paragraph 5.

60, at 2 (March 3, 2022). In the present case, there is both good cause and no prejudice for the reasons discussed below.

A. GOOD CAUSE EXISTS

1. WORKLOAD

A review of the facts is helpful in making a “good cause” determination. The backdrop to this matter is the Public Staff’s recent unprecedented workload. Along with the typical matters that arise, the Energy Division of the Public Staff, including witness Lawrence, was tasked with investigating rate cases brought by DEC (Docket No. E-7, Sub 1276, filed January 19, 2023) and its affiliate, Duke Energy Progress, LLC (DEP), (Docket No. E-2, Sub 1300, filed October 6, 2022). Witness Lawrence and other members of the Public Staff’s Energy Division filed testimony in the DEP rate case on March 27, 2023, and are preparing testimony to be filed on July 19, 2023, in the DEC rate case. A typical general rate case involves a significant amount of time for investigation; each of these rate cases required even more time and investigation than usual since both companies’ rate cases were filed pursuant to North Carolina’s new multiyear and performance-based ratemaking law, S.L. 2021-165, which requires investigation of a traditional rate case as well as forecasted capital additions over the next three years. The multi-week DEP rate case expert witness hearing commenced on May 4, 2023.³ The Director of the

³ Docket No. E-2, Sub 1300 - Tr. vol. 7, 1.

Public Staff's Energy Division testified that DEP's rate case, alone, had caused the Energy Division to accrue more than 1,000 hours of overtime.⁴

In the middle of this crushing workload, DEC filed its application in this matter on February 28, 2023 (and a corrected one on March 1, 2023) for recovery of its fuel and fuel-related charges. During the test year under review, there were over 420 outages. Tr. vol. 2, 322. It takes significant time and effort by the Public Staff to review outages and complex investigations can be required (tr. vol. 2, 321), although not all 420 outages required extensive investigation. Nor was this an ordinary fuel rider – DEC had an unprecedented underrecovery in excess of one billion dollars. To put this in perspective, the cumulative underrecoveries for *all* of DEC's past 17 fuel riders were less than the underrecovery for this single proceeding. Ex. vol. 2, 343. Because generating unit outages have a direct impact on underrecovered fuel costs, and because of the financial hardship this fuel proceeding, in particular, will have on DEC's customers, the Public Staff would have been derelict in its duties not to fully investigate outages such as the one in question for prudence and reasonableness of the costs of replacement power that resulted. However, there were only 49 business days between the filing of the fuel rider and the deadline for witness Lawrence to file testimony (or 48 business days from the filing of DEC's corrected application).

⁴ Docket No. E-2, Sub 1300 - Tr. vol. 17, 29.

2. DISCOVERY

In light of the extraordinary demands on the Energy Division's time and the tight deadlines, it was particularly critical that information be provided in a timely manner. Witness Lawrence testified that outages "take three or four data requests to really understand the issue, to really feel like we have an ability to make a recommendation to the Commission on those cases. And typically, there's a 10-day window for responses. So we can be just waiting for 30 to 40-days in a case." Tr. vol. 2, 328-29. Witness Lawrence explained "[w]e can really quickly start to be pushing up against deadlines to be able to prepare and provide testimony." *Id.* at 329. Therefore, the Public Staff and DEC have had, for years, a standing data request to expedite the providing of information. *Id.* Information is provided semi-annually by DEC to the Public Staff under the standing data request. *Id.* at 334.

However, DEC did not provide certain important information that the Public Staff believes fell within the scope of that standing data request. For example, DEC did not initially produce a document entitled "outage report" in response to the standing agreement to provide outage reports, nor was any indication provided that such document existed, or would be produced at a later date. Tr. vol. 2, 323. Also, Witness Lawrence testified: "I received the document to this data request which I did not expect to even exist in mid-April ..." Tr. vol. 2, 328. DEC did not consider a fossil fuel root cause analysis to be an "outage report" and therefore did not provide it early in the investigation. Tr. vol. 2, 120. Thus, the Public Staff's

investigation was significantly hindered by not receiving critical information under the standing agreement for a month and a half after the filing of the rider; “I would have expected to also have information on those, including outage reports and root cause analysis (such as that received for the Belews Creek Outage) with that standing data request.” Tr. vol. 2, Public Staff Flanagan Cross Ex. 1, pg. 7 of 9 (April 17, 2023, email). Witness Lawrence stated he “was honestly a little surprised” when the root cause analysis was ultimately produced (tr. vol. 2, 318) because such a document “is completely one that I would have expected to be provided” (tr vol. 2, 323) under the standing agreement. This is especially true since root cause analyses or root cause evaluations are routinely produced for nuclear outages. Tr. vol. 2, 322.

In another example, the Public Staff requested a meeting on March 27, 2023, to discuss “Steam Facility Outages.” Such calls are “immensely helpful.” Tr. vol. 2, 329. As witness Lawrence testified: “[I]n an hour and a half phone call we can narrow down our investigation and it takes away a hundred questions or more we have to ask.” *Id.* at 330. In response to the March 27 request, a meeting was scheduled for April 14, 2023 – some 2½ weeks after the request was made. However, this already-delayed meeting was unilaterally cancelled by DEC with less than 48 hours’ notice to the Public Staff. Against the backdrop of the tsunami of work, the multiweek delays, and the looming deadline to file testimony, it is little wonder that the Public Staff personnel were unable to find a mutually agreeable time to accommodate DEC’s unilateral request to reschedule the meeting. Ex. vol. 2, Public Staff Flanagan Cross Ex. 1.

Finally, the Public Staff continued to receive important information even after filing its Direct Testimony. Witness Lawrence testified that discovery propounded on DEC's rebuttal testimony allowed him to "learn information through that response." Tr. vol. 2, 313.

3. OUTAGE

The underlying facts of the outage at issue are out of the ordinary. Probably about five years ago, a bladder valve, an inflation tube, and a metal fitting (Foreign Materials) were left inside the turbine at the Belews Creek Steam Station (Belews Creek). Tr. vol. 2, 270. The Foreign Materials laid there, undiscovered, until early last year when they were finally found during an outage that was planned to last only from March 17 through April 22, 2022. *Id.* at 270-71. The discovery necessitated the removal of the turbine shell; in turn, this kept a 1,100 MW rated unit offline for an additional 16 days. *Id.* Aware of the facts of the matter, witness Lawrence testified in his Direct Testimony: "I believe that this outage was preventable and was likely caused because someone working on the turbine did not follow proper procedures for using and removing a bladder valve." *Id.* at 271.

Witness Lawrence had not completed his investigation and reduced his findings to writing by May 9, 2023, or by the expert witness hearing held on May 31, 2023. He was not asked questions regarding the results of his investigation at the expert witness hearing.

4. IMPACT

To the extent DEC argues the Supplemental Testimony should be stricken because no new information aided the Public Staff's investigation, that reasoning should not persuade the Commission. Witness Lawrence testified to the impact of the delay in receiving information precisely because it was impactful. And when specifically asked, witness Lawrence unequivocally stated responses to his later data requests did allow him to learn new information. Tr. vol. 2, 313.

5. DISCUSSION

The Public Staff has demonstrated good cause exists to permit the filing of the Supplemental Testimony. It is always vital that information be fully and timely provided, but especially in a time with a heavy workload and narrow window for investigation, and in the context of the ongoing DEC and DEP rate cases. Instead, DEC cancelled an "immensely helpful" meeting with less than 48 hours' notice and, surprisingly, failed to provide documents the Public Staff expected to receive. Allowing the Foreign Materials to both fall into the unit and also not be discovered for years is a serious and substantial event.

B. LACK OF PREJUDICE

DEC would not be prejudiced by allowing the Supplemental Testimony into the record for three reasons.

First, DEC was aware that supplemental testimony would be filed. Witness Lawrence stated in his Direct Testimony that the Public Staff will make “a supplemental filing.” Direct Testimony, pg. 16. Further, Lawrence testified: “[A]s I stated in my initial testimony, I still plan to file supplemental testimony on this issue as soon as possible.” Tr. vol. 2, 246. Therefore, DEC cannot claim surprise at the Supplemental Testimony.

Second, DEC had notice of the broad subject of the Supplemental Testimony. All the information found in Section II.A.3 above was known to DEC on May 9, 2023. Further, witness Lawrence testified in his Direct Testimony: “I believe that this outage was preventable and was likely caused because someone working on the turbine did not follow proper procedures for using and removing a bladder valve.” *Id.* at 271. DEC could have cross-examined Mr. Lawrence regarding these facts and learned the contours of his investigation. Further, DEC witness Flanagan’s revised rebuttal testimony addresses many of the allegations. Tr. vol. 2, 92-93.

Further, at the outset of his testimony (and therefore prior to his cross-examination by DEC), witness Lawrence alerted the parties that he had completed his investigation: “After reviewing responses to the data requests received on the Company’s rebuttal testimony, which I received late Friday evening, I do have enough information to make a recommendation on the Belews Creek outage discussed in my testimony which began on April 22nd, 2022.” Tr. vol. 2, 246.

Thus, by the time of the hearing, DEC had the ability to examine witness Lawrence about the subject matter of his Supplemental Testimony. And, in fact, DEC witness Flanagan addressed some of the issues in his rebuttal testimony. Tr. vol. 2, 92-93. Therefore, the Commission has sufficient information to review the record and make a ruling.

Third, in the alternative, any such prejudice can be addressed and resolved. The Public Staff agrees to any and all of DEC's proposals to cure any prejudice, including granting DEC the opportunity to file supplemental rebuttal testimony, granting five business days to conduct discovery, re-opening the evidentiary record for the purposes of receiving DEC's supplemental rebuttal testimony, and establishing a hearing date to allow for the cross-examination of witness Lawrence. The Public Staff understands, and accepts, that each of the proposed remedies by DEC will result in significantly more time for review and preparation of discovery and rebuttal testimony than what was initially allowed through the Commission's Scheduling Order.

Accordingly, the Public Staff respectfully submits that there is not sufficient prejudice to justify the striking of the Supplemental Testimony. Assuming, *arguendo*, there is prejudice, it can be cured by DEC's proposed remedies and the Public Staff assents to all of DEC's proposals to rectify any prejudice.

Therefore, to the extent the Commission determines that the Public Staff should have requested that the record remain open or be reopened and sought leave to file the Supplemental Testimony, the Public Staff hereby respectfully

petitions and seeks leave of the Commission to re-open the record and accept Mr. Lawrence's Supplemental Testimony. In support of these motions, the Public Staff incorporates by reference the law, facts, and discussion set forth herein.

WHEREFORE, the Public Staff respectfully requests that the Commission deny DEC's Motion, grant the Public Staff's motion to reopen the record and accept the Supplemental Testimony, find there is good cause and no insurmountable prejudice precluding the consideration of the Supplemental Testimony, and grant such other and further relief as may be just and proper.

Respectfully submitted this 11th day of July, 2023.

PUBLIC STAFF

Christopher J. Ayers
Executive Director

Lucy E. Edmondson
Chief Counsel

/s/ William Freeman, by electronic filing
William S. F. Freeman
William E. H. Creech
Staff Attorneys

4326 Mail Service Center
Raleigh, North Carolina 27699
telephone: (919) 733-6110
email: William.Freeman@psncuc.nc.gov
Zeke.Creech@psncuc.nc.gov

CERTIFICATE OF SERVICE

I certify that I have caused to be served a copy of the foregoing on all the parties of record on the date set forth below in the manner set forth below on the person(s) set forth below and in accordance with the applicable jurisprudence, especially Commission Rule R1-39.

Served on July 11, 2023, via email electronic delivery by agreement of the receiving party, upon those persons identified at the following addresses:

Ladawn.toon@duke-energy.com
bkaylor@rwkaylorlaw.com
robert.kaylor@duke-energy.com
jack.jirak@duke-energy.com
Kimberley.Campbell@duke-energy.com
Peggy.Holton@duke-energy.com
gina.freeman@duke-energy.com
ccress@bdixon.com
dconant@bdixon.com
cschauer@brookspierce.com
mtrathen@brookspierce.com
mmagarira@selcnc.org
tgooding@selcnc.org

/s/ William Freeman, by electronic filing
William S. F. Freeman
Staff Attorney