

**STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH**

DOCKET NO. E-7, SUB 1155

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application of Duke Energy Carolinas,	)	JOINT MOTION FOR
LLC for Approval of Residential New	)	RECONSIDERATION
Construction Program	)	

NOW COME Public Service Company of North Carolina, Incorporated d/b/a Dominion Energy North Carolina (“PSNC”) and Piedmont Natural Gas Company, Inc. (“Piedmont”) (PSNC and Piedmont collectively, “the LDCs”), pursuant to N.C. Gen. Stat. § 62-80, and hereby petition the Commission to reconsider one facet of the Order Requiring Implementation of Revised RNC Program and Renewal of Offer to Joint Market issued in this docket on November 8, 2021 (“RNC Order”), which approved the Residential New Construction Program of Duke Energy Carolinas, LLC (“DEC”), as revised by DEC in its September 21, 2020 filing with the Commission (“Revised RNC Program”).

The LDCs’ request for reconsideration is limited to the Commission’s approval of the HERO-Plus component of the Revised RNC Program. Reconsideration is warranted because the RNC Order misapplied the applicable burden of proof and approved the HERO-Plus component even though DEC failed to meet its burden of proving that the HERO-Plus incentive would not promote fuel switching or unfair or destructive competition with the LDCs. Accordingly, and for the reasons set forth below, the LDCs request that the Commission reconsider the RNC Order and disapprove the HERO-Plus incentive included in DEC’s Revised RNC Program.

## **I. PROCEDURAL BACKGROUND**

On September 21, 2017, DEC filed an application in this docket for approval of a proposed Residential New Construction Program (“RNC Program”). DEC stated that the RNC Program would provide incentives to residential builders to encourage the use of energy efficient building practices and equipment/appliances for new home construction. Further, DEC stated that eligibility would be based on the High Efficiency Residential Option (“HERO”) standard and requirements for energy efficient appliances, and that its proposal was intended to mirror Duke Energy Progress, LLC’s (“DEP’s”) Residential New Construction Program. The proposed RNC Program included a HERO-Plus incentive, which DEC proposed to pay to homebuilders on a sliding scale based on the kWh “saved” by constructing a more energy efficient home, as compared to a home built to the North Carolina Building Code minimum standards.

On October 23, 2017, the Public Staff filed comments recommending approval of DEC’s application. No additional filings were made in the docket until June 7, 2019, when DEC filed a motion requesting that the Commission allow DEC to withdraw its RNC Program application. In that filing DEC reported that, following discussions with the LDCs regarding their concerns as to the competitive consequences of the proposed RNC Program design, DEC decided to withdraw its request for approval of the RNC Program. (Motion to Withdraw p. 1).

After DEC filed its motion to withdraw, the Commission received approximately 60 statements of position generally expressing support for the proposed RNC Program or some similar measure and urging rejection of the motion. The RNC Order recognized, as to those statements of position, that “[a]ll of them appear to be from residential housing

construction or energy efficiency professionals.” (RNC Order p. 19). This is not surprising, as homebuilders in particular stand to benefit from the significant financial gain offered by the HERO-Plus component of the RNC Program.

The Public Staff filed notice on August 7, 2019, that it did not object to DEC’s motion to withdraw the application for approval of the RNC Program.

On November 25, 2019, the Commission issued an order scheduling a hearing for January 27, 2020, and provided notice of topics to be addressed at the hearing. Piedmont and PSNC thereafter filed letters stating that they would have representatives at the hearing available to answer questions from the Commission.

At the hearing on January 27, 2020, DEC presented two witnesses and Piedmont and PSNC each presented a witness. On June 23, 2020, the Commission issued an Order Holding in Abeyance Decision on Motion to Withdraw Program and Requiring Filing of Modified Program (“Abeyance Order”).

In the Abeyance Order the Commission concluded that: (1) DEC filed its proposed RNC Program in good faith as a cost-effective energy efficiency (“EE”) program and did not design the RNC Program with the intent to encourage fuel switching or promote unfair competition; (2) there is a significant difference in the financial resources available to the electric utilities for funding EE programs compared to those available to the LDCs for such purposes; (3) concerns about losses in the LDCs’ new residential construction market share merit further consideration and analysis; and (4) the Commission’s challenge is to balance the benefits of an electric EE program, which is supported by statutory mandate and has proven successful in DEP’s service area, with the need to prevent unfair or destructive competition between electric and natural gas utilities.

The Abeyance Order directed DEC to engage with the LDCs and Public Staff in further discussions and attempt to reach agreement on acceptable modifications to the proposed RNC Program that would be reasonably fuel choice neutral and, within 90 days, file a modified RNC Program that DEC deems appropriate for achieving EE savings and addressing the LDCs' fuel choice concerns. The Abeyance Order also directed DEC to provide certain additional information with its modified RNC Program.

On September 21, 2020, DEC filed its Revised RNC Program in response to the Abeyance Order. The Revised RNC Program retained both the HERO and HERO-Plus incentives with the following changes: (1) the maximum incentive available to builders of dwellings that meet or exceed the HERO standard was changed from up to \$750 to up to \$650; (2) the maximum incentive for annual confirmed kWh savings for dwellings that meet or exceed the HERO-Plus standard was changed from up to \$0.90/kWh to up to \$0.75/kWh; and (3) certain restrictions to the HERO and HERO-Plus incentives were added.

Thereafter, DEC and the LDCs and Public Staff exchanged information and discussed the LDCs' concerns regarding the proposed Revised RNC Program. During that time the Commission granted several extensions of time for the LDCs to file comments on the proposed Revised RNC Program. The parties were ultimately unable to agree on modifications to the Revised RNC Program sufficient to allay the LDCs' concerns. On January 19, 2021, the LDCs filed joint comments setting forth their concerns and opposition regarding the HERO-Plus component of the proposed Revised RNC Program. On February 16, 2021, Duke filed a request for leave to file Reply Comments, along with its Reply Comments, which the Commission subsequently granted.

The LDCs' joint comments expressed their continuing concerns that the HERO-Plus incentive contained in the Revised RNC Program promotes fuel-switching and requested that the Commission reject the Revised RNC Program in its current form and require DEC to eliminate the anti-competitive HERO-Plus incentive because it would encourage homebuilder selection of electric over natural gas for space and water heating. The LDCs' comments explained how the information contained in DEC's revised filing demonstrated the adverse competitive consequences of an incentive tied to kWh savings. For example, a homebuilder would receive a total incentive of \$1,366.50 if a home is built as all-electric and only \$895.50 if the home has a gas furnace and gas water heater. The LDCs' comments also pointed out how information regarding actual experience from DEP's RNC Program supported the conclusion that the HERO-Plus incentive has influenced fuel choice in the new home construction market and given DEP an unfair competitive advantage over the LDCs.

The RNC Order rejected the LDCs' contentions regarding unfair and destructive competition, stating in Finding of Fact 13, "It has not been clearly shown that the RNC Program as modified by DEC (Revised Program), will result in fuel switching from natural gas to electricity, or that it will promote unfair or destructive competition." (RNC Order p. 14). The RNC Order explained this finding in concluding, "DEC presented prima facie evidence that the Revised Program is not likely to promote unfair or destructive competition between DEC and the LDCs, and ... the LDCs did not come forward with sufficient evidence that shows otherwise." (RNC Order p. 31).

## II. LEGAL STANDARD

Pursuant to N.C. Gen. Stat. § 62-80, the Commission may at any time, rescind, alter, or amend an order upon reconsideration. The Commission's decision to rescind, alter, or amend an order upon reconsideration under N.C.G.S. § 62-80 is within the Commission's discretion. *State ex rel. Utilities Comm'n v. MCI Telecommunications Corp.*, 132 N.C. App. 625, 630, 514 S.E.2d 276, 280 (1999). Such action may not be taken arbitrarily or capriciously but may be warranted by some change in circumstances or a misapprehension or disregard of a fact that provides a basis for the Commission to rescind, alter, or amend a prior order. *State ex rel. Utilities Comm'n v. North Carolina Gas Service*, 128 N.C. App. 288, 293-294, 494 S.E.2d 621, 626, rev. denied, 348 N.C. 78, 505 S.E.2d 886 (1998).

## III. ARGUMENT

One of the criteria the Commission considers in determining whether to approve an incentive program such as DEC's Revised RNC Program is whether it promotes unfair or destructive competition. This criterion is specifically set forth in Commission Rule R8-68(e)(4) and is embodied in the public policy of North Carolina. *See* N.C. Gen. Stat. § 62-2(a)(4). The RNC Order stated that the "burden of proving that the Revised [RNC] Program will not promote unfair or destructive competition between DEC and the LDCs is on DEC." (RNC Order p. 25). Despite the unequivocal recognition that DEC had this burden of proof, Finding of Fact 13 in the RNC Order reflects that the Commission effectively held the LDCs to the burden of proving that the HERO-Plus component of the RNC Program would promote unfair or destructive competition. This is inherently inconsistent. The Commission should reconsider its decision and disapprove the HERO-Plus incentive component of the

Revised RNC Program since DEC did not meet its burden of proving that the HERO-Plus component of its RNC Program will not incent fuel switching or promote unfair or destructive competition.

**A. The RNC Order Effectively Placed the Burden of Proof on the LDCs.**

RNC Order Finding of Fact 13 states, “It has not been clearly shown that the RNC Program as modified by DEC (Revised Program), will result in fuel switching from natural gas to electricity, or that it will promote unfair or destructive competition.” (RNC Order p. 14). Because the only logical reading of this finding is that the Commission concluded that the LDCs failed to “clearly show” that the Revised RNC Program will result in fuel switching, or that it will promote unfair or destructive competition, Finding of Fact 13 cannot be reconciled with the RNC Order’s recognition that the burden of proof on these points rested with DEC. Contrary to Finding of Fact 13, the burden was not on the LDCs to prove that the proposed program would have these consequences.

The Abeyance Order directed DEC to file certain additional data and to provide that data to the LDCs. That data was provided by DEC and labeled as Attachment H to its Revised RNC Program filing. The Public Staff described the data in DEC’s Attachment H as “inconclusive and nearly impossible to verify.” (Public Staff Comments p. 8). The RNC Order agreed that “the DEC data is not optimal,” but “in the absence of better data the Commission must use the evidence presented.” (RNC Order p. 27). When a party has the affirmative burden of proof, as DEC did here, then the “absence” of evidence cannot suffice to satisfy that burden.

The RNC Order also noted the following regarding DEC’s Attachment H:

DEC noted that although Attachment H, Response No. 6, lists communities and homes that the LDC has provided locations that

they believe were impacted by DEP's RNC Program, the LDCs have not provided sufficient support for their assertions that DEP's Program impacts builders' choices between electricity and natural gas.

(RNC Order p. 10). This statement indicates that the RNC Order found the LDCs' evidence to be insufficient. However, DEC had the burden of proving that the Revised RNC Program would not promote fuel switching or unfair or destructive competition; the LDCs did not have the burden of proving the opposite.

The RNC Order's allocation of the burden of proof to the LDCs is also illustrated by the following statement: "the Commission concludes that the evidence presented by the *parties* does not show that the Revised Program is likely to result in fuel switching from natural gas to electricity, or that it will promote unfair or destructive competition." (RNC Order p. 28) (emphasis added). Because DEC had the burden of proof, the use of the term "parties" reflects that, as a practical matter, the Commission imposed some part of the burden of proof on the LDCs as well. The reference to the "evidence presented by the parties" in this conclusion is inconsistent with the Commission's recognition that the burden was solely on DEC to prove that the HERO-Plus component of its RNC Program will not promote fuel switching or promote unfair or destructive competition.

Finally, any doubt about the imposition of the burden of proof to the LDCs is dispelled by the RNC Order's explicit statement "that DEC presented prima facie evidence that the Revised Program is not likely to promote unfair or destructive competition between DEC and the LDCs, and that the LDCs did not come forward with sufficient evidence that shows otherwise." (RNC Order p. 31). This statement directly contradicts any notion that DEC had the burden of proving the lack of unfair or destructive competition. Moreover, it would not seem possible for DEC to establish a prima facie case based on evidence that



the Public Staff described as “inconclusive and nearly impossible to verify.” And, even if its evidence did meet the prima facie standard, DEC still had the ultimate burden of persuasion on the lack of unfair or destructive competition. *See In the Matter of Application of Duke Energy Carolinas, LLC, for Adjustment of Rates and Charges Applicable to Electric Utility Service in North Carolina*, Order Accepting Stipulation, Deciding Contested Issues, and Requiring Revenue Reduction, Docket No. E-7, Subs 1146, 819, 1152, and 1110, p. 266, 2018 WL 3209374 (June 22, 2018) (burden of proof involves both the burden of production and burden of persuasion). As discussed below, DEC did not and could not meet its ultimate burden of proving that the HERO-Plus component will not incent fuel switching or promote unfair or destructive competition.

**B. DEC Did Not Satisfy Its Burden of Proof.**

The LDCs’ Exhibit 1 filed with their joint comments on January 19, 2021, demonstrated that incentives offered under the HERO-Plus component of the RNC Program were considerably higher for all-electric homes compared to homes using natural gas. The record clearly established that, as illustrated by the effect of the HERO-Plus incentive on a sample home, DEC simply cannot meet its burden of proving that the HERO-Plus incentive will not promote fuel switching, or unfair or destructive competition, given the disparity between the incentives offered for the respective fuels under this aspect of the Revised RNC Program.

The HERO-Plus incentive based on a per kWh-saved metric unavoidably favors selection of electricity over natural gas. The difference between the smaller HERO-Plus incentive that would be paid to a homebuilder choosing gas heat as compared to the much higher incentive offered for an all-electric house will inevitably promote fuel switching

and/or unfair or destructive competition with the LDCs. As recognized in the dissent authored by Commissioner Brown-Bland, joined by Chair Mitchell and Commission Duffley, “[t]he proper inquiry on the present request for approval is whether the Program as proposed with incentives based on per kWh savings is appropriate, considering whether the Program could influence homebuilders’ choice of electricity or natural gas in a manner that promotes unfair competition or destructive competition between LDCs and electric utilities.” (Dissent p. 2).

The significant difference between the HERO-Plus incentives offered for an all-electric home, versus a gas home, when the size of the incentive is determined by the volume of electricity saved, will inevitably promote fuel switching by incenting builders to elect to construct all-electric homes. As further stated in the dissent:

An energy efficiency measure that incorporates incentives based on savings measured by the kWh, by definition a measure of ‘electricity’ use, is not only designed with electric energy savings in mind such that an all-electric appliance household has the most opportunity to increase its kWh savings (thus qualifying such homes for increased incentives and bill reductions), but, by default, is also designed to increase electric load by encouraging builders to choose to build new houses that are all-electric (with electric heating and hot water). Such a choice that is at all driven by an incentive whose value is dependent on kWh electric savings is made at the expense of natural gas utilities’ ability to compete on equal footing.

(Dissent p. 1).

The LDCs wholeheartedly agree with that statement, as they believe it is an unavoidable reality that the LDCs cannot hope to effectively compete with an incentive program tied to kWh savings.

#### **IV. CONCLUSION**

The LDCs support the goal of encouraging energy efficiency in a manner that does not promote unfair or destructive competition between electric and natural gas utilities, a

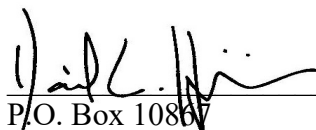
goal the Commission recognized in the Abeyance Order. The LDCs believe that both the DEC and DEP RNC Programs can be made fuel-neutral and still achieve substantial energy efficiency gains.

In approving the HERO-Plus incentive component of DEC's Revised RNC Program the RNC Order failed to hold DEC to its burden of proof and, in doing so, it approved a program that will, as recognized by the dissent, inevitably promote fuel switching and unfair or destructive competition with the LDCs. The HERO-Plus incentive based on a per kWh-saved metric unavoidably favors selection of electricity over natural gas. Accordingly, the Commission should reconsider the RNC Order and disapprove the HERO-Plus incentive program included in DEC's Revised RNC Program.

WHEREFORE, the LDCs ask that the Commission revisit its approval of only the HERO-Plus component of the Revised RNC Program and require DEC to further modify that program so that it incentivizes homebuilders to engage in energy efficient construction in a manner that does not rely on a kWh-saved metric. Such an approach would encourage energy efficient construction while remaining fuel neutral and avoid promotion of unfair or destructive competition between DEC and the LDCs.

Respectfully submitted, this the 30<sup>th</sup> day of December, 2021.

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**CERTIFICATE OF SERVICE**

I certify that I have served a true and exact copy of the foregoing document on all parties to this docket in accordance with Commission Rule R1-39, by United States mail, first class postage prepaid; by hand delivery; or by means of facsimile or electronic delivery upon agreement of the receiving party.

This the 30<sup>th</sup> day of December, 2021.

BURNS, DAY & PRESNELL, P.A.

By: 

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