STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1300

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of:	)	
	)	
Application of Duke Energy	)	**NOTICE OF APPEAL**
Progress, LLC for Adjustment of	)	**AND EXCEPTIONS**
Rates and Charges Applicable to	)	**OF CIGFUR II**
Electric Service in North Carolina	)	
and Performance Based Regulation	)	

To the Honorable Supreme Court of North Carolina:

Pursuant to Appellate Rule 18 and N.C.G.S. § 7A-29(b), the Carolina Industrial Group for Fair Utility Rates II ("CIGFUR II") hereby gives notice of appeal to the Supreme Court of North Carolina from (1) the 18 August 2023 Order Accepting Stipulations, Granting Partial Rate Increase, and Requiring Public Notice ("Order"); and (2) the 6 July 2023 Order on Post-Hearing Motions and Reconvening Hearing ("Evidentiary Order"), which denied CIGFUR II's 3 July 2023 Motion to Strike, both entered by the North Carolina Utilities Commission ("Commission").

Pursuant to N.C.G.S. § 62-90(a), CIGFUR II takes exception to the Order and Evidentiary Order, which CIGFUR II contends 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 or capricious; in violation of the due process rights of CIGFUR II as a party to the docket; and/or an abuse of discretion:

EXCEPTION 1

Findings of Fact 40-41 and the underlying Evidence and Conclusions supporting those findings are unlawful, unjust, unreasonable, and 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 or capricious.

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). The Commission disregarded the limits on its power when it approved a Customer Assistance Program ("CAP") that benefits a segment of the residential class of customers at the expense of both other residential customers and non-residential customers, rather than containing the costs for the CAP to be recovered only on an intraclass basis from the residential class of customers as required by § 62-133.16(b).

The General Assembly has determined that low-income customer assistance programs are permissible only in the case of telephone rates. In particular, N.C.G.S. § 62-140(a) says:

> No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage. *No public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service. … Provided further, that it shall not be considered an unreasonable preference or advantage for the Commission to order, if it finds the public interest so requires, a reduction in* ***local telephone rates for low-income residential consumers*** meeting a means test established by the Commission in order to match any reduction in the interstate

> subscriber line charge authorized by the Federal Communications Commission. If the State repeals any State funding mechanism for a reduction in the local telephone rates for low-income residential consumers, the Commission shall take appropriate action to eliminate any requirement for the reduced rate funded by the repealed State funding mechanism. For the purposes of this section, a State funding mechanism for a reduction in the local telephone rates includes a tax credit allowed for the public utility to recover the reduction in rates.

N.C.G.S. § 62-140(a) (emphasis added). Even so, the Commission's order ignores this express limitation and approves a ratepayer-funded bill discount program for certain residential class *electric* customers of Duke Energy Progress, LLC ("DEP" or "Company").

The Commission thus erred when it approved an unduly discriminatory, unreasonably preferential ratepayer-funded bill discount program. This improper assertion of authority exceeds the authority delegated to the Commission by the General Assembly. Whether to approve such a program is a legislative policy judgment reserved for the General Assembly. The Commission further erred by acting in a legislative capacity, particularly when doing so has contravened the General Assembly's express prohibition against discrimination and undue preference in rates for service provided by a public utility with few exceptions, none of which apply to the CAP.

EXCEPTION 2

Findings of Fact 40-41 and the underlying Evidence and Conclusions supporting those findings are unlawful, unjust, unreasonable, and 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 arbitrary or capricious.

The Commission has only that authority granted to it by the General Assembly. *E.g.*, *Lumbee River Elec. Membership Corp.*, 309 N.C. at 736, 309 S.E.2d at 216. The Commission disregarded the limits on its power when it approved the CAP because the CAP creates a new interclass cross-subsidy and allocates a portion of the Company's revenue requirement in a manner that does not comport with the cost causation principle, in contravention of N.C.G.S. §§ 62-133.16(a)(1) and (b).

As a result of landmark energy legislation enacted into law by the General Assembly in 2021,[1] the Commission may engage in performance-based regulation ("PBR") in accordance with the limitations on its authority as set forth in N.C.G.S. § 62-133.16 ("PBR Statute"). According to the PBR Statute, an application for PBR must include a multi-year rate plan ("MYRP"). *See* N.C.G.S. §§ 62-133.16(a)(7) and (b). When the Commission approves an application for PBR by an electric public utility, the Commission must "allocate[ ] the electric public utility's total revenue requirement among customer classes based upon the cost causation principle." § 62-133.16(b). The Commission must thus establish "a causal link between a specific customer class, how that class uses the electric system, and costs incurred by the

[1] *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 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."

electric public utility for the provision of electric service" to that specific customer class. § 62-133.16(a)(1). When the Commission approves an application for PBR by an electric public utility, the Commission must also minimize "interclass subsidization to *the greatest extent practicable*" by the end of the three-year MYRP period. § 62-133.16(b) (emphasis added).

In the context of the CAP approved by the Commission in its Order, the PBR plan and MYRP adopted in the Order fails to comply with two statutory conditions limiting the Commission's use of PBR:

First, the Order disregards the cost causation principle. To fund the CAP, the Commission allowed DEP to "spread the costs for the $42 CAP credit among *all* customer classes, excluding lighting schedules, through" the CAR Rider. (Order at 108 (emphasis added)). The Commission thus allowed the Company to recover some of the CAP's costs from non-residential customers, despite the CAP benefiting only a subset of residential class customers. Since the CAP benefits only residential customers, the cost causation principle requires that residential customers bear the costs of the CAP in full.

Second, similarly, the CAP creates an impermissible interclass cross-subsidy. In addition to allocating the electric public utility's total revenue requirement based upon the cost causation principle, § 62-133.16(b) compels the Commission to reduce interclass subsidies to the greatest extent practicable by the conclusion of an MYRP. Rather than reduce interclass subsidies by the greatest extent practicable as required

by law, here the Commission approved a *new* interclass subsidy in contravention of the constraints on the its authority imposed by the PBR Statute.

Chair Charlotte A. Mitchell's dissent, which Commissioner Kimberly W. Duffley joined in full,[2] addresses a number of issues relevant to this Exception. For example, the dissent acknowledges that although the Public Staff ultimately supported approval of the CAP Program,

> Public Staff witness D. Williamson testified regarding the Public Staff's concerns with the cross-subsidization issues created by the CAP, tr. vol. 20, 144, as well as the Public Staff's preference that there be a clear legislative directive for the development and deployment of assistance programs like the CAP. *Id.* at 146.

(Mitchell, Chair, dissenting at 10). The dissent correctly observes that the Order "problematically" directed DEP "to take action beyond that required by" the partial settlement between DEP, the Sierra Club, the North Carolina Justice Center, and the Public Staff (the "Affordability Stipulation"). *Id.* at 11. In addition, the dissent explains that while "affordability for the most vulnerable customers is, and must continue to be, a critical focus of the [Company] and the Commission:

> given the concerns expressed by the Public Staff, as well as by CIGFUR witness Phillips, regarding cross-subsidization, the reduction of customer usage through energy efficiency – actually reducing the amount of electricity that a customer must use and pay for – better serves customers. While I support the give and the take, as well as the outcome, of the Affordability Stipulation, I would not have gone beyond the stipulation, as the majority does, for this reason. In my view, DEP and its stakeholders' resources and efforts are well-spent identifying and developing programs that maximize the

[2] *See* Order at 245.

> deployment of federal funding available for weatherization and energy efficiency, particularly funding that results from recent federal legislation, to the advantage of those customers in need. I see DEP's Residential Income-Qualified Energy Efficiency and Weatherization Program, Order Approving Program, *Application by Duke Energy Progress, Inc. for Approval of Residential Income-Qualified Energy Efficiency and Weatherization Program*, No. E-2, Sub 1299 (Mar. 1, 2023), as the type of program that better addresses energy burden and intensity. I also see the availability of federal dollars available for weatherization as a significant and real opportunity to expand the reach of this program to customers in need and to provide longer term assistance to these customers. My hope is that DEP's resources and attention remain on this program and on the opportunity for its customers created by the availability of the federal funding.

Id. at 13.

The Commission erred both when it approved the Affordability Stipulation and when it went beyond that to which the stipulating parties agreed pursuant to the Affordability Stipulation. In either case, the Commission lacked the statutory authority to approve the CAP because it severs the causal link between usage and cost recovery in violation of §§ 62-133.16(a)(1) and (b); is funded in part on an interclass subsidy basis in violation of § 62-133.16(b); is unduly discriminatory and unreasonably preferential in violation of § 62-140; and is otherwise affected by errors of law as set forth herein.

EXCEPTION 3

As it relates to the issues set forth herein, Findings of Fact 42-48 and 78, and the underlying Evidence and Conclusions supporting those findings are unjust, unreasonable, and 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 arbitrary or 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 the PBR Statute. More specifically, the Commission impermissibly concluded that a 10% reduction in interclass subsidies satisfies N.C.G.S. § 62-133.16(b). Under § 62-133.16(b), the Commission may engage in PBR only if the approved PBR plan minimizes interclass subsidies to the "greatest extent practicable" by the conclusion of the MYRP period. Before the introduction of PBR in North Carolina in 2021,[3] DEP routinely requested—and the Commission routinely approved—interclass subsidy reductions of 25%. Even so, in this proceeding—the first electric general rate case 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 cross-subsidy reductions, the Commission's approval of only a 10% interclass subsidy reduction by the conclusion of the MYRP period, and § 62-133.16(b)'s mandate that the Commission reduce interclass subsidies to the

[3] *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 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."

greatest extent practicable by the conclusion of the MYRP period, the PBR plan with MYRP approved by the Commission in the instant general rate case is impermissible as a matter of law. This is particularly true where, as here, the Commission relied on historical practice when rejecting at least one witness' testimony proposing a greater than 10% subsidy reduction. (*See* Order at 117).

EXCEPTION 4

As it relates to the issues set forth herein, Findings of Fact 42-48 and 78, and the underlying Evidence and Conclusions supporting those findings are unjust, unreasonable, and 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 arbitrary or 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 the electric public utility'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 § 62-133.16(b), the Commission may engage in PBR only if its approved plan minimizes interclass subsidies to the "greatest extent practicable" by the conclusion of the MYRP period. 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—the first electric general rate case since the advent of PBR in North

Carolina—the MYRP 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 DEP witness Teresa Reed. (Order at 117). Even so, the Commission failed to adequately explain why witness Reed's testimony was credible when (1) Ms. Reed acknowledged that other customer classes had historically subsidized residential ratepayers; and (2) such a subsidy persisted even when DEP previously sought, and the Commission previously approved, a 25% reduction in interclass subsidies before the introduction of PBR, which requires that any such interclass subsidy be reduced to the "greatest extent practicable" by the conclusion of the MYRP. § 62-133.16(b). As a result, the Commission failed to adequately explain why it approved DEP's proposed revenue apportionment among customer classes.

EXCEPTION 5

As it relates to the issues set forth herein, Findings of Fact 42-48 and 78, and the underlying Evidence and Conclusions supporting those findings are unjust, unreasonable, 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 arbitrary or capricious.

The Commission's interpretation of § 62-133.16 conflates the PBR Statute's mandatory requirements and limitations on the Commission's authority to engage in PBR (as set forth in § 62-133.16(b)) with non-dispositive criteria that the Commission must or may merely consider (as set forth in §§ 62-133.16(d)(1) and (2), respectively)

when acting on an electric public utility's PBR application that otherwise complies with the PBR Statute's requirements. Here, the Commission approved DEP's PBR application by concluding that the Company had reasonably designed its proposed PBR plan with MYRP to "balance" the PBR Statute's directive to reduce interclass subsidies with other competing priorities.

> The Commission concludes that DEP's approach of gradually reducing the subsidies between classes by utilizing a variance reduction of 10% is reasonable and that the 10% variance reduction approach moves towards eventual rate parity/minimization of interclass subsidization while, at the same time, *balancing the other requirements of the PBR Statute including that no class of customer is unreasonably harmed or faces a sudden and substantial increase in rates resulting in rate shock*. The Commission agrees with DEP witness Reed who testified that DEP appropriately considered 'competing priorities' such as cost causation, rate shock, and gradualism in proposing the 10% variance reduction. Tr. vol. 11, 320-21. The Commission does not agree with the recommendation of CIGFUR II witness Phillips' argument that a greater variance reduction is warranted in this proceeding, primarily in light of the harm that such a reduction would cause to certain customer classes. Specifically, DEP witness Reed explained that if DEP had employed a 25% subsidy reduction, as recommended by CIGFUR II witness Phillips, the proposed increase to the Residential class would increase from 9.9% to 10.4% and the proposed increase to the Lighting class would increase from 19.9% to 24.9%. Tr. vol. 11, 265. *Thus, balancing its obligations under the PBR Statute to ensure allocation of revenue requirement based on cost causation, minimization of interclass subsidization, equitable treatment of customer classes, and avoidance of unreasonable prejudice and rate shock*, the Commission concludes that DEP's PBR Application as amended by the stipulations and the various provisions of this Order, is in alignment with cost causation or reasonably headed that way, avoids unreasonable harm to any class of customers, and does not unreasonably

> prejudice an class of customers or otherwise result in rate shock.

(Order at 236) (emphasis added).

The Commission's analysis garbles mandatory conditions with permissive, non-dispositive ones. Before approving a PBR plan with MYRP under § 62-133.16, the Commission *must* ensure that interclass subsidies are reduced to the greatest extent practicable by the conclusion of the MYRP period and *must* allocate the electric public utility's total revenue requirement among the customer classes based upon the cost causation principle as defined by § 62-133.16(a)(1). The Commission is "authorized to approve" PBR, but only if it "allocates the electric public utility's total revenue requirement among customer classes based upon the cost causation principle," and "*interclass subsidization of ratepayers is minimized to the greatest extent practicable by the conclusion of the MYRP period*." G.S. 62-133.16(b) (emphasis added). Here, the Commission has failed on both accounts.

Once the Commission assures itself that a proposed PBR plan with MYRP complies with § 62-133.16(b)'s mandatory requirements, it must or may merely consider a number of non-dispositive factors when deciding whether to ultimately approve, modify, or reject a PBR application. *See* §§ 62-133.16(d)(1) and (2).

The Commission's analysis purports to "balance" the "requirements" set forth in §§ 62-133.16(d)(1) and (2) with the limitations on the Commission's statutory authority to engage in PBR set forth in § 62-133.16(b), thus ignoring the mandatory character of interclass cross-subsidy reduction and allocating the electric public utility's total revenue requirement based upon the cost causation principle. While

§ 62-133.16(d) sets out criteria that the Commission must or may consider when deciding a PBR application, those criteria are secondary and necessarily subordinate to the mandatory conditions set out in § 62-133.16(b), which constrains the Commission's statutory authority to engage in PBR. Here, the Commission's analysis shows that the Commission considered interclass cross-subsidy reduction as a permissive consideration to be balanced against competing non-dispositive criteria, rather than a mandatory requirement before engaging in PBR. The Commission thus entered the order under a misapprehension of the law and committed reversible error.

EXCEPTION 6

Findings of Fact 74-75 and the underlying Evidence and Conclusions supporting those findings are unjust, unreasonable, and unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious.

The Commission's fuel rider analysis incorrectly applied the PBR Statute, which, by its own terms, "shall operate independently, and be considered separately, from riders or other cost recovery mechanisms otherwise allowed by law, unless otherwise incorporated into such plan." § 62-133.16(g). The Commission has decided to discontinue use of the equal percentage method for allocating changes in fuel and fuel-related costs—as those are defined by § 62-133.2(a1)—for cost recovery among the different customer classes. From 2008 to 2023, the Commission has allocated fuel and fuel-related costs among customer classes using an equal percentage increase or decrease methodology. Under the equal percentage methodology, DEP recovers fuel

and fuel-related costs from customers "using a uniform percent increase or decrease per rate class, such that each rate class will, on average experience the same average monthly percentage increase or decrease as the overall fuel and fuel-related cost[s] change." (Order at 225).

In its Order, the Commission has effectively undone 15 years of precedent to eliminate the equal percentage methodology in favor of a methodology purportedly based on the cost causation principle. At the hearing, the Public Staff explained that it was advocating for the changed methodology to conform to §§ 62-133.16(a)(1) and (b). The Commission credited the Public Staff's testimony when deciding to change the methodology used to allocate fuel and fuel-related costs among customer classes. (Order at 226). But N.C.G.S. § 62-133.16—and its cost causation principle as defined by § 62-133.16(a)(1)—do not apply to the fuel rider. In particular, the PBR statute provides,

> Nothing in this section shall be construed to (i) limit or abrogate the existing rate-making authority of the Commission or (ii) invalidate or void any rates approved by the Commission prior to the effective date of this section. In all respects, the alternative rate-making mechanisms, designs, plans, or settlements shall operate independently, and be considered separately, from riders or other cost recovery mechanisms otherwise allowed by law, unless otherwise incorporated into such plan.

N.C.G.S. § 62-133.16(g). By assuming that the fuel rider needed to comply with §§ 62-133.16(a)(1) and (b), the Commission committed a legal error.

EXCEPTION 7

Findings of Fact 74-75 and the underlying Evidence and Conclusions supporting those findings are unjust, unreasonable, and unwarranted; affected by

errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious.

First, even if the fuel rider were required to adhere to the cost causation principle, the Commission still erred when it rejected the historically accepted equal-percentage methodology in favor of a voltage-differentiated methodology. Unrebutted evidence establishes that elimination of the equal-percentage method of allocating fuel and fuel-related costs among customer classes could result in unjust and unreasonable rates for the Large General Service class of customers. In his direct testimony, CIGFUR II witness Nicholas Phillips explained that many of the costs recovered through the fuel rider are not fuel expenses, but instead are "basically capital costs." (Tr. vol. 21 at 488). As Mr. Phillips explained, "To the extent th[o]se [capital] costs are included in the annual fuel adjustment, an equal percentage basis is appropriate. *Id.* "When all costs are considered, the LGS class continues to significantly subsidize other classes. This fact is strong evidence that the uniform bill increase/decrease methodology results in just, reasonable rates, is not causing an undue cost shift over time, and should be continued." *Id.*

Second, discontinuation of the equal-percentage methodology for allocating fuel and fuel-related costs recovered through the fuel rider ignores the substantial interclass subsidy that Large General Service class customers provide other customer classes in base rates. The Commission relied upon Public Staff witness Lucas' testimony that the equal-percentage method can benefit industrial customers at the cost of expense of other customers. (Order at 225-26). However, witness Phillips

testimony shows that, even if Large General Service customers receive a benefit from the equal percentage method of allocating fuel and fuel-related costs, the LGS Class "continues to significantly subsidize other classes." (Tr. vol. 21 at 488).

The Commission failed to adequately consider witness Phillips' testimony, failed to explain why it failed to adequately consider witness Phillips' testimony, and approved the Public Staff's recommendation to eliminate the equal percentage methodology without any evidence in the record to demonstrate that such a methodology would not result in undue prejudice, rate shock, or unjust and unreasonable rates for the Large General Service customer class, particularly in light of the historical and ongoing subsidies that persist in base rates where the Large General Service customer class is subsidizing other classes of customers.

EXCEPTION 8

The Commission's decisions to deny CIGFUR II's 3 July 2023 Motion to Strike and overrule CIGFUR II's objection to the admission of Exhibit 6 to Public Staff witness Jay Lucas' direct testimony (Tr. vol. 20, pp. 85-88; 124) were unjust, unreasonable, and unwarranted; arbitrary or capricious; an abuse of discretion; and in violation of Commission Rule R1-24.

When acting as a court of record, the Commission "shall apply the rules of evidence applicable in civil actions in the superior court, insofar as practicable, but no decision or order of the Commission shall be made or entered in any such proceeding unless the same is supported by competent material and substantial evidence upon consideration of the whole record." N.C.G.S. § 62-65(a).

As part of his direct testimony, witness Lucas submitted "Lucas Exhibit 6," an altered version of an exhibit (a file containing several Excel spreadsheets) submitted by a DEP witness in a separate docket ("Revised Harrington Exhibit 1") and which was not admitted into the record in the instant proceeding. (*See* Tr. vol. 20, pp. 84-85; Ex. vol. 20 at 143). During cross-examination, witness Lucas admitted that he had failed to provide a red-lined version or summary of changes made to Harrington Exhibit 1. (Tr. vol. 20, p. 85) Nor did witness Lucas provide the spreadsheets underlying Lucas Exhibit 6. When asked about the document, he replied, "It's got about 38 tabs that are all linked together. So there's lots of numbers that flow from one spreadsheet to another. . . . That'd be a lot of spreadsheets. . . . I haven't provided that." (*Id.* at 85).

The Commission's decision to admit, and rely on, this inauthentic exhibit was an abuse of discretion, contrary to law, and contrary to North Carolina Rules of Evidence, to which the Commission is supposed to adhere "insofar as practicable" when it is acting as a court of record. N.C.G.S. § 62-65(a). Based on witness Lucas' testimony, the Commission had no way to know the nature, extent, or materiality of witness Lucas' alterations to Harrington Exhibit 1. Moreover, witness Lucas failed to produce and provide the spreadsheets supporting his final calculations. Despite admitting that he had altered Harrington Exhibit 1, and that changes to one spreadsheet affected the others, witness Lucas failed to provide the documentation supporting Lucas Exhibit 6. Without such documentation. The Commission, therefore, could not have known whether Lucas Exhibit 6 was accurate and authentic,

nor could it have known the materiality or weight to give Lucas Exhibit 6, and it was an abuse of discretion for the Commission to admit it. Further, the Order is in error due to its reliance upon evidence that was not competent and should not have been admitted into the record. Moreover, it was error for the Commission to adopt the Public Staff's recommendation to discontinue use of the equal percentage method in the absence of competent material and substantial evidence.

EXCEPTION 9

The Commission's 6 July 2023 Evidentiary Order denying CIGFUR II's motion to strike and the Commission's decision to admit Public Staff witness David Williamson's second supplemental testimony and second supplemental exhibits over CIGFUR II's objections, were unjust, unreasonable, and unwarranted; arbitrary or capricious; an abuse of discretion; and violated Commission Rule R1-24. (*See* Tr. vol. 24 at 49-50, 153).

Over CIGFUR II's objection, the Commission declined to strike the second supplemental direct testimony of Public Staff witness David Williamson, which was filed by the Public Staff on 27 June 2023, 54 days after the expert witness hearing in this matter began. The Public Staff then filed witness D. Williamson's corrected second supplemental exhibits of witness D. Williamson on 28 June 2023, 55 days after the expert witness hearing in this matter began. The Public Staff never sought leave from the Commission to file testimony out of time.

The Evidentiary Order violates Commission Rule R1-24(g). Under Rule R1-24(g)(2), the Public Staff was obligated to file "*all* testimony, exhibits and other

information which is to be relied upon at the hearing *20 days in advance of the scheduled hearing*" (emphasis added). The Rule permits only one exception to this 20-day requirement: Relief from the 20-day requirement

> may be granted by the Commission, after notice of hearing and before the date of hearing, in cases in which it appears by stipulation of counsel for the respective party that the oral testimony or exhibits of expert witnesses will not be of such technical or complicated nature as to warrant a recess of the hearing for study and preparation of cross examination.

Rule R1-24(g)(5). Here, the Commission ignored the 20-day requirement and failed to adhere to the lone exception for late-filed testimony. In particular, the Commission allowed witness D. Williamson to file his second supplemental direct testimony and exhibits 54 days, and his corrected second supplemental exhibits 55 days, after the expert witness hearing commenced—a staggering *74 and 75 days late, respectively*. Moreover, the Commission allowed witness D. Williamson's second supplemental direct testimony and exhibits into evidence, despite the absence of the stipulation required by Rule R1-24(g)(5).

The Evidentiary Order denying CIGFUR II's motion to strike and admitting witness D. Williamson's second supplemental direct testimony and exhibits over objections was unjust, unreasonable, and unwarranted; arbitrary or capricious; an abuse of discretion; in violation of Commission Rule R1-24; and a deprivation by the Commission of essential components of due process. Further, the Order is in error due to its reliance upon evidence that was not competent and should not have been admitted into the record.

EXCEPTION 10

The Commission's 6 July 2023 Evidentiary Order denying CIGFUR II's motion to strike and the Commission's decision to admit Public Staff witness David Williamson's second supplemental testimony and second supplemental exhibits, as filed on 27 June 2023 and corrected on 28 June 2023, were unjust, unreasonable, and unwarranted; arbitrary or capricious; an abuse of discretion; and violated Commission Rule R1-24. (Tr. vol. 24, pp. 49-50; 153).

Over CIGFUR II's objection and after denying CIGFUR II's motion to strike, the Commission admitted the second supplemental testimony of Public Staff witness D. Williamson, which was filed by the Public Staff on 27 June 2023 and then "corrected" without sworn testimony on 28 June 2023. As part of its motion to strike witness Williamson's testimony, CIGFUR requested the opportunity to cross-examine witness Williamson on the issues raised in his supplemental testimony. In its Evidentiary Order, the Commission recognized that our Supreme Court has determined that when the Commission "permits a late-filed exhibit, opposing parties have the right to demand that the hearing be reopened to allow for cross-examination of witnesses regarding the information presented by the late-filed exhibit or to present rebuttal evidence." (Evidentiary Order, 3–4). Even so, the Commission determined that witness D. Williamson's testimony was not "new," except insofar as he made certain "mathematical calculation[s] of the assignment of the Public Staff's proposed revenue requirement to individual customer classes and

the use of the Public Staff's principles to determine its final recommendation." (Evidentiary Order, 4).

The Commission's determination that witness D. Williamson's testimony on the whole did not constitute new evidence warranting further cross-examination was unjust, unreasonable, and unwarranted; arbitrary or capricious; and an abuse of discretion. In his first supplemental testimony, witness D. Williamson exercised independent judgment to evaluate the total revenue requirement and recommend how that revenue requirement should be apportioned among customer classes. In subsequently filed corrected first supplemental testimony, witness D. Williamson withdrew his recommendations for revenue apportionment. In his second supplemental testimony, however, witness D. Williamson made his recommendations based entirely on the Company's working papers. Despite being the Public Staff's expert, witness D. Williamson exercised no independent judgment, and the Commission improperly denied CIGFUR and other interested parties the right to thoroughly cross-examine witness Williamson on this feature of his second supplemental testimony.

By denying CIGFUR's motion to strike and disallowing a thorough cross-examination, the Order was unjust, unreasonable, and unwarranted; arbitrary or capricious; incomplete; an abuse of discretion; and a deprivation of by the Commission of an essential component of due process, the right to confront and to cross-examine witnesses during a judicial proceeding. Further, the Order is in error

due to its reliance upon evidence that was not competent and should not have been admitted into the record.

EXCEPTION 11

The Commission's 6 July 2023 Evidentiary Order denying CIGFUR II's motion to strike and the Commission's decision to admit Public Staff witness David Williamson's second supplemental testimony and second supplemental exhibits, as filed on 27 June 2023 and corrected on 28 June 2023, were unjust, unreasonable, and unwarranted; arbitrary or capricious; an abuse of discretion; and violated Commission Rule R1-24. (Tr. vol. 24, pp. 49-50; 153).

Over CIGFUR II's objection, the Commission declined to strike the second supplemental testimony of Public Staff witness D. Williamson, which was filed by the Public Staff on 27 June 2023 and subsequently corrected without sworn testimony on 28 June 2023. As part of its motion to strike witness D. Williamson's testimony, CIGFUR requested the opportunity to present rebuttal evidence on the issues raised in witness D. Williamson's second supplemental testimony. In its Evidentiary Order, the Commission recognized that our Supreme Court has determined that when the Commission "permits a late-filed exhibit, opposing parties have the right to demand that the hearing be reopened to allow for cross-examination of witnesses regarding the information presented by the late-filed exhibit or to present rebuttal evidence." (Evidentiary Order, 3–4). Even so, the Commission determined that witness D. Williamson's testimony was not "new," except insofar as he made certain "mathematical calculation[s] of the assignment of the Public Staff's proposed revenue

requirement to individual customer classes and the use of the Public Staff's principles to determine its final recommendation." (Evidentiary Order, 4).

The Commission's determination that witness D. Williamson's second supplemental testimony on the whole did not constitute new evidence warranting rebuttal testimony was unjust, unreasonable, and unwarranted; arbitrary or capricious; and an abuse of discretion. In his first supplemental testimony, witness D. Williamson exercised independent judgment to evaluate the revenue requirements. However, in his second supplemental testimony, witness D. Williamson made his recommendations based entirely on the Company's working papers. Despite being the Public Staff's expert, witness D. Williamson exercised no independent judgment, and the Commission denied CIGFUR and other interested parties the right to present rebuttal evidence in response to witness D. Williamson's second supplemental testimony.

By denying CIGFUR's motion to strike and disallowing the opportunity to provide rebuttal evidence, the Evidentiary Order was unjust, unreasonable, and unwarranted; arbitrary or capricious; an abuse of discretion; and a deprivation of by the Commission of an essential component of due process, the right to examine witnesses during a judicial proceeding. Further, the Order is in error due to its reliance upon evidence that was not competent and should not have been admitted into the record.

EXCEPTION 12

When the Commission conducts formal hearings, as it did when it presided over the instant proceeding—a general rate case with PBR application filed by an electric public utility pursuant to N.C.G.S. § 62-133.16, it is exercising functions that are judicial in natural and shall act in a judicial capacity. N.C.G.S. §§ 62-23 and 62-60. The Commission is, therefore, required to conform its proceedings to the requirements of due process. The right to confront and examine witnesses are essential elements of due process. Any limitation to the right of cross-examination "calls into question the 'integrity of the fact-finding process.'" *Chambers v. Mississippi*, 410, U.S. 284, 295 (1972). The Commission erred when it limited the scope of cross-examination during the reconvened hearing. (*See* Tr. vol. 24 at 62, 66-68; *see also* Evidentiary Order at 4).

EXCEPTION 13

The Commission erred during the reconvened hearing held on 24 July 2023 when it prohibited counsel for CIGFUR II from asking on direct examination, and further prohibited counsel for the Carolina Utility Customers Association, Inc. ("CUCA") from asking on cross-examination, questions of CIGFUR II witness Brian C. Collins related to D. Williamson's late-filed second supplemental testimony and exhibits, as corrected. (*See* Tr. vol. 24 at 60-63; 65-68). 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).

CIGFUR II demanded the opportunity to proffer supplemental testimony related to D. Williamson's Second Supplemental Testimony and Exhibits, as requested both in CIGFUR II's 3 July 2023 Motion to Strike and orally during the reconvened hearing on 24 July 2023, and was denied the opportunity to do so, both by way of the Evidentiary Order and the Commission's rulings from the bench during the 24 July 2023 reconvened hearing.

EXCEPTION 14

CIGFUR II hereby incorporates by reference hereto its Motion for Reconsideration and the attachments thereto, filed in this docket on 16 October 2023, and includes the grounds set forth therein as its fourteenth exception.

CONCLUSION

For the reasons set forth above, the Order and Evidentiary Order are unlawful, unjust, unreasonable, and unwarranted; in excess of the Commission's statutory authority; 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 and the Evidentiary Order should therefore be reversed as to the Exceptions set forth herein.

Respectfully submitted this the 17th of October, 2023.

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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 CIGFUR II upon all parties of record by email transmission with the parties' consent.

This the 17th of October, 2023.

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