STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

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

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 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	CUCA'S NOTICE OF CROSS APPEAL AND EXCEPTIONS

Carolina Utility Customers Association, Inc. ("CUCA"), through counsel and pursuant to N.C.G.S. §§ 7A-29(b), 62-90, and Rule 18 of the North Carolina Rules of Appellate Procedure, hereby gives notice of cross appeal to the Supreme Court of North Carolina from the *Order Accepting Stipulations, Granting Partial Rate Increase, Requiring Public Notice, and Modifying Lincoln CT CPCN Conditions* (the "Order") issued by the North Carolina Utilities Commission ("Commission") on December 15, 2023 in the above-captioned proceedings.

Pursuant to N.C.G.S. § 62-90(a), CUCA takes exception to the Order on the following grounds, which CUCA contends are unlawful, unjust, unreasonable, and/or unwarranted and prejudicial; 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 CUCA as a party to the docket; and/or an abuse of discretion.

EXCEPTION 1
RATE OF RETURN ON COMMON EQUITY

The Order's Evidence and Conclusions for Findings of Fact No. 48-50, 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 violation of the due process rights of CUCA as a party to the docket; and arbitrary and capricious in approving a 10.1% rate of return on common equity ("ROE") for Duke Energy Carolinas, LLC ("Duke" or "DEC").

In the Order, the Commission approved a rate of return on common equity ("ROE") ("Duke" or "DEC") of 10.1%,[1] 30 basis points higher than the 9.8% ROE the Commission authorized for Duke Energy Progress, LLC ("DEP") just four months earlier.[2] The Commission's findings of fact and conclusions of law failed to offer sufficient explanation for any differential treatment between the DEP and DEC proceedings. Further the Commission erred in its ROE determination by failing to appropriately consider and account for the lessened risk to DEC resulting from adoption and approval o of the MYRP.

Moreover, DEC's primary expert witness regarding ROE conceded on cross-examination that *he is not aware of any substantive difference between DEC and DEP that*

[1] Findings of Fact Nos. 48–50, Order at 28; Order at 198.

[2] Order Accepting Stipulations, Granting Partial Rate Increase, and Requiring Public Notice, *In re Application of Duke Energy Progress, LLC For Adjustment of Rates and Charges Applicable to Electric Service in North Carolina and Performance Based Regulation*, Docket No. E-2, Sub 1300 at 157 (Aug. 18, 2023) (the "DEP Order").

would justify DEC having a different rate of return than that authorized for DEP. The only basis for the difference in his recommendations for DEC and DEP is the change in the prevailing interest rates that occurred during the few months between the preparation of his testimony in each case. However, he also conceded that (1) the authorized rate of return should not depend on changes in interest rates over the course of months and (2) interest rates are as likely to go down as they are to go up during the multi-year rate plan ("MYRP") period.

Because the Commission approved an ROE 30-basis points higher for DEC than DEP despite (1) the similar proceedings being conducted less than four months apart and (2) DEC's own expert witness testifying that he is not aware of any substantive difference between DEC and DEP that would justify DEC having a different rate of return than that authorized for DEP, the Commission's ROE determination is arbitrary and capricious and constitutes an abuse of discretion.

EXCEPTION 2
APPROVAL OF MYRP "PROJECTS" THAT ARE NOT "DISCRETE AND IDENTIFIABLE" "CAPITAL" PROJECTS AS REQUIRED BY STATUTE

The Order's Evidence and Conclusions for Finding of Fact No. 29, and Finding of Fact No. 29 itself, 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; arbitrary and capricious, and in excess of the Commission's statutory authority. The Order erroneously approved DEC's requested MYRP "projects" for inclusion in the multi-year rate plan ("MYRP"), including many programs which were not

"known and measurable . . . capital investments" associated with "discrete and identifiable capital spending projects," as required by N.C.G.S. § 62-133.16(c)(1)(a).[3]

N.C.G.S. § 62-133.16(c)(1)(a) provides that for the first year of an MYRP, the

> base rates . . . shall be fixed in a manner prescribed under G.S. 62-133 . . . plus costs associated with a ***known and measurable set of capital investments***, net of operating benefits, associated with a set of ***discrete and identifiable capital spending projects*** to be placed in service during the first rate year.

(emphasis added). Similarly, changes to rate base in the second and third years of an MYRP must be based on "Commission-authorized ***capital investments*** that will be used and useful during the rate year" and "associated expenses." The faithful application of this narrow statutory authorization is critical to ensuring that ratepayers are protected and that the deviation from traditional ratemaking is limited to the specific circumstances authorized by the General Assembly.

A review of the testimony and exhibits submitted in evidence during the hearing makes clear that the MYRP projects approved by the Commission include a number of programs that are not permitted by Section 62-133.16(c)(1)(a) because they are not "discrete and identifiable," and in some cases they are not even "capital" spending projects. Examples of such programs include the Distribution Hazard Tree Removal program, Hardening & Resilience: Public Interference program, Infrastructure Integrity program, Cathodic Protection, Targeted Wood Pole Upgrade, and Transmission Hazard Tree Removal programs. Notably, the proposed Hazard Tree Removal programs involved costs

[3] *See* Finding of Fact No. 29, Order at 102–03.

that are not properly treated as capital spending—they are simply expenses, as recognized in the applicable utility accounting rules and principles.

Together, the six programs above include proposed spending more than $700 million over the course of the MYRP, with DEC's exhibits and testimony providing no information regarding what, precisely, a single dollar of that money will be spent on. More concretely, these programs involve work that DEC admits it has not, will not and—critically—cannot identify until some later date. These spending programs do not represent "discrete and identifiable" projects. On the contrary, they appear to be nothing more than buckets of money that DEC intends to employ if and when DEC identifies that the relevant kinds of work need to be done.

These kinds of spending programs are not permissible "known and measurable" and "discrete and identifiable" projects in the MYRP as required by the General Assembly in authorizing the Commission to approve an MYRP.

Furthermore, in reaching its conclusion to authorize these programs, the Commission gave "significant weight to the compromise agreements reflected in the Revenue Requirement Stipulation."[4] The Commission cannot rely on stipulations, the *ipse dixit* of witnesses, or the existence of a list of projects to support the conclusion that the proposed projects are in fact discrete and identifiable, as required by statute.

In addition to the Commission's conclusions being legally erroneous and unsupported by evidence, the Commission's order does not acknowledge, let alone address, the arguments and evidence submitted by CUCA on these points and includes no statutory

[4] Order at 103.

analysis supporting the inclusion of these projects in the MYRP, thus failing to comply with the requirements of N.C.G.S. § 62-79.

EXCEPTION 3
FAILURE TO EXCLUDE MYRP PROJECTS WITH NO O&M SAVINGS CALCULATED, CONTRARY TO N.C.G.S. § 62-133(c)(1) AND COMMISSION RULE R1-17B(d)(2)(k)

In addition to erroneously approving spending programs that are not "known and measurable" or "discrete and identifiable," the Commission also failed to exclude projects with no O&M savings calculated, contrary to N.C.G.S. § 62-133(c)(1) and Commission Rule R1-17B(d)(2)(k), rendering the Order's Evidence and Conclusions for Finding of Fact No. 29, and the corresponding Finding of Fact, unjust, unreasonable, or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; arbitrary and capricious, and in excess of the Commission's statutory authority, on this additional basis.

N.C.G.S. § 62-133.16(c)(1)(a) specifies that the rates applicable under any approved MYRP must be "net of operating benefits." Reflecting this requirement, Rule R1-17B(d)(2)(k) requires proposed MYRP submissions to include "[p]rojected operating benefits" associated with each proposed MYRP project.

DEC's submissions and testimony indicated an expectation that many of the proposed MYRP projects will result in operating benefits, including reductions in operating expenses, which Rule R1-17B(d)(2)(k) required DEC to identify and Section 62-133.16(c)(1)(a) requires be netted out of DEC's MYRP revenues to the benefit of ratepayers.

Specifically, despite DEC's repeated acknowledgments that avoiding or reducing the severity of outages results in O&M savings, DEC's submissions do not identify any

credit for O&M savings for Distribution Automation, ADMS, Capacity Upgrade projects, Distribution Hazard Tree Removal, Breaker Upgrades, Capacity & Customer Planning, Transmission Substation H&R, Transmission System Intelligence, Transmission Line H&R, Transmission Transformers, or Transmission Vegetation Management.

Because DEC acknowledged there will be O&M savings but did not identify the expected O&M savings from these projects, the Commission had no evidentiary basis to establish the rates authorized by section 62-133.16 for an MYRP including these projects.

In addition to the Commission's conclusions being legally erroneous and unsupported by evidence, the Commission's order does not acknowledge, let alone address, the arguments and evidence submitted by CUCA on these points and includes no statutory analysis supporting the inclusion of these projects in the MYRP, thus failing to comply with the requirements of N.C.G.S. § 62-79.

EXCEPTION 4
FAILURE TO MINIMIZE INTERCLASS SUBSIDIES AS REQUIRED BY N.C.G.S. § 62-133(B)

The Order's Evidence and Conclusions for Findings of Fact No. 41–47, 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; arbitrary and capricious, and in excess of the Commission's statutory authority. In its Order, the Commission accepted DEC's proposal to reduce subsidies by 10% per year,[5] despite having a statutory mandate to ensure that "interclass subsidization of ratepayers is

[5] *See* Findings of Fact No. 41–47, Order at 27 – 28; Order at 148–49.

minimized *to the greatest extent practicable* by the conclusion of the MYRP period" under N.C.G.S. § 62-133(b).

By requiring a proposed performance-based ratemaking ("PBR") application to minimize interclass subsidies to the "greatest extent practicable by the conclusion of the MYRP period," the General Assembly did not intend for the Commission to simply check a box that the proposed PBR "moves toward" rate parity. Rather, the section requires that the rates approved actually will achieve the greatest reduction in interclass subsidies that can be achieved in light of other limitations. While N.C.G.S. § 62-133.16(d)(1) requires the Commission to consider whether a PBR Application, in its entirety, "assures that no customer or class of customers is unreasonably harmed" by the proposal, the Commission's findings of fact and conclusions of law failed to consider whether subsidies could be decreased faster for certain classes, even if rate shock prevented a greater than 10% reduction for the lighting class, as propounded by CUCA's expert witness. There is nothing in Chapter 62 of the North Carolina General Statutes or in the decisions of this Commission that required DEC to reduce interclass subsidies by some uniform percentage for each class.

Because the evidence before the Commission at best makes the case that one class could be negatively impacted by further decreasing its subsidies, and not that the approved PBR reduces interclass subsidies "to the greatest extent practicable," as required by Section 62-133.16(c), the interclass subsidy approved by the Commission is impermissible as a matter of law.

EXCEPTION 5
FAILURE TO REVIEW GIP PROJECT RELIABILITY RESULTS

The Order's Evidence and Conclusions for Finding of Fact Nos. 16-18, and Finding of Fact Nos. 16-18 themselves, 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; and arbitrary and capricious.

In its previous rate case, where DEC sought approval for various Grid Improvement Plan ("GIP") projects including Self-Optimizing Grid ("SOG"), this Commission allowed DEC to defer certain GIP costs but noted that its decision

> allows DEC to treat costs incurred in pursuing the settled GIP programs as regulatory assets ***pending a prudence and reasonableness determination in a later rate case***. DEC remains fully at risk for the reasonableness and prudence determination of its GIP costs and for its ultimate recovery from customers, as would be the case if DEC simply undertook these programs without a deferral and then sought recovery of the costs in a rate case.[6]

(emphasis added). In that order, the Commission indicated that it would consider data regarding achievement of purported reliability benefits and the cost-effectiveness of GIP investments in any cost recovery proceedings.[7]

However, in its Order, the Commission did not make any prudence or reasonableness determination as to GIP projects—particularly SOG—even though the evidentiary record before the Commission demonstrated that (1) reliability has not significantly improved since the last rate case despite investment of hundreds of millions

---

[6] Order Accepting Stipulations, Granting Partial Rate Increase, and Requiring Customer Notice, Docket No. E-7, Sub 1214, at 141 (Mar. 31, 2021).

[7] *Id.* at 140.

of dollars in SOG based upon promised improvements to reliability and (2) the reliability results shown by DEC in this case in support of GIP spending do not match its other filings.

CONCLUSION

For the reasons stated above, the Commission's Order is unlawful, unjust, unreasonable, or unwarranted and prejudicial; in excess of the Commission's statutory and constitutional authority; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; arbitrary or capricious; violative of due process or equal protection rights; and/or constitutes an abuse of discretion.

Respectfully submitted, this the 1st day of March, 2024.

/s/ Christopher B. Dodd

Marcus W. Trathen
Matthew B. Tynan
Christopher B. Dodd
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, LLP
Suite 1700, Wells Fargo Capitol Center
150 Fayetteville Street
P.O. Box 1800 (zip 27602)
Raleigh, NC 27601
(919) 839-0300
mtrathen@brookspierce.com
mtynan@brookspierce.com
cdodd@brookspierce.com

Counsel for CUCA

Certificate of Service

I hereby certify that a copy of the foregoing CUCA'S NOTICE OF CROSS APPEAL AND EXCEPTIONS has been served this day upon all parties of record in this proceeding, or their legal counsel, by electronic mail with permission or U.S. Mail.

This the 1st day of March, 2024.

BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, LLP

/s/ Christopher B. Dodd
Christopher B. Dodd