Lawrence B. Somers
Deputy General Counsel

Mailing Address:
NCRH 20 / P.O. Box 1551
Raleigh, NC 27602

o: 919.546.6722
f: 919.546.2694

bo.somers@duke-energy.com



January 28, 2019

**VIA ELECTRONIC FILING**

Ms. M. Lynn Jarvis
Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4300

**RE: Duke Energy Carolinas, LLC's Response in Opposition to Public Staff's Motion**
**Docket Nos. E-7, Sub 1181, SP-12478, Sub 0 and SP-12479, Sub 0**

Dear Ms. Jarvis:

I enclose Duke Energy Carolinas, LLC's Response in Opposition to Public Staff's Motion for filing in connection with the referenced matter.

Thank you for your attention to this matter. If you have any questions, please let me know.

Sincerely,

Lawrence B. Somers

Enclosure

cc: Parties of Record
Dwight Allen, Esquire

BEFORE THE
NORTH CAROLINA UTILITIES COMMISSION

Docket No. E-7, Sub 1181
Docket No. SP-12478, Sub 0
Docket No. SP-12479, Sub 0

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| In the Matter of Transfer of Certificates of Public Convenience and Necessity and Ownership Interests in Generating Facilities from Duke Energy Carolinas, LLC to Northbrook Carolina Hydro II, LLC and Northbrook Tuxedo, LLC | DUKE ENERGY CAROLINAS, LLC'S RESPONSE IN OPPOSITION TO PUBLIC STAFF'S MOTION |

NOW COMES Duke Energy Carolinas, LLC ("DEC" or the "Company"), pursuant to N.C. Gen. Stat. §62-80 and Commission Rule R1-7, and hereby responds in opposition to the Public Staff's Motion filed on January 18, 2019 ("Public Staff Motion"). As set forth below, the Public Staff's Motion should be denied because it (1) fails to timely allege any new evidence or argumentation which is necessary to enable the Commission's reconsideration of the rates established in the Commission's June 22, 2018 *Order Accepting Stipulation, Deciding Contested Issues, and Requiring Revenue Reduction* in Docket No. E-7, Sub 1146 ("Sub 1146 proceeding") and (2) inappropriately bases its request for potential future reconsideration of the 2015-2017 capital costs necessary for compliance and safe operation of the small hydro units on the sale of the facilities.

## Background

Although the parties' previously-filed comments and witness testimony have already discussed the background of these issues involved in the proceeding at length, the Public Staff's characterization of the events in its Motion necessitate additional recital of the key events in this

process. The Company filed a Joint Notice of Transfer, Request for Approval of Certificates of Public Convenience and Necessity, Request for Accounting Order and Request for Declaratory Ruling for the proposed sale of five hydroelectric generating facilities on July 5, 2018. Prior to that, the Company made approximately $17.3 million in capital improvements to the hydroelectric facilities in 2015-2017. These capital costs[1] were included in the net plant in rate base established in the Company's general rate case in Docket No. E-7, Sub 1146. In its Motion, the Public Staff asserts that the Company only notified the Public Staff of the proposed sale two days before it filed its rate case with a "bare outline" and that the proposed sale of the hydroelectric facilities had not become concrete enough for the Public Staff to initiate an investigation. Notably, the Public Staff does not explain why it either reviewed and did not oppose, or chose not to review, the approximately $17.3 million in capital improvements to the hydroelectric facilities during the rate case proceeding, even though it was aware of a possible sale. Following the Company's August 2017 meeting with the Public Staff to inform it of the proposed small hydro units sale, the Company and the Public Staff held subsequent meetings on February 6, 2018 and May 9, 2018 to further discuss the status of the proposed sale. Since that time, the Company has responded to approximately 75 data requests from the Public Staff and participated in numerous conference calls with the Public Staff to discuss multiple issues regarding the transaction, including providing substantial details about the underlying 2015-2017 projects and capital costs incurred by DEC. Despite having more than 17 months to fully investigate the 2015-2017 costs at issue in its Motion, through extensive meetings, data requests, several conference calls with subject matter experts, and the wide range of investigatory powers available to the Public Staff during Sub 1146 proceeding, the Public Staff still has not alleged nor come forward with any new evidence or

[1]In her testimony, DEC witness Veronica Williams states that 95% of those costs were included in current rates set by the Commission in the Sub 1146 proceeding. (Williams, P. 9, L3)

sufficient arguments to warrant the Commission's reconsideration of the rates established in Docket No. E-7, Sub 1146.[2] In fact, in its Motion, the Public Staff, even after its extensive discovery, states that its motion "does not forecast or suggest that there is anything unreasonable or imprudent about DEC's 2015-2017 expenditures on its hydroelectric facilities." Public Staff Motion at ¶ 7. In the pre-filed testimony of its witnesses Mr. Maness and Mr. Metz, the Public Staff does not allege that a single dollar incurred by the Company at the small hydro units from 2015-2017, and already being recovered in rates, should have been disallowed as unreasonable or imprudently incurred. Yet, the Public Staff asks the Commission to authorize it to have the ability to continue its review of the costs at issue in DEC's next general rate case and essentially be granted a "third bite at the apple." Under these circumstances and the law, as set forth in further detail below, the Public Staff's Motion must be denied.

**The Public Staff's Motion Pursuant to N.C. Gen. Stat. §62-80 is Improper**

N.C. Gen. Stat. §62-80 states in pertinent part, "The Commission may at any time upon notice to the public utility and to other parties of record affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it." The statute does not allow for a party, including the Public Staff, to request the Commission hold open for investigation a review of costs already reviewed and approved by this Commission. The statute is intended to permit the Commission to address substantive issues and is not simply a procedural mechanism for a party to request that an issue be held open just in case it later discovers that it wants to provide additional information to the Commission, especially when it has already had two Commission dockets to make such inquiry and allegations.

[2] As the Commission is aware, the Sub 1146 Order is currently on appeal, but the Public Staff (nor any other party) did not appeal the Commission's approval of the costs at issue in the Public Staff's Motion.

182 days after the Commission entered its Sub 1146 Order, and 162 days after DEC filed its joint notice and request in this docket, the Public Staff filed its Motion pursuant to N.C. Gen. Stat. §62-80.[3] The Public Staff did not timely appeal the Commission's Sub 1146 Order as to the 2015-2017 costs at issue. The Supreme Court has held that N.C. Gen. Stat. §62-80 does not grant a party the right to seek a motion to rescind after expiration of the 30-day appeal period. In *Utilities Commission v. Edmisten*, 291 N.C. 575, 581-82, 232 S.E.2d 177 (1977), the Supreme Court held that, "We think it clear that, *at least until the order became final by expiration of the time allowed for appeal*, G.S. 62-80 authorized the Commission, upon its own motion or upon the motion of any party, to reconsider its previously issued order . . ." (emphasis added). In *State ex rel. Utilities Com'n v. Carolina Water Service*, 335 N.C. 493, 498, 439 S.E.2d 127, 129-30 (1994) the Supreme Court denied an attempted appeal and held as follows:

> Thirty days after the final order was entered, the Commission's order could no longer be appealed. While the Commission can choose to rescind, alter, or amend a final decision on its own accord, *it is not required to rehear an issue brought by a party after the order has been final for thirty days*. We hold CWS should have followed the correct channel of appeal at the time of the initial decision and appealed the final decision of the full Commission to the Supreme Court within 30 days.

(citations omitted, emphasis added). Accordingly, based upon N.C. Gen. Stat. §§62-90 and 62-80 and Supreme Court caselaw, the Public Staff's motion is time barred and should be denied.

The North Carolina Supreme Court has held that costs are presumed to be reasonable unless challenged. *State ex rel. Utilities Com. v. Conservation Council of North Carolina*, 312 N.C. 59, 64, 320 S.E.2d 679, 683 (1984) (citing *Utilities Com. v. Intervenor Residents*, 305 N.C. 62, 76-77, 286 S.E.2d 770, 779 (1982)). The Public Staff was aware of the additional capital investments

[3] Again, in its Motion the Public Staff did not actually ask the Commission to rescind or modify its Sub 1146 Order, instead it asked the Commission to allow the Public Staff to *potentially* (although it has not come forward with any such challenge despite ample opportunity to do so) hold open the *possibility* of making such a challenge in DEC's *next general rate case*.

and the possibility of a sale of the assets, but made no challenge to the reasonableness of the Facilities' costs incurred by the Company in the Sub 1146 rate case proceeding. The time for the Public Staff to file for reconsideration or appeal the reasonableness of the Facilities' costs has long since passed.

Even if the Public Staff's Motion is not time barred, the Commission has no power to modify or set aside its prior order under N.C. Gen Stat. §62-80, absent any additional evidence or change in conditions requiring it for the public interest. *State ex rel. Utilities Com'n v. North Carolina Gas Service*, 128 N.C. App. 288, 494 S.E.2d 621, *rev. denied* 348 N.C. 78, 505 S.E.2d 886 (1998) (citing *State ex Rel. Utilities Com. v. Carolina Coach Co.*, 260 N.C. 43, 50, 132 S.E.2d 249, 254 (1963)). It its December 23, 2004 *Order Denying Complainants' Motion for Reconsideration* in Docket No. E-7, Sub 743, the Commission followed this language and held, "Absent any new evidence or argumentation in this docket, the Commission will not rescind, alter, or amend its ruling."

With its Motion, after the opportunity to gather information about the Facilities' 2015-2017 costs and proposed sale for nearly a year and half, and after approximately 75 data requests sent and answered on the topic over the past 6 months, the Public Staff has not provided any new evidence or argumentation to warrant the Commission rescinding, altering or amending its ruling. In fact, the Public Staff expressly stated that its Motion "does not forecast or suggest that there is anything unreasonable or imprudent about DEC's 2015-2017 expenditures on its hydroelectric facilities." Public Staff Motion at ¶ 7. Despite that, the Public Staff moves that this Commission hold in abeyance its review of the reasonableness of costs already approved and deemed reasonable by this Commission, which were not challenged at the time of their approval or are even challenged in the current docket. The Public Staff's request to hold open potential challenges to reasonable

and prudent costs that it could have challenged in the Sub 1146 rate case, if it so chose, much less costs it has reviewed in this docket and has not argued were unreasonable or imprudent, is not permitted under N.C. Gen Stat. §62-80, is unreasonable and should be denied by the Commission.

**The Public Staff's Motion Inappropriately Relates the Cost of the Facilities' Upgrades to the Sale of the Facilities**

In its motion the Public Staff makes two arguments which represent a fundamental misunderstanding of the posture of the Facilities as it relates to cost recovery and DEC's position. First the Public Staff states that,

> DEC observed it notified the Public Staff of the proposed sales of the hydroelectric facilities in August of 2017, two days before it filed its rate application in the Sub 1146 preceding. DEC argues the Public Staff thus had notice of the proposed sale in time to conduct a full reasonableness review in conjunction with the rate case and should not get another "bite at the apple." [4]

Second, the Public Staff argues that a finding of imprudence of capital expenditure in a future rate case would not be retroactive ratemaking. The Public Staff states, "an adjustment of the recoverable loss on sale - if imprudence or unreasonableness is shown - should be made effective beginning on the date of approval of the sale."[5]

With due respect, the Public Staff is incorrect on both arguments. Contrary to the position of the Public Staff, the question of whether the capital additions made by DEC were prudent is not related to the sale of the Facilities. Whether DEC was prudent in making those capital investments is entirely separate and independent of DEC selling the Facilities following the improvements. The Public Staff most certainly knew of the capital projects before and during the Sub 1146 proceeding, and if it believed those improvements to be imprudent, it should have challenged them

[4] Motion of the Public Staff p. 4.

[5] *Id.* at pp. 5-6

in that proceeding. Of course, the Public Staff did not, and those capital expenditures were included into DEC's rate base. Now, the Public Staff is using the sale of the assets as a reason to *potentially* go back and challenge those capital projects retroactively even though it has been explicit in stating that it has found no such reason to challenge those costs and may never do so.

The Public Staff's position on retroactive ratemaking suffers from the same defect.[6] The Public Staff correctly cites that the Supreme Court has ruled,

> Retroactive ratemaking has been defined as adjustments to future rates to rectify undue past profits....it has also been defined as occurring when an additional charge is made for the use of utility service or the utility is required to refund revenues collected, pursuant to then lawfully established rates for such past use.

*State ex rel. Utilities Com. v Nantahala Power & Light Co*, 326 N.C. 190, 206 (1990). As previously stated, the issue here is whether the capital projects were a prudent expenditure. Those expenditures were already approved by the Commission in the Sub 1146 proceeding. The future sale of those projects is irrelevant to that prudency test. The Public Staff is now functionally asking the Commission to allow the Public Staff to revisit prior approved expenditures and possibly reduce or disallow those expenditures. This appears to be the type of retroactive ratemaking about which the Court was concerned. Be that as it may, the concept of retroactive ratemaking is complex and subject to differing interpretations. For purposes of this case, the decision does not turn on whether the Public Staff's proposal is called retroactive ratemaking or something else. The fact remains that the Public Staff had ample opportunity to address the prudency of the 2015-2017 hydro investments in Sub 1146 and chose not to do so. The prudency question does not turn on whether or not the assets were sold as the Public Staff contends. The Public Staff has not alleged

[6] The concept of retroactive ratemaking is discussed at length in *State ex rel. Utilities Commission. v. Edmisten*, 291 N.C.451, 232 S.E.2d184 (1977).

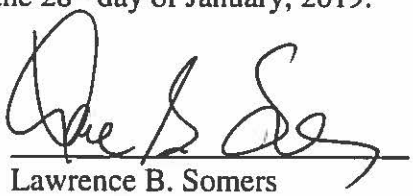
that inclusion of the hydro assets in rate base in the Sub 1146 proceeding was inappropriate, and its request to hold the matter open should be denied.

The only remaining issue in this docket is the prudence of the sale, specifically the reasonableness of any legal or transaction costs. Contrary to the statements by the Public Staff in its Motion,[7] DEC has not reversed its position. Rather, DEC has continuously acknowledged that the Public Staff is entitled to review or challenge the prudency of expenditures of the sale itself and never intended that the prudent costs approved by the Commission in the Sub 1146 proceeding should be revisited. As stated in the Company's July 5, 2018 joint notice and request, "An accounting order granting the relief that DEC seeks will not preclude the Commission or parties from addressing the reasonableness of the costs deferred *arising from the Transaction* in the next general rate proceedings filed by DEC." Joint Notice at ¶12 (emphasis added). In its Motion, the Public Staff completely ignores the phrase "arising from the Transaction" and unfairly misinterprets DEC's position. As previously noted, the prudency of the capital improvement expenditures on the Facilities have already been approved by the Commission and put into DEC's rate base in the Sub 1146 proceeding. The sale of the Facilities has no bearing on the prudency of those expenditures, and even if it did the Public Staff was well aware of the potential sale prior to the filing of the Sub 1146 proceeding and as such the sale does not constitute "new" evidence. Any reduction of the already approved expenditures in DEC's rate base is not authorized under N.C. Gen Stat. §62-80.

[7] *Id.* at p. 3.

WHEREFORE, DEC respectfully requests that the Commission deny the Motion filed by the Public Staff and that DEC's request for the issuance of an Accounting Order and other approvals in this docket be approved.

Respectfully submitted, this the 28th day of January, 2019.



Lawrence B. Somers
Deputy General Counsel
Duke Energy Corporation
P. O. Box 1551/NCRH 20
Raleigh, North Carolina 27602
919-546-6722
bo.somers@duke-energy.com

Dwight W. Allen
Allen Law Offices, PLLC
1514 Glenwood Ave. Suite 200
Raleigh, NC 27604
919-838-5175
dallen@theallenlawoffices.com

Attorneys for Duke Energy Carolinas, LLC

## CERTIFICATE OF SERVICE

I certify that a copy of Duke Energy Carolinas, LLC's Response in Opposition to Public Staff's Motion, in Docket Nos. E-7, Sub 1181, SP-12478, Sub 0, and SP-12479, Sub 0, has been served by electronic mail, hand delivery or by depositing a copy in the United States mail, postage prepaid to the following parties of record:

David T. Drooz
Chief Counsel - Public Staff
North Carolina Utilities
Commission
4326 Mail Service Center
Raleigh, NC 27699-4326
david.drooz@psncuc.nc.gov

Katherine Ross
Parker Poe
P.O. Box 389
Raleigh, North Carolina 27602
katherineross@parkerpoe.com

This is the 28th day January, 2019.

By: _____

Lawrence B. Somers
Deputy General Counsel
Duke Energy Corporation
P.O. Box 1551/NCRH 20
Raleigh, North Carolina 27602
Tel 919.546.6722
bo.somers@duke-energy.com