

BEFORE THE
NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-2, SUB 1219

In the Matter of
Application by Duke Energy Progress,
LLC, for Adjustment of Rates and
Charges Applicable to Electric Utility
Service in North Carolina

MOTION FOR SPECIAL
ACCOMMODATIONS FOR CIGFUR
WITNESS NICHOLAS PHILLIPS, JR.

NOW COMES the Carolina Industrial Group for Fair Utility Rates II (CIGFUR) in the above-captioned dockets, by and through the undersigned legal counsel and pursuant to Commission Rule R1-7, and respectfully moves that the Commission waive the requirement of in-person appearance for CIGFUR witness Nicholas Phillips, Jr. at the separate Duke Energy Progress, LLC (DEP) expert witness hearing to be scheduled in these dockets, and that the Commission instead either: (1) allow witness Phillips to participate in the non-consolidated, DEP-specific portion of the evidentiary hearing via remote appearance; or (2) propound written questions to witness Phillips and provide him the opportunity to respond to such questions via supplemental testimony to be filed in these dockets. In support of this motion, CIGFUR respectfully shows unto the Commission as follows:

BACKGROUND

1. On October 30, 2019, DEP filed its rate case application in Docket No. E-2, Sub 1219. The evidentiary hearing in this matter was originally set to commence on May 4, 2020. As a result of the current and unprecedented COVID-19 pandemic and declared State of Emergency (COVID-19 Pandemic),

the Commission issued orders postponing the evidentiary hearings in this rate case pending further of the Commission.

2. On April 13, 2020, CIGFUR caused to be filed the *Direct Testimony of Nicholas Phillips on Behalf of CIGFUR*.
3. On June 17, 2020, the Commission issued its Order Adopting Procedures for Expert Witness Hearings (Expert Witness Procedural Order). In the Expert Witness Procedural Order, the Commission noted its preference “to conduct the entirety of these rate case hearings in person. However, due to the current pandemic and continued uncertainty regarding the timing of easing of restrictions, related to mass gatherings, the initial, consolidated phase of the hearing on topics related to both DEC and DEP will be conducted remotely.” The Commission also ordered that the DEC- and DEP-specific phases of the hearing be conducted in person.
4. On July 9, 2020, the Commission issued an Order Accepting Recommended Consolidated Issues for Remote Expert Witness Hearing and Postponing Separate Issue Hearings (Consolidated Hearing Order). The Consolidated Hearing Order, among other things, postponed the previously scheduled separate hearings on DEC’s and DEP’s applications for adjustment of rates and charges for electric utility service in North Carolina until a date certain to be set by subsequent order.
5. The North Carolina Justice Center, the North Carolina Housing Coalition, the Natural Resources Defense Council, and Southern Alliance for Clean Energy (NCJC et al.) was the only party to these dockets to reserve time for the

cross-examination of CIGFUR witness Phillips. On July 16, 2020, NCJC et al. agreed to waive its previously requested cross-examination of CIGFUR witness Phillips in exchange for CIGFUR waiving its previously requested cross-examination of NCJC witness Wallach.

6. On July 20, 2020, CIGFUR filed a Motion to Excuse CIGFUR Witness Phillips from Attending Evidentiary Hearing (Motion to Excuse). In support of such Motion to Excuse, CIGFUR stated that it entered into an Agreement and Stipulation of Settlement (Stipulations) with DEP, resolving the contested issues between CIGFUR and DEP. Further, CIGFUR stated that as part of the Stipulations CIGFUR and DEP agreed to waive cross-examination on each other's pre-filed direct testimony, and agreed that such testimony may be entered into the record at the hearing without objection by CIGFUR or DEP. Finally, CIGFUR included a list of numerous parties that affirmatively consented to CIGFUR's Motion to Excuse, or affirmatively stated that they have no objection to CIGFUR's Motion to Excuse.
7. On July 23, 2020, CIGFUR filed an Amended Motion to Excuse (Amended Motion to Excuse), stating that it had consulted with all parties regarding the Motion to Excuse, and that each party to the above-captioned dockets either affirmatively consented to CIGFUR's Motion to Excuse or affirmatively stated that they have no objection to CIGFUR's Motion to Excuse, or both. In addition, CIGFUR clarified in its Amended Motion to Excuse that it was requesting that witness Phillips be excused from testifying at both the

consolidated phase and the separate DEC- and DEP-specific phases of the evidentiary hearings.

8. Also on July 23, 2020, the Commission issued an Order Granting in Part and Denying in Part Motion to Excuse CIGFUR Witness Phillips from Testifying at Expert Witness Hearings (Phillips Order). The Phillips Order excused witness Phillips from testifying at the consolidated expert witness hearing in these dockets to be held beginning July 27, 2020, but did not excuse witness Phillips from testifying at the separate, in-person, DEC- and DEP-specific expert witness hearings to be scheduled in these dockets.

COVID-19 BACKGROUND AND RISK FACTORS

9. Since the Commission entered its Expert Witness Procedural Order on June 17, 2020, the number of COVID-19 cases has risen dramatically both nationwide and in North Carolina, and the numbers of new cases, hospitalizations, and deaths continue to surge.¹
10. On June 24, 2020, Governor Cooper issued Executive Order 147² extending the “Phase 2 Order” (Executive Order No. 141) until July 17, 2020. On July 16, 2020, Governor Cooper issued Executive Order 151 further extending the “Phase 2 Order” until at least August 7, 2020. The Phase 2 Order provides in pertinent parts that:
 - a. “People who are at high risk of severe illness from COVID-19 are very strongly encouraged to stay home and travel only for absolutely

¹ <https://www.washingtonpost.com/nation/2020/06/13/coronavirus-live-updates-us/>.

² Available at <https://files.nc.gov/governor/documents/files/EO141-Phase-2.pdf>.

essential purposes. The Centers for Disease Control and Prevention (“CDC”) defines high-risk individuals as people 65 years or older **and people of any age who have serious underlying medical conditions...**³ (emphasis in original);

- b. “Individuals are strongly encouraged to telework to the greatest extent permissible by their employer;”⁴
- c. “Mass gatherings are prohibited. ‘Mass Gathering’ means an event or convening that brings together more than ten (10) people indoors or more than twenty-five (25) people outdoors at the same time in a single confined indoor or outdoor space, such as an auditorium, stadium, arena, or meeting hall...In publicly accessible indoor facilities, the Mass Gathering limit applies per room of the facility.”⁵

11. On June 29, 2020, North Carolina Supreme Court Chief Justice Cheri Beasley (Justice Beasley) issued an Order further extending various Emergency Directives related to COVID-19, including in pertinent part from Emergency Directive 3 that “Judicial officials throughout the state are hereby authorized to conduct proceedings that include remote audio and video transmission, notwithstanding any other provision of law” as a result of the “catastrophic

³ *Id.* at Section 2.

⁴ *Id.* at Section 3, Para. A.

⁵ *Id.* at Section 7, Para. A.1.

conditions resulting from the COVID-19 outbreak [that] have existed and continue to exist in all counties of the state.”⁶

12. On July 20, 2020, North Carolina Supreme Court Chief Justice Cheri Beasley issued an Order extending several emergency directives related to COVID-19 for an additional thirty days until August 19, 2020.⁷ Such extended directives include, in pertinent part, as follows:

No session of court may be scheduled if doing so would result in members of the public sitting or standing in close proximity and/or for extended periods of time in contravention of current public health guidance.

Judicial officials should continue to make use of remote hearing technology to the greatest extent possible to limit in-person appearances.

13. The U.S. continues to learn more about COVID-19 every day, but much remains unknown to date. For example, while it seems universally accepted at this point that “[e]veryone is at risk for getting COVID-19 if they are exposed to the virus[,]”⁸ there remain many facts that are not conclusively known based on existing scientific information, including but not limited to: (a) Which individual characteristics either increase or decrease a person’s relative susceptibility to becoming infected by COVID-19? (b) For those that become

⁶ Available at <https://www.nccourts.gov/assets/inline-files/29%20June%202020%20-%207A-39%28b%29%282%29%20Order%20Extending%20Emergency%20Directives%202-8%20%28Final%29.pdf?CY8IPxkiGr5uf5yD9sW0rwhePpp50bMP>

⁷ Available at https://www.nccourts.gov/assets/news-uploads/20%20July%202020%20-%207A-39%28b%29%282%29%20Extension%20Order%20for%20Emergency%20Directives%209-15%2C%2020%20%28Final%29_0.pdf?JzSu0K8m4dYD7jlVVf0RBQ_C7BsnQ7qt.

⁸ U.S. Centers for Disease Control, “Who Is at Increased Risk for Severe Illness?” (updated June 25, 2020, and last accessed July 24, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html>.

infected, which factors—including but not limited to an exhaustive list of underlying risk factors—contribute to causing a severe,⁹ mild, or asymptomatic infection? (c) For those that become infected and suffer a severe case, which factors and/or medical interventions increase or decrease a person’s chance of survival? and (d) what long-term effects, if any, persons who have recovered from COVID-19 will suffer?

14. Although much remains unknown about COVID-19, some facts are universally accepted at present by the public health and epidemiological communities, including that:

- a. COVID-19 is a highly contagious disease;¹⁰
- b. The greater one’s age, the higher the risk that person will suffer severe illness from COVID-19 should that person become infected.¹¹ “In fact, 8 out of 10 COVID-19-related deaths in the United States have been among adults aged 65 years and older.”¹² The CDC advises that **“staying home is the best way to protect yourself and others from**

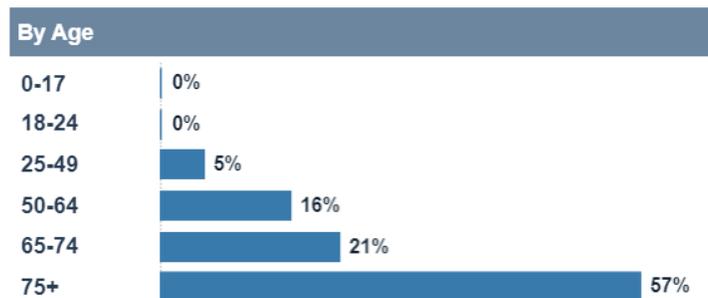
⁹ “Severe illness means that the person with COVID-19 may require hospitalization, intensive care, or a ventilator to help them breathe, or they may even die.” U.S. Centers for Disease Control, “*Older Adults*” (updated June 25, 2020, and last accessed July 24, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.

¹⁰ N.C. Department of Health and Human Services, “COVID-19: What Do I Need To Do?” (last accessed July 24, 2020), available at <https://files.nc.gov/covid/documents/materials-resources/Slow-the-Spread-Avoid-Others.pdf>.

¹¹ “As you get older, your risk for severe illness from COVID-19 increases. For example, people in their 50s are at higher risk for severe illness than people in their 40s. Similarly, people in their 60s or 70s are, in general at higher risk for severe illness than people in their 50s. The greatest risk for severe illness from COVID-19 is among those aged 85 or older.” *Id.*

¹² U.S. Centers for Disease Control, “*Older Adults*” (updated June 25, 2020, and last accessed July 24, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.

getting sick” (emphasis in original).¹³ In North Carolina, specifically, this age-related risk factor is underscored in the disproportionate number of deaths from COVID-19 in older people relative to younger ones. This chart, taken from the N.C. Department of Health & Human Services’ COVID-19 Dashboard,¹⁴ shows the percentage of deaths to date in North Carolina, broken down by age category:



- c. In addition to age, there exist a number of underlying medical conditions that can put a person at increased risk for severe illness from COVID-19;¹⁵ and
- d. Certain behaviors can increase or decrease one’s risk of exposure to and infection by the virus that causes COVID-19. Because human beings are the primary disease vector for the virus that causes COVID-19, the higher risk behaviors include, but are not limited to, any action or

¹³ U.S. Centers for Disease Control, “Travel in the US” (updated June 28, 2020, and last accessed July 24, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html>.

¹⁴ <https://covid19.ncdhhs.gov/dashboard/cases> (data current as of July 23, 2020; last accessed July 24, 2020).

¹⁵ U.S. Centers for Disease Control, “People with Certain Medical Conditions” (updated July 17, 2020, and last accessed July 24, 2020), available at https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html.

activity that would put a person in incidental or extended contact with another human being. One example of such high-risk behavior is traveling:

COVID-19 cases and deaths have been reported in all 50 states, and the situation is constantly changing. Because travel increases your chances of getting infected and spreading COVID-19, **staying home is the best way to protect yourself and others from getting sick** (emphasis in original).¹⁶

With respect to air travel, in particular, the CDC provides that

[a]ir travel requires spending time in security lines and airport terminals, which can bring you in close contact with other people and frequently touched surfaces. Most viruses and other germs do not spread easily on flights because of how air circulates and is filtered on airplanes. However, social distancing is difficult on crowded flights, and you may have to sit near others (within 6 feet), sometimes for hours. This may increase your risk for exposure to the virus that causes COVID-19.¹⁷

15. Another example of a behavior that increases one's individual risk of exposure to COVID-19 is attending or participating in an event or gathering. The CDC advises that "[t]he risk of COVID-19 spreading at events and gatherings increases as follows:"

¹⁶ U.S. Centers for Disease Control, "Travel in the US" (updated June 28, 2020, and last accessed July 24, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html>.

¹⁷ *Id.*

Lowest risk: Virtual-only activities, events, and gatherings.

More risk: Smaller outdoor and in-person gatherings in which individuals from different households remain spaced at least 6 feet apart, wear cloth face coverings, do not share objects, and come from the same local area (e.g., community, town, city, or county).

Higher risk: Medium-sized in-person gatherings that are adapted to allow individuals to remain spaced at least 6 feet apart and with attendees coming from outside the local area.

Highest risk: Large in-person gatherings where it is difficult for individuals to remain spaced at least 6 feet apart and attendees travel from outside the local area.

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Similarly, the NC Department of Health & Human Services depicts the relative risk of activities and settings as follows:

	Stationary	Moving
Indoor	High Risk (e.g. sitting in a movie theater)	Moderate Risk (e.g. shopping in a retail setting)
Outdoor	Moderate Risk (e.g. sitting at an event in an outdoor setting)	Lower risk (e.g., walking on a park trail)

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WITNESS PHILLIPS' PERSONAL CIRCUMSTANCES AND COVID-19 RISK STATUS

16. Witness Phillips resides in the St. Louis, Missouri area. The only feasible method of travel for witness Phillips to make the trip between St. Louis and Raleigh is by air. Due to the decreased frequency of available flights between St. Louis, MO and Raleigh, NC as a result of COVID-19's impact on consumer

¹⁸ U.S. Centers for Disease Control and Prevention, "Older Adults" (updated June 25, 2020; last accessed July 24, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.

¹⁹ N.C. General Assembly, House Health Committee, Presentation by Mandy Cohen, MD, MPH, Secretary, Department of Health and Human Services (June 17, 2020), available at <https://www.ncleg.gov/documentsites/committees/house2019-26/06-17-20/House%20Health%2006%2017%202020%20FINAL.pdf>.

travel habits and the resulting effect such change has had on the airline industry, witness Phillips expects that round-trip air travel between St. Louis and Raleigh would take approximately six (6) hours (12 hours on a round-trip basis) and most likely expose him to all of the people (i) on at least four (4) separate airplanes²⁰ (i.e. a layover with a connecting flight each way); and (ii) in at least six (6) separate airports (i.e. STL Airport → connecting airport → RDU Airport on the way to Raleigh; RDU Airport → connecting airport → STL Airport on the return trip).

17. Witness Phillips is 74 years old and will turn 75 in a few months. As indicated above, this factor alone puts witness Phillips at significantly increased risk for severe illness should he be exposed to and become infected by COVID-19. Witness Phillips' age also puts him within the age bracket accounting for 80% of all COVID-19-related deaths in the U.S., as cited above. Moreover, witness Phillips' medical doctor has advised witness Phillips that, because of his age, it is not safe for him to fly and/or to be in an airport while the COVID-19 Pandemic is ongoing.

18. Witness Phillips' spouse, with whom he resides and for whom he serves as a caregiver, likewise is in her 70s. In addition, witness Phillips' spouse suffers from pre-existing medical conditions that put her at even further increased risk of severe complications should she become infected with COVID-19. As a result, travel to North Carolina poses a significant risk to both witness Phillips' health and the health of his immediate family. In addition, witness Phillips'

²⁰ For example, witness Phillips is not aware that the STL Airport's major airline carriers, Delta and American Airlines, have any direct flights between STL and RDU.

spouse’s risk factors would witness Phillips to self-quarantine upon his return to Missouri were he required to travel to North Carolina to attend the evidentiary hearings in person, thus leaving his spouse alone and without a caregiver.

19. Because of witness Phillips’ and his spouse’s respective statuses as high-risk for a severe COVID-19 infection, witness Phillips has not gone into work at his physical office space in the last three (3) months and, instead, has—with very limited, low-risk exceptions—remained vigilantly sheltered in place at home
20. The CDC advises that for individuals considering traveling away from their local community, the following questions first be asked; I provide the answers to each of the CDC-recommended questions in the context of witness Phillips’ situation:

- a. “Is COVID-19 spreading where you’re going?”
 - i. Yes.

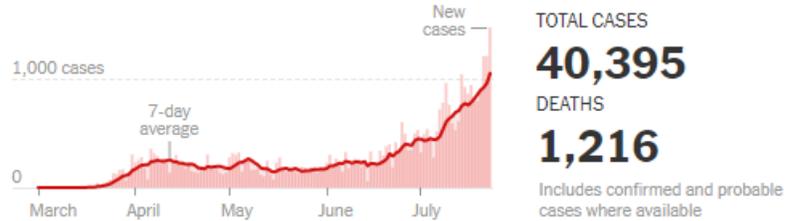


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²¹ North Carolina Coronavirus Map and Case Count, New York Times, *available at* <https://www.nytimes.com/interactive/2020/us/north-carolina-coronavirus-cases.html>.

- b. “Is COVID-19 spreading in your community?”
 - i. Yes.

By The New York Times Updated July 24, 2020, 2:18 P.M. E.T.



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- c. “Will you or those you are traveling with be within 6 feet of others during or after your trip?”
 - i. Most likely, yes. As indicated above, the CDC guidance acknowledges that air travel often necessarily requires close human interaction and contact both in airports (i.e. security lines) and on airplanes.
- d. “Are you or those you are traveling with more likely to get very ill from COVID-19?”
 - i. Yes, for the reasons set forth above.
- e. “Do you live with someone who is more likely to get very ill from COVID-19?”
 - i. Yes, as set forth in more detail above.
- f. “Does the state or local government where you live or at your destination require you to stay home for 14 days after traveling?”

²² Missouri Coronavirus Map and Case Count, New York Times, available at <https://www.nytimes.com/interactive/2020/us/missouri-coronavirus-cases.html>.

- i. Not as of this writing, but some Missouri local health officials in the area where witness Phillips resides are considering heightening restrictions in response to the continued local surge in new COVID-19 cases.²³
- g. “If you get sick with COVID-19, will you have to miss work or school?”
 - i. Although witness Phillips has been working from home, if he gets sick with COVID-19, he likely will be unable to work because he is at increased risk for several illness should he become infected with COVID-19, up to and including possible hospitalization or even death.

21. Witness Phillips’ testimony is important to CIGFUR’s participation as an intervening party in these dockets; however, the in-person requirement to appear could potentially and unnecessarily expose witness Phillips to COVID-19. As noted above, if exposed to COVID-19 as a result of traveling to or from Raleigh, or from attending the hearing to provide in-person testimony, he is at greater risk of experiencing significant, if not life-threatening, complications from COVID-19. Thus, to permit witness Phillips to testify remotely or to propound written questions and allow witness Phillips to answer them via supplemental written testimony filed in these dockets would be appropriate and reasonable accommodations to protect his health and safety, the health and safety of his immediate family, and the health and safety of those

²³ <https://www.ksdk.com/article/news/health/coronavirus/st-louis-coronavirus-restrictions/63-f6987d74-2fb5-4c7b-90fb-0321e3bdada2>

with whom he would interact during his travels and throughout the in-person hearings.

22. In addition to avoiding interstate travel during the COVID-19 Pandemic, allowing for remote participation will help to limit the number of people present at the hearing.

23. CIGFUR will ensure that witness Phillips has access to high speed internet connections that allow him to participate with clear video and audio connections, in the event that the Commission allows witness Phillips to participate remotely.

24. The circumstances at issue here are extraordinary, and the interests of public health and safety justify special accommodations be made for witness Phillips.

25. CIGFUR has consulted with all other parties to these dockets regarding its Motion for Special Accommodations for witness Phillips, and no party has indicated any objection to CIGFUR's request for relief set forth in this motion.

CONCLUSION

For the foregoing reasons, CIGFUR submits that the in-person participation in the DEP-specific phase of the instant rate case hearing poses a significant risk to witness Phillips' health and safety, and also puts the health and safety of the immediate family member with whom he resides at significant risk. Accordingly, CIGFUR respectfully requests that the Commission accommodate its request (and witness Phillips' desire) to either: (1) allow witness Phillips to participate in the non-consolidated phase of the DEP rate case evidentiary hearing in the above-captioned dockets via remote means; or

(2) propound written questions to witness Phillips and allow witness Phillips the opportunity answer such questions via supplemental testimony to be filed in these dockets.

Respectfully submitted, this the 24th day of July, 2020.

CIGFUR II

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CERTIFICATE OF SERVICE

The undersigned attorney for CIGFUR II hereby certifies that she caused the foregoing *Motion for Special Accommodations for CIGFUR Witness Nicholas Phillips, Jr.* to be served upon the parties of record in this proceeding by electronic mail.

July 24, 2020.

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