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STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-7, SUB 1282

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Duke Energy Carolinas, LLC Pursuant to N.C.G.S. § 62-133.2 and Commission Rule R8-55 Regarding Fuel and Fuel-Related Cost Adjustments for Electric Utilities	))))))	POST-HEARING BRIEF OF CIGFUR III

NOW COMES the Carolina Industrial Group for Fair Utility Rates III (CIGFUR III or CIGFUR), by and through the undersigned counsel, pursuant to the Commission's Notice of Due Date for Proposed Orders and/or Briefs and the Commission's July 21, 2023 Order Granting Extension of Time to File Proposed Orders and Briefs, and respectfully submits this post-hearing brief in the above-captioned docket.

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POST-HEARING BRIEF OF CIGFUR III
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I. INTRODUCTION

NOW COMES the Carolina Industrial Group for Fair Utility Rates III (CIGFUR III), by and through the undersigned counsel, and submits this Post-Hearing Brief (Brief) to the North Carolina Utilities Commission (Commission) in the above-captioned docket. This post-hearing brief is intended to provide an overview of CIGFUR's positions on a few key issues in this docket. CIGFUR's silence on any issue should not be construed as an endorsement of or agreement with the position of any other party on any issue.

II. ARGUMENT

A. In addition to deploying the rate mitigation measures provided for in the Stipulation between the Public Staff and the Company (Stipulation), the Commission should approve the additional rate mitigation measure proposed by the Company.

This is an extraordinary fuel rider proceeding, involving a $999 million under-recovery in the current test period. *See* Tr. vol. 2, p. 141. Similarly, in the absence of the Stipulation, the proposed fuel and fuel-related cost factors in this fuel rider proceeding would result in a 17.99% ***total bill increase*** on customers' bills. *See id.* Extraordinary times call for extraordinary measures, including using every available means of rate mitigation possible to help reduce the detrimental impact to the Company's ratepayers, particularly as it currently has a general rate case requesting a substantial

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increase in its overall revenue requirement pending before this Commission, which will in itself likely result in a material rate increase to DEC's customers.

Although the Stipulation reflects a good start toward mitigating what would have otherwise been a 17.99% **total bill increase**, it does not use all the tools in the toolbox to mitigate the rate impact as low as possible. More specifically, it only reduces the total bill increase from 17.99% to approximately 13 percent. *See* Tr. vol. 2, p. 297. Had the Company's EDIT rate mitigation proposal been utilized, the total bill increase would be reduced to approximately 10 percent.

As CIGFUR witness Collins noted in his direct testimony, the return of excess deferred income taxes (EDIT) to customers associated with the over-collection of federal taxes can last years before being returned to customers, even though it is money that belongs to the ratepayers. *See* Tr. vol. 2, p. 347.

Notably, nothing in the Stipulation precludes the Commission from using Excess Deferred Income Taxes (EDIT) as an additional rate mitigation measure and doing so is in the public interest. So while the Public Staff seemed resolute in its position that its approval would be required to refund the EDIT funds in a manner different than that which it previously stipulated to with DEC in DEC's last rate case, the Public Staff failed to acknowledge that the Commission has the authority to apply the EDIT balances toward the fuel and fuel-related under-recovery in this docket, regardless of any Stipulations previously entered into that may have been approved by the Commission. *See, e.g.*, *id.* at 299-300.

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B. Non-unanimous stipulations, particularly when entered into after the hearing has already begun, are subversive of due process.

"In its delegation of ratemaking authority to the Commission, the legislature has established an elaborate procedural, hearing, and appeals process that contemplates the full consideration of all evidence put forth by each of the parties certified via the statute to have an interest in the outcome of contested proceedings." *State ex rel. Utilities Commission v. Carolina Utility Customers Association*, 348 N.C. 452, 463, 500 S.E.2d 693, 701 (1998) (internal citations omitted) (*CUCA I*). "The fact that the Commission is empowered by section 62-69(a) to resolve cases by informal disposition does not absolve it of all other provisions of chapter 62 and its formal rate-making duties therein mandated, absent full agreement of all parties to a contested case." *Id.* at 463, 702. Indeed, "only those stipulations that are entered into by all of the parties before the Commission may form the basis of informal disposition of a contested proceeding under section 62-69(a)." *Id.* at 466, 703.

While the value of such stipulations has long been recognized by the courts of this State as well as this Commission, the North Carolina Supreme Court has expressly recognized that "the court will not extend the operation of the agreement beyond the limits set by the parties or by the law." *J.L. Roper Lumber Company v. Elizabeth City Lumber Company*, 137 N.C. 431, 439, 49 S.E. 946, 949 (1905) (internal citations omitted). Indeed, our Supreme Court has noted that

> Chapter 62 contemplates a full and fair examination of evidence put forth by *all* of the parties. To allow the Commission to dispose of a contested rate case by stipulation of less than all certified parties would effectively absolve the Commission of its statutory and due process obligations to afford all parties a fair hearing. As perceptively enunciated by the Texas Court of Appeals:

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> The adoption of a non-unanimous stipulation raises several due-process concerns. The most obvious is the possibility that opposing parties may be denied an opportunity to present evidence against acceptance of the stipulation. A more subtle problem is the possibility of an unintentional shift of the burden of proof from the utility to the opponents of the stipulation. There is a danger that when presented with a ready-made solution, the Commission might unconsciously require that the opponents refute the agreement, rather than require the utility to prove affirmatively that the proposed rates are just and reasonable. This danger is increased when the Commission staff is a signatory party and is in a position of advocating the stipulation.

CUCA I at 464, 702 (emphasis in original) (*quoting Cities of Abilene v. Public Utilities Commission*, 854 S.W.2d 932, 938-39 (Tex. Ct. App. 1993), *rev'd in part on other grounds*, 909 S.W.2d 493 (Tex. 1995)).

The Court went on to opine state that while it

> recognizes the crucial role that informal disposition plays in quickly and efficiently resolving many contested proceedings and encourages all parties to seek such resolution through open, honest and equitable negotiation. Our decision here merely recognizes that *such negotiation and settlement is subversive of due process and the legislative authority delegated to the Commission if it lacks representation of all the parties with a certified interest in the outcome of the proceeding*.

CUCA I at 466, 703 (emphasis added).

On May 30, 2023, the first day of the evidentiary hearing held in this matter, counsel for the Company announced on the record that "the Company and Public Staff have reached an alignment on a partial settlement[.] We have made the other parties, counsel, aware and we'll work towards formalizing the settlement agreement, to submit it for review." Tr. vol. 1, p. 15. With permission from the Presiding Commissioner, counsel for the Company and the Public Staff, respectively, proceeded to summarize the material terms of the Stipulation. *See id.* at 15-16. Presiding Commissioner Kemerait then asked

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"And when do DEC and the Public Staff anticipate preparing the partial settlement agreement and filing it in the Docket?" to which counsel for the Public Staff replied "Soon." and counsel for DEC replied by the end of the next business day or the second business day thereafter. *See id.* at 16-17.

Counsel for multiple parties, including CIGFUR III, CUCA, and SACE, objected to proceeding with the evidentiary hearing and requested the hearing be held in recess until the Stipulating Parties filed a copy of the Stipulation in the docket and CIGFUR, CUCA, and SACE could each have an opportunity to discuss with their respective clients. *See id.* at 17-21. The Commission continued the hearing until 1 p.m. on May 31, 2023. *See id.* at 21.

Importantly, the second day of the evidentiary hearing in this matter began at 1 p.m. on May 31, 2023, despite the fact that the Stipulating Parties had not yet finalized or filed the Stipulation. *See* Tr. vol. 2, p. 8. Presiding Commissioner Kemerait admonished as follows:

> We had certainly hoped and expected to have had the Settlement Agreement finalized and prepared and provided to the Commission and all of the parties in advance of the beginning of the hearing but that hasn't happened so we will get it to everyone as soon as possible.

Id. at 8-9. Indeed, the Stipulating Parties did not file the Stipulation until after the second day (of two total days) of the evidentiary hearing was underway, giving counsel for CIGFUR, CUCA, and SACE no time to review the *finalized, as-filed* Stipulation with their respective clients before the evidentiary hearing and corresponding record were already closed. Moreover, the parties did not have an opportunity to conduct discovery or present evidence during the hearing regarding the Stipulation, specifically with regard to the

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impact that EDIT mitigation could have had combined with the stipulated rate mitigation measures and the effect of leaving it on the table, as the Public Staff evidently suggests the Commission do in this proceeding.

All of these issues collectively constitute a deprivation of due process for intervenors that, in light of statutory deadlines for the Commission to issue a decision and at this point in the proceeding, the only adequate remedy seems to be to both approve the Stipulation and require that the Company also utilize the additional EDIT rate mitigation proposal it presented in rebuttal testimony. It is difficult to imagine that approving a rate significantly higher than that which is being proposed by the public utility itself—if the EDIT rate mitigation proposal were also utilized—would satisfy the "just and reasonable" test.

C. Pursuant to G.S. 62-80, the Commission is expressly authorized to rescind, alter, or amend its prior orders and/or decisions, including the decision to approve a stipulation or settlement between certain parties to a contested proceeding.

N.C. Gen. Stat. § 62-80 provides that

> The Commission may at any time upon notice to the public utility and to the 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. Any order rescinding, altering or amending a prior order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original orders or decisions.

In other words, the Commission does not need the permission of the Public Staff to undo a portion of a stipulation entered into in a prior case that the Commission approved. Importantly, DEC witness Clark stated implicitly that the only reason the EDIT rate mitigation proposal was not included in the Stipulation was because DEC took the

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position that it required "alignment" with the Public Staff due to an existing stipulation entered into in a prior docket. *See* Tr. vol. 2, p. 200. When asked whether the EDIT rate mitigation was still an option on the table from DEC's perspective, witness Clark answered in the affirmative. *See id.* at 201.

> Q. … There is nothing in this Stipulation that would prevent or preclude the Commission from ordering that the EDIT proposal contained in the Company's rebuttal testimony be utilized as an additional mitigation strategy on top of the 16-month mitigant stipulated between the Company and the Public Staff, correct?
>
> A. That's correct.

Id. at 203-04. Aside from repeatedly arguing that utilizing EDIT as an additional rate mitigation method in the instant docket would unravel a piece of a prior Stipulation between DEC and the Public Staff, the Public Staff failed to articulate any compelling evidence or good cause to disregard an additional rate mitigation measure that would help to significantly decrease the rate impact to customers below the 13% impact resulting from the stipulated terms between DEC and the Public Staff. *See, e.g., id.* at 299. The prior Stipulation notwithstanding, the Commission possesses express statutory authority to modify a portion of the prior Stipulation to allow for use of the EDIT rate mitigation measure proposed by the Company in this docket.

D. The equal percentage increase/decrease method of allocating fuel and fuel-related costs is just and reasonable and appropriate for continued use in the instant case and in future fuel rider proceedings.

As CIGFUR has previously noted, the Stipulation is a good start and the only issue CIGFUR takes with it is that it does not do enough to mitigate the rate impact caused by DEC's annual fuel rider. To that end, CIGFUR supports the use of the equal increase/decrease method of allocating fuel costs, as provided for in the Stipulation.

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As CIGFUR witness Collins testified, DEC has for approximately a decade allocated annual fuel and fuel-related costs using a uniform or equal bill increase or decrease methodology. *See* Tr. vol. 2, p. 348. CIGFUR witness Collins testified that the uniform or equal increase or decrease method of fuel and fuel-related cost allocation has not, to his knowledge, been contested in any annual fuel charge adjustment proceeding. *See id.* Witness Collins provided several justifications for continuing to use the equal increase/decrease method of allocating fuel and fuel-related costs, including:

1) "The method has served ratepayers well and should be continued during this time of increased volatility in fuel prices and upward pressure on electric rates." *Id.*

2) "This method has withstood the test of time and changing it now when fuel costs are extremely volatile would be unfair, unreasonable, and disruptive, particularly to high load factor customers." *Id.*

3) "The uniform bill methodology levelizes over time any harsh impacts and results in equal percentage increases or decreases to all customers, which are fair, just, and reasonable. While the high load factor customer classes see reduced impacts during times of fuel cost increases, these same customers receive less of a reduction during times of fuel cost decreases, thereby resulting in a fair and symmetrical approach over time." *Id.* at 348-49.

4) When the fuel adjustment was first codified into law, it only involved cost recovery for fuel costs. Over time, and pursuant to changes in the applicable law, various non-fuel costs have been allowed to be recovered through the fuel rider. "Many such costs are basically capital costs. For example, renewable costs, such as purchased power from solar or other renewable energy facilities, are not fuel expenses; yet such costs are allowed to be recovered through the fuel rider. To the extent these costs are included in the annual fuel adjustment, an equal percentage basis is appropriate." *Id.* at 349. Witness Collins went on to testify that "[r]ecovering [such non-fuel costs disproportionately from industrial customers through energy charges collected through the fuel rider penalizes higher load factor customers, who in fact require less costs to serve per unit of energy. This would in turn create more subsidization between customers with varying load factors, thereby rewarding inefficient use of system resources." *Id.*

5) It does not make sense to eliminate the equal percentage method of allocating fuel and fuel-related costs while there remains a substantial subsidy paid by industrial customers in base rates. *See id.* at 350.

WHEREFORE, CIGFUR III respectfully requests the Commission consider the arguments raised in this Post-Hearing Brief and for such other and further relief as may be just and proper.

Respectfully submitted, this the 24th day of July, 2023.

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CERTIFICATE OF SERVICE

The undersigned attorney for CIGFUR III hereby certifies that she caused the foregoing *Post-Hearing Brief of CIGFUR III* to be served this day upon counsel of record for all parties to this docket by electronic mail.

This the 24th day of July, 2023.

/s/ Christina D. Cress
Christina D. Cress