STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1142
DOCKET NO. E-7, SUB 1146

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-2, SUB 1142	)	
	)	
In the Matter of	)	
Application by Duke Energy Progress, LLC,	)	
for Adjustment of Rates and Charges	)	ORDER ON REMAND
Applicable to Electric Utility Service in	)	ACCEPTING CCR SETTLEMENT
North Carolina	)	AND AFFIRMING PREVIOUS
	)	ORDERS SETTING RATES
DOCKET NO. E-7, SUB 1146	)	AND IMPOSING PENALTIES
	)	
In the Matter of	)	
Application by Duke Energy Carolinas,	)	
LLC, for Adjustment of Rates and Charges	)	
Applicable to Electric Utility Service in	)	
North Carolina	)	

BY THE COMMISSION: On February 23, 2018, and June 22, 2018, respectively, the Commission issued orders in the above-captioned dockets establishing rates in response to applications for rate increases filed in 2017 by Duke Energy Progress, LLC (DEP), and Duke Energy Carolinas, LLC (DEC; collectively, the Companies). In each case, the Commission found that the company had become subject to new requirements related to the management of coal ash, or coal combustion residuals (CCR), and that each had incurred significant costs to comply with these new legal requirements. Several parties, including the Attorney General's Office (AGO), argued that ratepayers should not be forced to cover costs caused by the Companies' years of failure in managing their coal ash basins. The Public Staff proposed an "equitable sharing" arrangement which would have resulted in a 50/50 sharing of costs between the Companies' ratepayers and shareholders.

The Commission rejected the arguments of the AGO, Sierra Club, the Public Staff, and others and allowed the Companies to recover substantially all of their CCR costs. In Docket No. E-2, Sub 1142 (Sub 1142), the Commission allowed DEP to recover $232.4 million in CCR costs incurred during the period from January 1, 2015, through August 31, 2017; required DEP to amortize the cost recovery in rates over a five-year period; allowed DEP to earn a return[1] on the unamortized balance during the five-year

[1] While frequently referred to as "return," to clarify, the Companies were allowed to recover the costs incurred to finance the CCR costs during the amortization period.

amortization period; and assessed a $30 million management penalty (2018 DEP Rate Order). Similarly, in Docket No. E-7, Sub 1146 (Sub 1146), the Commission allowed DEC to recover $545.7 million in CCR costs incurred during the period from January 1, 2015, through December 31, 2017; required DEC to amortize the cost recovery in rates over a five-year period; allowed DEC to earn a return on the unamortized balance during the five-year amortization period; and assessed a $70 million management penalty (2018 DEC Rate Order).

Appeal and Remand

Several parties, including the AGO, Sierra Club, and the Public Staff, timely appealed the Commission's rate case orders to the North Carolina Supreme Court pursuant to N.C.G.S. § 62-90 on the CCR cost recovery and other issues. While these appeals were pending, the Companies each filed another application for increase in rates — DEC on September 30, 2019, and DEP on October 30, 2019.

On December 11, 2020, after the close of the evidentiary record in the 2019 rate cases before the Commission, the Court issued its opinion substantially affirming the Commission's orders in the 2017 DEC and DEP rate cases, including issues on appeal regarding discharges to surface waters and increases in the basic facilities charge. However, the Court reversed those portions of the Commission's order rejecting the Public Staff's equitable sharing proposal and remanded the cases for additional findings and conclusions related to the Commission's consideration of "all other material facts" relevant to the Public Staff's proposal regarding recovery of CCR costs "as required by N.C.G.S. § 62-133(d)." *State ex rel. Utils. Comm'n v. Stein*, 375 N.C. 870, 947, 851 S.E.2d 237, 286 (2020) (*Stein*).

As the Court notes in its opinion, the issues on appeal of the 2017 rate cases related to the recovery of CCR costs were: (1) whether the costs were properly classified as property used and useful or as operating expenses; (2) whether these costs were reasonably incurred; and (3) whether the Commission's decision to award a return on the unamortized balance of the costs was lawful. *Id*. at 900, 851 S.E.2d at 257. In summary, the Court concluded

> that the Commission did not err by: (1) allowing the inclusion of a large majority of the utilities' coal ash costs in the cost of service used for the purpose of establishing the utilities' North Carolina retail rates; (2) interpreting N.C.G.S. § 62-133(d) to authorize the Commission, in the exercise of its discretion, to allow a return on the unamortized balance of the deferred operating expenses . . . . On the other hand, we hold that the Commission erred by rejecting the Public Staff's equitable sharing proposal without properly considering and making findings and conclusions concerning "all other material facts" as required by N.C.G.S. § 62-133(d). As a result, we affirm the Commission's decisions, in part, and reverse and

> remand the Commissions' decisions for further proceedings not inconsistent with this decision, in part.

Id. at 946-47, 851 S.E.2d at 286.

In challenging the reasonableness and prudence of the CCR costs, both the AGO and the Public Staff argued that the Commission did not adequately consider their admitted evidence of violations of environmental laws in allowing recovery of the full amount of the CCR costs. With respect to the reasonableness and prudence of the CCR costs, the Court agreed that "the record contains ample evidentiary support for the Commission's determination . . . that the intervenors had failed to elicit sufficient evidence to satisfy the burden of production imposed upon them in *Bent Creek*," and "that the intervenors failed to identify and quantify the specific costs that should have been disallowed as unreasonable and imprudently incurred . . . ." *Id*. at 911-12, 851 S.E.2d at 263-64. The Court further agreed with the Commission and with Public Staff witness Lucas "that it would be difficult, if not impossible, to quantify, in even the most general sense, the costs which the utilities would have incurred had they handled the coal ash stored at their facilities in a manner that differed from what they actually did or if specific alleged environmental violations had not occurred." *Id*.

In response to the AGO and Public Staff arguments that much of the CCR costs were operating expenses and not property used and useful — thus ineligible for rate base treatment or to earn a return — the Court noted that the formula set forth in N.C.G.S. § 62-133(b) provides "a workable framework that can be used to establish just and reasonable rates," *id*. at 921, 851 S.E.2d at 270, but that the Commission did not err in relying upon N.C.G.S. § 62-133(d) in these cases in "deferring certain extraordinary costs, amortizing them to rates, and allowing the utility, in the exercise of the Commission's discretion, to earn a return upon the unamortized balance . . . ." *Id*. at 922, 851 S.E.2d at 270. Quoting *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 327, 230 S.E.2d 651 (1976), the Court held that N.C.G.S. § 62-133(d) "expressly empowers the Commission to 'consider all other material facts of record that will enable it to determine what are reasonable and just rates.'" *Id*. at 345, 230 S.E.2d at 662 (citing *State ex rel. Utils. Comm'n v. Morgan*, 277 N.C. 255, 177 S.E.2d 405 (1970)). *See also State ex rel. Utils. Comm'n v. Thornburg*, 325 N.C. 463, 385 S.E.2d 451 (1989); *State ex rel. Utils. Comm'n v. Nantahala Power & Light Co*., 313 N.C. 614, 332 S.E.2d 397 (1985); *State ex rel. Utils. Comm'n v. Duke Power Co*., 305 N.C. 1, 287 S.E.2d 786 (1982); *State ex rel. Utils. Comm'n v. Pub. Serv. Co*., 257 N.C. 233, 125 S.E.2d 457 (1962).

> Thus, this Court's prior decisions, while failing to delineate the exact contours of the Commission's authority pursuant to N.C.G.S. § 62-133(d), have clearly indicated that N.C.G.S. § 62-133(d) is available to the Commission for the purpose of dealing with unusual situations and that the authority granted to the Commission pursuant to N.C.G.S. § 62-133(d) is not limited by the more specifically stated ratemaking principles set out elsewhere in N.C.G.S. § 62-133(b). Simply put, if the Commission's authority pursuant to N.C.G.S. § 62-133(d) could only be exercised in a

manner that coincided with the Commission's authority as delineated in the other provisions of N.C.G.S. § 62-133, the enactment of N.C.G.S. § 62-133(d) would have been a purposeless undertaking.

After carefully examining our reported decisions construing N.C.G.S. § 62-133(d), we conclude that this statutory provision provides the Commission with an opportunity to consider facts that, while not specifically relevant to the ordinary ratemaking determinations required by N.C.G.S. § 62-133(b), should necessarily be considered in establishing rates that are just and reasonable to both the utility and the using and consuming public. For that reason, we reject the notion that the traditional rules governing the inclusion of costs in a utility's rate base pursuant to N.C.G.S. § 62-133(b)(1) and in a utility's operating expenses pursuant to N.C.G.S. § 62-133(b)(3) limit the scope of the Commission's authority pursuant to N.C.G.S. § 62-133(d), with any such determination being fundamentally inconsistent with the apparent legislative intent to use N.C.G.S. § 62-133(d) to provide a "safety valve" available to the Commission when ordinary ratemaking standards prove inadequate. However, as our earlier admonition that the predecessor to N.C.G.S. § 62-133(d) did not allow the Commission to "roam at large in an unfenced field" clearly indicates, N.C.G.S. § 62-133(d) does not give the Commission license to ignore the ordinary ratemaking standards set out elsewhere in N.C.G.S. § 62-133 in cases in which the use of those principles, without the necessity to consider "other facts," allows for the establishment of just and reasonable rates for the utility in question. Instead, N.C.G.S. § 62-133(d) provides the Commission with limited authority to take a holistic look at the cases that come before it in order to ensure that the limitations inherent in the ordinary ratemaking standards enunciated in N.C.G.S. § 62-133 do not preclude the Commission from carrying out its ultimate obligation to establish rates that are just and reasonable in extraordinary instances in which the traditional ratemaking standards set out in N.C.G.S. § 62-133 are insufficient. As a result, consistently with the results reached in the decisions that we have summarized above, we hold that the Commission may employ N.C.G.S. § 62-133(d) in situations involving (1) unusual, extraordinary, or complex circumstances that are not adequately addressed in the traditional ratemaking procedures set out in N.C.G.S. § 62-133; (2) in which the Commission reasonably concludes that these circumstances justify a departure from the ordinary ratemaking standards set out in N.C.G.S. § 62-133; (3) determines that a consideration of these "other facts" is necessary to allow the Commission to fix rates that are just and reasonable to both the utility and its customers; and (4) makes sufficient findings of fact and conclusions of law supported by substantial evidence in light of the whole record explaining why a divergence from the usual ratemaking standards would be appropriate and why the approach that the

Commission has adopted would be just and reasonable to both utilities and their customers.

Stein, 375 N.C. at 925-26, 851 S.E.2d at 272-73 (footnote omitted).

After affirming the Commission on these issues, the Court stated that while subsection (d) "'empowers' the Commission to consider all material facts of record in setting just and reasonable rates, . . . this authority [is] coupled with a concomitant obligation on the Commission's part to consider all potentially relevant facts in formulating its decision." *Id*. at 930-31, 851 S.E.2d at 276. The Court remanded the case for further proceedings, concluding that it was "not persuaded that the Commission fulfilled its duty to consider *all* of the material facts of record revealed in the record in determining whether to adopt the ratemaking approach proposed by the utilities and to reject the Public Staff's equitable sharing proposal utilizing the authority granted to it pursuant to N.C.G.S. § 62-133(d)." *Id*. at 931, 851 S.E.2d at 276. Thus, the Commission was directed on remand to "consider[] all of the potentially relevant facts and circumstances and explain[] the manner in which it has chosen to exercise its discretion by making appropriate findings and conclusions that have adequate evidentiary support" in rejecting or adopting "the Public Staff's equitable sharing proposal, either as proposed or in some modified form." *Id*. at 932, 851 S.E.2d at 277 (citation and footnote omitted).

Settlement and Procedure on Remand

Following issuance of the Supreme Court's decision, on December 17, 2020, the Commission issued an Order Requesting Comments on Procedure on Remand, which, among other things, sought the parties' comments on the procedure to be employed in addressing the Court's remand of the cases. On January 11, 2021, the Public Staff, the AGO, DEP, DEC, Carolina Industrial Group for Fair Utilities II (CIGFUR II) and Carolina Industrial Group for Fair Utilities III (CIGFUR III), and Sierra Club filed a Joint Submission Regarding Procedure Upon Remand.

On January 25, 2021, DEP, DEC, the AGO, Sierra Club, and the Public Staff (collectively, CCR Settling Parties) filed a Coal Combustion Residuals Settlement Agreement (CCR Settlement) resolving on a comprehensive basis the multiple CCR cost recovery issues present in the 2017 and 2019 rate cases.

On January 29, 2021, the Companies filed the testimony of Stephen G. De May in support of the CCR Settlement. Contemporaneously, the CCR Settling Parties, along with CIGFUR II and CIGFUR III, filed a Supplement to Joint Submission Regarding Procedure on Remand and requested that the Commission reopen the 2017 rate cases and admit as new evidence the CCR Settlement and supporting testimony for consideration on the remand issue without the need to hold evidentiary hearings in connection with its further consideration of equitable sharing. On February 5, 2021, the Public Staff filed the testimony of Michael C. Maness in support of the CCR Settlement.

On February 12, 2021, the Commission issued an Order Reopening Records, Allowing Testimony or Comments on Proposed Settlement, and Allowing Requests for Hearing granting the motion to reopen the rate case dockets and to accept into evidence the CCR Settlement and the supporting testimony filed by DEC, DEP, and the Public Staff. The order also directed parties to file testimony or comments on the CCR Settlement, or to file a request for a hearing on the CCR Settlement and supporting testimony, on or before February 19, 2021. The Commission further stated that a party's choice not to file a request for a hearing would be deemed as a waiver by that party of its right to cross-examine the witnesses who provide testimony regarding the CCR Settlement.

On February 17, 2021, the Commission issued an Order Requiring Responses to Commission Questions. On February 23, 2021, DEP and DEC filed verified responses to the Commission's questions.

No additional evidence, supporting testimony, comments, or requests for a hearing on the CCR Settlement were received.

Based upon the foregoing and the entire record in these proceedings the Commission on remand makes the following

FINDINGS OF FACT

1. Since 2014, the Companies have become subject to new legal requirements relating to its management of coal ash, including the North Carolina Coal Ash Management Act (CAMA) enacted in 2014 and amended in 2016, and the United States Environmental Protection Agency (EPA) final rule — the Coal Combustion Residuals Rule (CCR Rule) — promulgated in 2015. These state and federal laws and regulations introduced new requirements for the management of coal ash, or coal combustion residuals (CCR), and mandated the closure of the coal ash basins at all of DEP's and DEC's coal-fired power plants. The Companies have incurred significant costs to comply with these new legal requirements (CCR costs).

2. In the Sub 1142 proceeding DEP sought recovery of its actual CCR costs incurred from January 1, 2015, through August 31, 2017, along with financing costs at its approved weighted average cost of capital (WACC), which on a North Carolina retail jurisdiction basis amounted to approximately $241.9 million. In the 2018 DEP Rate Order, the Commission concluded that DEP was entitled to recover these CCR costs, less a disallowance of $9.5 million, for a total amount of approximately $232.4 million. The Commission also concluded that the actual CCR costs incurred by DEP, less the $9.5 million, are known and measurable, reasonable and prudent, and used and useful in the provision of service to DEP's customers, and thus DEP was entitled to recover these costs through rates. Further, the Commission concluded that, under normal circumstances, the five-year amortization period proposed by DEP was appropriate and reasonable and absent any management penalty should be approved, with DEP entitled to earn a return on the unamortized balance.

3. Also in the 2018 DEP Rate Order, the Commission concluded that a management penalty in the approximate sum of $30 million was appropriate as to DEP's CCR remediation expenses. The Commission implemented the penalty by directing DEP to amortize the $232.4 million over five years with a return on the unamortized balance and then to reduce the resulting annual revenue requirement by $6 million for each of the five years.

4. In the Sub 1146 proceeding DEC sought recovery of its actual CCR costs incurred from January 1, 2015, through December 31, 2017, along with financing costs at its approved WACC, which on a North Carolina retail jurisdiction basis amounted to approximately $545.7 million. The Commission in the 2018 DEC Rate Order concluded that DEC was entitled to recover these CCR costs. The Commission also concluded that the actual CCR costs incurred by DEC are known and measurable, reasonable and prudent, and used and useful in the provision of service to DEC's customers, and thus DEC was entitled to recover these costs through rates. Further, the Commission concluded that, under normal circumstances, the five-year amortization period proposed by DEC was appropriate and reasonable and absent any management penalty should be approved, with DEC entitled to earn a return on the unamortized balance.

5. Also in the 2018 DEC Rate Order the Commission concluded that a management penalty in the approximate sum of $70 million was appropriate as to DEC's CCR remediation expenses. The Commission implemented the penalty by directing DEC to amortize the $545.7 million over five years with a return on the unamortized balance and then to reduce the resulting annual revenue requirement by $14 million for each of the five years.

6. On January 25, 2021, the CCR Settling Parties filed the CCR Settlement in the 2017 and 2019 rate case dockets resolving the issues among them related to CCR cost recovery. Not all parties to the 2017 and 2019 rate cases are parties to the CCR Settlement.

7. The CCR Settlement, which is the product of the give-and-take in settlement negotiations between the CCR Settling Parties, is material evidence in these dockets and is entitled to be given appropriate weight in these proceedings, along with other evidence adduced by the Companies and intervenor parties.

8. Section III.E.i and ii of the CCR Settlement provide that the CCR Settling Parties request and support that on remand in the 2017 rate case dockets, the Commission leave in place its decisions in the Subs 1142 and 1146 proceedings, including the Cost of Service Penalties.

9. Section III.E.iii and iv also provide that the amount of CCR Costs and Financing Costs sought for recovery in 2019 DEP and DEC rate cases will be reduced by $261 million and $224 million, respectively. Additionally, Section III.E provides for the recovery of Financing Costs sought for recovery in the 2019 rate cases accrued during the Deferral Period, calculated at the WACC, and provides for the recovery of Financing

Costs during the five-year Amortization Period, calculated using: (i) DEP's and DEC's cost of debt as stipulated by the Companies and the Public Staff in the Second Partial Stipulation adjusted as appropriate to reflect the deductibility of interest expense; (ii) a cost of equity 150 basis points below the stipulated rate of return on common equity of 9.60%; and (iii) a 48% debt and 52% equity capital structure.

10. Section III.F of the CCR Settlement provides that the amount to be recovered for Future CCR Costs defined as costs incurred by DEP from March 1, 2020, through February 28, 2030, along with associated Financing Costs incurred during the Deferral Period, will be reduced by $162 million but allows for recovery of any remaining CCR Costs, subject to determination by the Commission that such costs were reasonably and prudently incurred. Similarly, Section III.F provides that the amount to be recovered of Future CCR Costs incurred by DEC from February 1, 2020, through January 31, 2030, along with associated Financing Costs incurred during the Deferral Period, will be reduced by $108 million but allows for recovery of any remaining CCR Costs, subject to determination by the Commission that such costs are reasonably and prudently incurred. Additionally, Section III.F provides for recovery of Financing Costs during the applicable Deferral Period, calculated at the WACC, and permits recovery of Financing Costs during the applicable Amortization Period, calculated using a reduced cost of equity.

11. Section III.D.i of the CCR Settlement provides that the Public Staff, the AGO and the Sierra Club (collectively, Intervenor Settling Parties) waive their right to assert that future CCR costs should be shared between the Companies and their respective ratepayers through equitable sharing of the costs or other adjustment except as provided in the CCR Settlement. Section III.D.ii provides that the Intervenor Settling Parties waive their right to challenge future CCR costs on the basis that the Companies' prior coal ash management practices were inadequate and led to unreasonable CCR costs being incurred or led to CCR costs being unreasonably higher than otherwise would have been incurred. Section III.D.iii of the CCR Settlement provides that the Intervenor Settling Parties reserve their right to propose an adjustment to future CCR costs on the grounds that the costs were otherwise unreasonable or were imprudently incurred.

12. Section III.G of the CCR Settlement provides for an allocation between DEP, DEC, and their customers of any proceeds from ongoing coal ash insurance litigation.

13. The provisions of the CCR Settlement applicable to the instant dockets are just and reasonable and in the public interest in light of all of the evidence presented and are not inconsistent with the Court's opinion in *Stein* remanding the 2017 rate cases to the Commission for additional proceedings.

DISCUSSION OF EVIDENCE AND CONCLUSIONS

The evidence supporting these findings of fact is found in the verified applications, and Form E-1s filed in both Subs 1142 and 1146; the CCR Settlement; the testimony and exhibits of the expert witnesses in both the 2017 and 2019 rate cases; the settlement

testimony of DEP and DEC witness De May and Public Staff witness Maness; and the entire record in each of these proceedings.

The testimony and exhibits in these proceedings are voluminous. The Commission has carefully considered all the evidence and the records as a whole. However, the Commission has not attempted to recount every statement of every witness in this Order. The Commission incorporates by reference the evidence summarized in the 2018 DEP and DEC Rate Orders and finds and affirms all other findings of fact in those orders necessary to support the discussion and conclusions set forth below.

Summary of the Evidence

Companies' Settlement Testimony

In support of the January 25, 2021 CCR Settlement witness De May testified that the CCR Settlement represents a balanced solution that resolves the coal ash cost recovery debate in North Carolina, providing both immediate and long-term savings for customers and long-term certainty for the Companies and their investors and allowing all parties to move forward towards the desired cleaner energy future. He concluded that the CCR Settlement is in the public interest and should be approved.

Witness De May provided an overview of the CCR Settlement. He testified that it resolves among the CCR Settling Parties, subject to Commission approval, CCR cost recovery issues in both the 2017 and 2019 rate cases in a comprehensive manner for the period beginning January 1, 2015, through February 28, 2030 — a period of over fifteen years. Witness De May contended that the CCR Settlement requires the Companies to reduce the amount of coal ash-related costs to be recovered from customers and grants the Companies the ability to earn a return upon the recovered costs at a negotiated cost of equity lower than each Company's allowed rate of return on common equity. The CCR Settlement also provides customers with immediate and future rate reductions — DEP and DEC together will absorb approximately $1.1 billion on a North Carolina system basis through February 2030. Witness De May testified that on a North Carolina retail basis, the net present value of the cost savings to customers (including applicable financing costs) is in excess of $900 million. Witness De May noted that, importantly, a large portion of the rate reduction will occur over the near term, during a period in which many customers are still suffering economic hardship from the COVID-19 pandemic.

Witness De May also summarized the benefits of the CCR Settlement to the Companies. He explained that it "validates and affirms the reasonableness and prudence of [each] Company's ash basin closure strategy," provides more certainty and stability regarding cost recovery, and — by preserving the Companies' ability to recover financing costs, albeit at a reduced rate — preserves their access to much needed capital on reasonable terms, also benefitting customers. Finally, the CCR Settlement — in settling the legacy issue of coal ash cost recovery — allows the collective focus to shift to the future to cleaner sources of energy, while maintaining the Companies' drive to keep electricity affordable and reliable.

Witness De May explained that the CCR Settlement appropriately balances the need for rate relief with the impact of such rate relief on customers. He stated that each Company is pleased that its rates are competitive and below the national average and will remain so under the CCR Settlement, noting that providing safe, reliable, and increasingly clean electricity at competitive rates is key. Witness De May stated that, particularly in light of the current economic conditions faced by customers due to the COVID-19 pandemic, each Company believes the CCR Settlement fairly balances the needs of customers with the need to recover substantial investments made to continue to comply with regulatory requirements and safely provide high quality electric service. He concluded that given the size of the necessary capital and compliance expenditures the Companies face, it is essential that DEP and DEC maintain their financial strength and credit quality for the benefit of their customers.

Public Staff Settlement Testimony

Public Staff witness Maness testified that the CCR Settlement would comprehensively resolve the following CCR cost recovery issues: (1) issues pending before the Commission on remand in the 2017 DEP and DEC rate cases; (2) issues pending before the Commission in the 2019 rate cases; (3) the treatment of CCR costs incurred by DEC from February 1, 2020, through January 31, 2030, and by DEP from March 1, 2020, through February 28, 2030, along with associated Financing Costs; and (4) how any proceeds received from insurance litigation related to CCR costs would be shared by ratepayers, DEC, and DEP.

In addition, witness Maness explained that from the perspective of the Public Staff, the most important ratepayer benefits of the CCR Settlement are: (1) DEC's and DEP's agreement to forego the combined recovery of CCR costs and associated Financing Costs in excess of $900 million, on a present value basis, over the period from January 1, 2015, though January 31, 2030, for DEC and February 28, 2030, for DEP; (2) the allocation of the proceeds of CCR insurance litigation; and (3) the avoidance of protracted litigation over CCR costs and financing costs into 2030 among the CCR Settling Parties. Accordingly, witness Maness stated that the Public Staff believes the CCR Settlement is in the public interest and should be approved.

Standard of Review

The Commission is required to set just and reasonable rates for public utilities. N.C.G.S. § 62-130(a). Just and reasonable rates are those that provide the utility an opportunity to earn a fair return on its property and are fair to the utility's customers. To this end, the North Carolina Supreme Court has counseled:

> [T]he fixing of "reasonable and just" rates involves a balancing of shareholder and consumer interests. The Commission must therefore set rates which will protect both the right of the public utility to earn a fair rate of return for its shareholders and ensure its financial integrity, while also protecting the right

> of the utility's intrastate customers to pay a retail rate which reasonably and fairly reflects the cost of service rendered on their behalf.

State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 313 N.C. 614, 691, 332 S.E.2d 397, 474 (1985), *rev'd on other grounds*, 476 U.S. 953, 90 L.Ed.2d 943 (1986), *appeal after remand*, 324 N.C. 478, 380 S.E.2d 112 (1989) (*Nantahala*).

The burden of proof to show that rates are just and reasonable is on the utility. N.C.G.S. § 62-134(c). However,

> the reasonableness and prudence of those costs is "presumed" unless the Commission or an intervenor adduces sufficient evidence to cast doubt upon their reasonableness or prudence, at which point the burden to make an affirmative showing of the reasonableness of the costs in question shifts to the utility. *State ex rel. Utils. Comm'n v. Intervenor Residents of Bent Creek/Mt. Carmel Subdivisions*, 305 N.C. 62, 76, 286 S.E.2d 770, 779 (1982) (*Bent Creek*). In order to satisfy this burden of production, an intervenor must offer affirmative evidence tending to show that the expenses that the utility seeks to recover "are exorbitant, unnecessary, wasteful, extravagant, or incurred in abuse of discretion or in bad faith or that such expenses exceed either the cost of the same or similar goods or services on the open market or the cost similar utilities pay to their affiliated [utilities] for the same or similar goods or services." *Id.* at 76–77, 286 S.E.2d at 779. If a utility expense is "properly challenged," "[t]he Commission has the *obligation* to test the reasonableness of such expenses." *Id*. at 76, 286 S.E.2d at 779.

Stein, 375 N.C. at 908, 851 S.E.2d at 261-62.

Finally, the Commission's orders must be based on competent, material, and substantial evidence in the record. N.C.G.S. § 62-65(a). Where settlement has been reached by less than all of the parties in a case, as with the CCR Settlement in these cases, that settlement should be accorded full consideration and weighed by the Commission along with all other evidence presented in reaching its decision:

> The Commission may even adopt the recommendations or provisions of the nonunanimous stipulation as long as the Commission sets forth its reasoning and makes 'its own independent conclusion' supported by substantial evidence on the record that the proposal is just and reasonable to all parties in light of all the evidence presented.

State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, Inc., 348 N.C. 452, 466, 500 S.E.2d 693, 703 (1998) (*CUCA I*); *see also State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, Inc.*, 351 N.C. 223, 524 S.E.2d 10 (2000) (*CUCA II*).

Discussion and Conclusions

In summary, based upon the evidence and the whole record, including the provisions of the CCR Settlement applicable to these dockets, and in the exercise of its independent judgment and discretion after considering all material facts of record, the Commission concludes that the CCR Settlement is in the public interest and should be approved. Moreover, the Commission concludes that the ratemaking treatment of CCR costs set forth in the CCR Settlement results in just and reasonable rates for the Companies' customers. As provided in the CCR Settlement, the Commission leaves in place the decision on CCR cost recovery in the Subs 1142 and 1146 proceedings, including the Cost of Service Penalties.

The issues related to the recovery of costs incurred to comply with CAMA and the CCR Rule have been highly contentious in the last two general rate cases for both DEP and DEC. The parties to the instant proceedings proffered several hundreds of pages and hours of testimony reviewing the history of coal-fired generation and the handling of coal ash throughout the history of the utilities serving North Carolina consumers, comparing the past coal ash handling practices of these utilities to others across the region and the country, debating what different decisions perhaps should have been made and when, and attempting to quantify the impact of such decisions on the CCR costs now sought to be recovered from customers. Additionally, the Commission has received significant testimony from public witnesses on these issues. Indeed, coal ash — including its environmental impact and associated cost — was the predominant topic at the public witness hearings held in these 2017, as well as the 2019, rate cases.

As noted above, and prior to its joining the CCR Settlement, the Public Staff had argued that responsibility for these costs (not otherwise imprudently incurred) should be shared equally between the utility and its customers. Other parties argued that the utility should bear all or substantially all of the costs of compliance with the recently adopted state and federal requirements. After careful consideration, the Commission in the 2018 DEP and DEC Rate Orders determined that the CCR costs incurred, with one exception, were reasonable and prudent but imposed a management penalty in each case.

Subsequent to issuance of the *Stein* opinion on December 11, 2020, the CCR Settling Parties worked to reach a compromise on the issues. The CCR Settlement seeks to resolve not only the 2017 rate cases on remand from the Court but also the 2019 rate cases and future CCR costs to be incurred through January 2030 for DEC and February 2030 for DEP.

On February 12, 2021, upon joint motion of the CCR Settling Parties, as well as CIGFUR II and CIGFUR III, the Commission reopened the evidentiary records; accepted into evidence the CCR Settlement and the supporting testimony filed by DEC, DEP, and the Public Staff; allowed additional testimony or comments on the CCR Settlement by other parties; and allowed requests for hearing by any party. No additional testimony or comments were filed by any party, and no party requested a hearing. Thus, all parties

waived their rights to introduce additional testimony or to cross-examine DEP's, DEC's, or the Public Staff's witnesses on their settlement testimony.

The Commission recognizes that the CCR Settlement is the product of give-and-take between the CCR Settling Parties — DEP, DEC, the AGO, Sierra Club, and the Public Staff. The settlement and supporting testimony by the parties offer an immediate and longer-term resolution of the ratemaking treatment of CCR costs in lieu of the positions previously advocated by the parties. The settlement aimed to resolve these contentious issues in the outstanding DEP and DEC rate cases, as well as into the near future, and strikes a balance between the Companies and their customers that each of the CCR Settling Parties found to be appropriate and in the public interest.

The Companies explain that the CCR Settlement provides benefit to customers through both immediate and future rate reduction — DEP and DEC together will absorb approximately $1.1 billion (on a North Carolina system basis) in CCR-related costs over the time period covered by the CCR Settlement, reducing the amounts they would otherwise seek to recover from customers. On a North Carolina retail basis, the net present value of the savings to customers from forgone CCR cost recovery (including applicable financing costs) amounts to more than $900 million. Importantly, a large portion of the rate reduction will occur over the near term, during a period in which many customers are suffering severe economic hardship from the COVID-19 pandemic. The Commission takes note that the Public Staff supports this position, asserting that the settlement obligates DEP and DEC to forego recovery of costs in excess of $900 million (combined DEP and DEC), resulting in a significant reduction in the proposed revenue increase in this case.

The Commission recognizes that for purposes of these proceedings the CCR Settling Parties agreed that the Commission should leave in place its decisions in the Subs 1142 and 1146 proceedings, including the Cost of Service Penalties. The agreement to these provisions was made in conjunction with the agreement as to additional reductions to the Companies' CCR cost recovery of $261 million (DEP) and $224 million (DEC) in the 2019 rate cases, future reduced recovery of CCR costs through January/February 2030 of $162 million (DEP) and $108 million (DEC), and other additional customer-savings provisions. Finally, the Commission notes that the Intervenor Settling Parties have agreed to waive their rights to assert that Future CCR Costs, including Financing Costs, shall be shared between the Companies and customers through equitable sharing or any other adjustment for the purpose of sharing, and waive their rights to challenge any Future CCR Costs, including Financing Costs on the basis that the Companies' historical coal ash management practices were inadequate and led to unreasonable CCR costs being incurred or led to CCR costs being unreasonably higher than otherwise would have been incurred. The Intervenor Settling Parties reserve their rights only to propose a disallowance adjustment to future CCR costs on the grounds that the costs were otherwise unreasonable or were imprudently incurred.

Thus, the CCR Settling Parties have settled the ratemaking treatment of CCR costs in these rate cases, the 2019 rate cases, and future rate cases. The settlement

aims to reduce costs that are passed on to customers, to avoid additional protracted litigation over the Companies' historical management practices, and to provide some closure to the debate that has been waged for several years. Indeed, as noted above, the parties to the Companies' rate cases have extensively litigated these contested issues since at least the filing of the 2017 rate cases, and the CCR Settlement seeks to resolve comprehensively certain issues for CCR costs incurred by DEP from January 1, 2015, through February 28, 2030, and by DEC from January 1, 2015, through January 31, 2030.

While the CCR Settlement is a nonunanimous settlement, the Commission places significant weight on the fact that the Public Staff and the AGO, each of which has litigated the issues associated with CCR cost recovery vigorously in these cases and advocated zealously for consumers, are parties to the CCR Settlement. Moreover, beginning with the 2017 rate cases, each of the CCR Settling Parties has advocated for significantly different ratemaking treatment for CCR costs, particularly as to how much cost should be borne by customers versus by the Companies. Thus, the Commission recognizes the extent of the compromise and give-and-take that was necessary to achieve consensus on the ratemaking issues.

As noted by Public Staff witness Maness,

> among the most important benefits provided by the CCR Settlement Agreement are: (1) the agreement of DEC and DEP to forego recovery of CCR Costs and associated Financing Costs in excess of $900 million (combined DEC and DEP), on a present value basis, over the period from January 1, 2015, through January 31, 2030 (DEC), and February 28, 2030 (DEP), resulting in a significant reduction in the proposed revenue increase in this case; (2) the agreement to allocate any proceeds of CCR insurance litigation; and (3) the avoidance of protracted litigation over CCR and Financing Costs into 2030 among the parties to the Agreement and possibly the appellate courts.

Maness Settlement Testimony at 5-6. For these reasons, the Public Staff concludes that the CCR Settlement is in the public interest and should be approved.

Similarly, as noted by the Companies' witness De May, the settlement "represents a balanced solution" that provides both immediate and long-term savings for customers while providing the certainty the Companies require to meet their business needs. Further, witness De May explains that the settlement allows the CCR Settling Parties to put the debate behind them and move forward to focus on a cleaner energy future.

CUCA is the one party to these proceedings that presented evidence regarding DEP's and DEC's CCR costs but did not join the CCR Settlement.[2] CUCA witness

[2] The Commission notes that CUCA is indicated as "not objecting" to the CCR Settlement and did not request an opportunity to present additional evidence on the CCR Settlement or cross-examine the witnesses of the Companies or the Public Staff on the CCR Settlement.

O'Donnell testified that the North Carolina legislature passed CAMA in 2014 in response to the Dan River spill and that CAMA is more stringent than the CCR Rule. He recommended that DEP not be allowed to recover CCR costs associated with any plant that is not subject to the CCR Rule but that is subject to CAMA. He further recommended that to the extent any site was no longer receiving coal ash, remediation costs should not be paid for by ratepayers in these cases or any future cases. These arguments were previously rejected in both the 2018 DEP and DEC Rate Orders, and these Commission determinations were upheld by the North Carolina Supreme Court in *Stein*. Further, the Commission notes that the Commission's adoption of the CCR Settlement provides CUCA some relief in that the Companies have agreed to reduce a combination of CCR Costs and Financing Costs sought to be recovered in the 2019 rate cases as well as certain amount of Future CCR Costs in the next general rate case for each Company.

After several years of litigation before this body and the North Carolina Supreme Court, the CCR Settling Parties have worked to achieve a settlement of their views and what they perceive to be a full and fair resolution of their disparate positions. In recognition of the foregoing, and based on the evidence in the record, the Commission is persuaded that the compromise on the ratemaking treatment of CCR costs embodied in the CCR Settlement reasonably balances the interests of the utilities and the ratepayers and will result in just and reasonable rates for ratepayers. The CCR Settlement appropriately resolves the issues involving the ratemaking treatment of the costs incurred in connection with DEP's and DEC's management, handling, and remediation of CCRs, including the Financing Costs incurred while those costs are deferred and while they are being recovered through the Amortization Period. In addition, the CCR Settlement provides benefits to customers, including a significant reduction in the amount of costs to be recovered by the Companies, certainty as to the application of insurance proceeds for customers' benefit, and the avoidance of protracted and expensive litigation regarding the Companies' historical practices. The CCR Settlement, which provides significant savings to customers in the near term, also appropriately balances the need for rate relief with the impact of such rate relief on customers in light of the current economic conditions faced by customers due to the COVID-19 pandemic.

The Commission also acknowledges the public witness hearings conducted by the Commission in these proceedings, as well as in the 2019 rate cases, during which public witnesses appeared and testified before the Commission. A majority of those witnesses who testified expressed concerns regarding the costs and impacts of coal-fired electricity generation, and the Commissioners heard first-hand the many perspectives and opinions of customers as to the clean-up of coal ash and the associated costs. Similarly, numerous statements of consumer position filed in these dockets expressed that customers should not bear responsibility for costs associated with the clean-up of coal ash. Thus, based on the perspectives and concerns consistently expressed by witnesses at the public hearings and in the statements of consumer position, the Commission concludes that the history and legacy of coal-fired electricity generation by the Companies is an issue of significant importance to their customers, and their perspectives have been given weight in the Commission's decision-making process. While the CCR Settlement may not go as far as many, but not all, customers advocated, it strikes a fair balance for customers that the

Commission determines will reduce costs (and rates) associated with CCRs, particularly in the near term, and furthers the Companies' financial health and access to capital at a reasonable cost for the customers' benefit.

For these reasons, and based on its determination that the ratemaking treatment set forth by the Settling Parties in the CCR Settlement will result in just and reasonable rates for DEP's and DEC's customers and will comprehensively resolve the CCR cost recovery issues litigated in the 2017 and 2019 rate cases, the Commission concludes that the CCR Settlement is in the public interest and should be approved on remand. In reaching this conclusion, the Commission has carefully considered the direction given by the Court and further concludes that approval of the CCR Settlement is not inconsistent with, and satisfies, the Court's decision in *Stein*.

IT IS, THEREFORE, ORDERED as follows:

1. That the CCR Settlement is hereby approved, and the results of the Commission's ratemaking decisions in the Docket No. E-2, Sub 1142 and E-7, Sub 1146 proceedings, including the management penalties, remain in place and unchanged; and

2. That the approval of the CCR Settlement resolves the issues remanded to the Commission by the North Carolina Supreme Court in *Stein* and concludes the proceedings on remand.

ISSUED BY ORDER OF THE COMMISSION.

This the 25th day of June, 2021.

NORTH CAROLINA UTILITIES COMMISSION

Joann R. Snyder, Deputy Clerk

Commissioner Daniel G. Clodfelter concurs in the result.

DOCKET NO. E-2, SUB 1142
DOCKET NO. E-7, SUB 1146

Commissioner Daniel G. Clodfelter, concurring in the result:

Although I do not join in the Commission majority's opinion, for the reasons set forth in my partial dissenting opinions in Docket Nos. E-2, Sub 1219 and E-7, Sub 1214, and subject to the limitations and qualifications contained in those opinions, I concur in the result.

/s/ Daniel G. Clodfelter
Commissioner Daniel G. Clodfelter