

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. E-7, SUB 1282

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

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| In the Matter of | | |
| Application of Duke Energy Carolinas, LLC, |) | |
| Pursuant to N.C.G.S. § 62-133.2 and |) | ORDER RULING ON |
| Commission Rule R8-55 Relating to Fuel |) | SUPPLEMENTAL TESTIMONY |
| and Fuel-Related Charge Adjustments |) | PROFFERED POST-HEARING |
| for Electric Utilities |) | |

BY THE PRESIDING COMMISSIONER: Pursuant to N.C. Gen. Stat. § 62-133.2, the Commission is required to conduct annual fuel charge adjustment proceedings for electric utilities engaged in the generation or production of electricity by fossil or nuclear fuels. Pursuant to N.C.G.S. § 62-133.2 and Commission Rule R8-55, on February 28, 2023, Duke Energy Carolinas, LLC (DEC) filed its application in the above-captioned docket. In its application, DEC requested changes to its fuel charges effective for service rendered on and after September 1, 2023.

PROCEDURAL HISTORY

On March 16, 2023, the Commission issued an Order Scheduling Hearing, Requiring Filing of Testimony, Establishing Discovery Guidelines, and Requiring Public Notice, which in pertinent part set this matter for hearing on Tuesday, May 30, 2023, and required that the direct testimony and exhibits of the Public Staff and other intervenors be filed, in advance of the hearing, on or before Tuesday, May 9, 2023. The intervention and participation by the Public Staff in Commission proceedings is recognized pursuant to N.C.G.S. § 62-15.

Relevant to this order, the Public Staff filed the direct testimony of Evan D. Lawrence on May 9, 2023. In prefiled direct testimony, witness Lawrence stated that the Public Staff “has been unable to complete its investigation into the outages [of the Belews Creek Steam Station Unit 2 that began on April 22, 2022, and August 31, 2022, and also of the W.S. Lee Combined Cycle Plant that began on December 11, 2022] and cannot make recommendations at this time [relating to disallowance of replacement power costs].” Tr. vol. 2, 275. Also, in prefiled direct testimony, witness Lawrence stated that “the Public Staff will continue to investigate these outages and provide the results of its investigation in a supplemental filing.” *Id.* at 275.

During the evidentiary hearing¹ in this matter and upon direct examination, witness Lawrence testified that after reviewing discovery responses received from DEC the Friday evening prior to the hearing, he was now in a position to make a recommendation regarding the treatment of the replacement power costs attributable to the April 22, 2022 Belews Creek Steam Station Unit 2 outage that began on April 22, 2022 and planned to file supplemental testimony with his recommendation as soon as possible. *Id.* at 246, 325-26. Witness Lawrence further testified: “I do recognize that parties would not have had a chance to review and respond to this so I plan to . . . file supplemental testimony on this issue as soon as possible.” *Id.*

Also, during the evidentiary hearing, the Presiding Commissioner, Commissioner Kemerait, asked witness Lawrence whether it was the Public Staff’s intention that recommendations related to the April 22, 2022 Belews Creek Steam Station Unit 2 outage be resolved in the present proceeding or deferred until the 2024 fuel adjustment proceeding. *Id.* at 326. Witness Lawrence responded that the Public Staff was “open to whatever approach the Commission preferred[,]” and acknowledged that “we might be getting too late for this case[.]” *Id.* at 326-27. Following this exchange, counsel for DEC requested and the Presiding Commissioner allowed DEC to reserve the right to object to any supplemental testimony on this issue that the Public Staff might file. *Id.* at 327.

At the conclusion of the evidentiary hearing, the Presiding Commissioner asked whether any party had any motions or procedural matters that needed to be addressed. *Id.* at 355. Counsel for the Public Staff did not make a motion that the record be held open to receive supplemental testimony, and the Presiding Commissioner closed the evidentiary hearing record accordingly. *Id.* at 355.

On June 20, 2023, the court reporter caused to be filed the hearing transcript in the docket. On June 20, 2023, the clerk filed a Notice of Due Date for Proposed Orders and/or Briefs, which are due to be filed with the Commission on or before July 21, 2023.

On June 30, 2023, the Public Staff filed the Supplemental Testimony of Evan D. Lawrence, which includes confidential portions, and further includes Lawrence Supplemental Exhibits 1 and 2 (Lawrence Supplemental Testimony and Exhibits). The Public Staff’s filing was not accompanied by a motion for leave to file supplemental testimony or a motion to reopen and reconvene the evidentiary hearing.

On July 6, 2023, DEC filed a Motion to Strike Public Staff’s Filing of Supplemental Testimony and Request for Relief in the Alternative, which requests that the Lawrence Supplemental Testimony and Exhibits (DEC Motion) be stricken from the record pursuant to Commission Rules R1-7 and R1-24 and Rule 402 of the North Carolina Rules of Evidence. In the alternative, DEC requests that (1) it be given an opportunity to conduct discovery regarding the Lawrence Supplemental Testimony and Exhibits, (2) the

¹ The hearing in this matter commenced as scheduled on May 30, 2023, and continued on May 31, 2023. The pertinent portions of the hearing transcript cited to herein are from the Transcript of Hearing Held in Raleigh on Wednesday, May 31, 2023, Volume 2.

evidentiary record be reopened for the purpose of receiving DEC rebuttal testimony responding to the Lawrence Supplemental Testimony and Exhibits, and (3) the Commission reopen the hearing for the purpose of allowing additional cross-examination of Witness Lawrence regarding his supplemental testimony and exhibits.

On July 11, 2023, the Public Staff filed a Motion and Response to DEC's Motion (Public Staff Motion) which primarily requests that the Commission deny DEC's motion to strike the Lawrence Supplemental Testimony and Exhibits and requests that the Commission enter into the record and consider the Lawrence Supplemental Testimony and Exhibits. In the alternative, the Public Staff states that it

agrees to any and all of DEC's proposals to cure any prejudice, including granting DEC the opportunity to file supplemental rebuttal testimony, granting five business days to conduct discovery, re-opening the evidentiary record for the purposes of receiving DEC's supplemental rebuttal testimony, and establishing a hearing date to allow for the cross-examination of witness Lawrence.

Public Staff Motion, at 11.

APPLICABLE LEGAL AUTHORITY

N.C. Evidence Code

N.C.G.S. § 62-65 requires that the Commission apply the North Carolina Rules of Evidence, codified at N.C.G.S. § 8C-1 *et seq.*, "insofar as practicable." The North Carolina Supreme Court has held that "procedure before the Commission is, however, not as formal as that in litigation conducted in the superior court." *Utilities Comm'n v. Telegraph Co.*, 267 N.C. 257, 269 (1966). The Commission has previously opined that, "[a]s a result, the Commission is not bound to follow the strict letter of the rules of evidence, but is entitled to take practical issues into account in ruling on evidentiary issues." Order on MSI's Objections, 2, Docket No. W-354, Sub 236 (April 24, 2004). The North Carolina Rules of Evidence require "authentication or identification as a *condition precedent* to admissibility[.]" N.C.G.S. § 8C-1, Rule 901 (emphasis added).

Commission Rule R1-24

Commission Rule R1-24 requires that "[t]he proposed initial direct testimony of an expert witness . . . shall be reduced to writing," and that the Public Staff and all other Intervenor or Protestants "shall file all testimony, exhibits and other information which is to be relied upon at the hearing 20 days in advance of the scheduled hearing." Commission Rules R1-24(g)(1)-(2).

Commission Rule R1-24(d) requires that "Prepared Statements" such as prefiled testimony, be offered into evidence and subject to the same evaluation, *e.g.*,

cross-examination and questions from Commissioners, as testimony offered orally from the witness stand. Verbatim, Rule R1-24(d) states

A witness may read into the record as his testimony statements of fact prepared by him, or written answers to questions of counsel; provided, such statements shall not include argument; provided, further, that before such statements are read or *offered in evidence* a copy thereof shall be delivered to the presiding officer, a copy to the reporter, and copies to opposing counsel, as may be directed by the presiding officer. *The admissibility of such written statements or questions and answers shall be subject to the same rules as if such testimony were produced in the usual manner.*

(Emphasis added.)

Commission Rule R1-24(g)(4) “clearly sets forth a general pre-filing requirement for expert testimony offered by formal parties[.]” Order Ruling on Motion and Allowing Proffer of Evidence, 2, Docket No. W-1000, Sub 5 (Oct. 21, 1999). The general pre-filing requirement prescribes hearing procedures for offering expert witness testimony *filed in advance of the hearing* into evidence and requires that the witness be “immediately tendered for cross-examination[.]” Commission Rule R1-24(g)(4).

Overall, Commission Rule R1-24 establishes a general framework for the Commission’s practice of allowing prefiled expert witness testimony. First, the sponsoring party is required to file the proposed written testimony with the Commission in advance of the scheduled hearing. Next, the sponsoring party must offer the prefiled written testimony into evidence during the hearing (and it must accordingly be accepted into the hearing record notwithstanding any objections).² Finally, the witness must be made available for cross-examination at the hearing by opposing parties and the Commission unless cross-examination is waived.

The Commission has previously explained its practice of requiring prefiled expert witness testimony stating that

[s]uch practice allows for all parties to be apprised prior to the hearing of all contested issues to be resolved in the case, for all parties to conduct adequate discovery and prepare for cross-examination of opposing witnesses, and, generally, for a more complete record with the most efficient use of the Commission’s resources.

Order on Motion Regarding Hearing Procedure, 2, Docket No. EMP-93, Sub 0 (May 15, 2017).

² In the event that an objection to proffered prefiled testimony is sustained by the presiding commissioner, Commission Rule R1-24(g)(4) allows the party sponsoring the excluded testimony to offer an alternative.

It should be noted that no Commission rule governs evidence proffered to the Commission following the close of the evidentiary hearing. This is not a deficiency or oversight in the Commission's rules; rather, the proffer of evidence post-hearing complicates the execution of required procedures for admitting the proffered evidence, as well as vetting it so as to enable the finder of fact to determine the proper weight to afford the underlying fact or expert opinion asserted.

N.C. Supreme Court Precedent

The North Carolina Supreme Court has held that, where the Commission permits the proffer of evidence post-hearing, opposing parties have the right to demand that the hearing be reopened to allow for (1) cross-examination of witnesses regarding the information presented and (2) presentation of rebuttal evidence. *State ex rel. Utilities Com. v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 269, 148 S.E.2d 100, 109-110 (1966).

ARGUMENTS OF THE PARTIES

DEC

DEC asserts that the Public Staff has failed to demonstrate good cause for the late filing of the Lawrence Supplemental Testimony and Exhibits as follows. DEC argues that Witness Lawrence fails to identify specific new information that informs the Supplemental Testimony and Exhibits that was unavailable to witness Lawrence when his initial testimony was filed with the Commission. DEC Motion, at 2. DEC also contends that, “[i]f the Public Staff believed that the Scheduling Order did not provide sufficient time, it should have petitioned the Commission shortly after the issuance of the Scheduling Order for appropriate relief.” *Id.* at ¶ 29. Finally, regarding the dispute over the timing and sufficiency of certain information provided by DEC to the Public Staff, DEC argues that “the appropriate recourse would be to file a motion to compel at the Commission and seek relief at the time of such failure—not to unilaterally elect to file supplemental testimony two months after the otherwise applicable deadline for testimony.” *Id.* at ¶ 31.

Further, DEC contends that the Lawrence Supplemental Testimony and Exhibits are prejudicial to DEC on the following counts. First, the Lawrence Supplemental Testimony and Exhibits are the first time that witness Lawrence recommended that the Commission disallow DEC's requested replacement power costs resulting from an outage beginning on April 22, 2022, at DEC's Belevs Creek generating station. DEC Motion, at 1. Second, DEC argues that the Lawrence Supplemental Testimony and Exhibits violates the “basic structure of most litigated proceedings[,]” which affords the applicant the final response through rebuttal testimony.³ *Id.* at ¶ 32. DEC asserts that

[i]n this scenario, the Public Staff's approach in which Mr. Lawrence asserted in his initial direct testimony that the outages were “preventable”

³ DEC further asserts: “DEC is the party requesting an adjustment in its rates for fuel and fuel related costs. DEC bears the burden of proof. As such, DEC is entitled to the last word. Its rebuttal testimony

forced the Company to rebut such assertions. But by withholding his final recommendation, Mr. Lawrence was then able review the Company's rebuttal testimony and fine-tune his opinions prior to submitting his supplemental testimony. This approach provides an inequitable procedural advantage—effectively an “end-around” of the standard cadence of the litigated proceeding[.]

Id.

Finally, DEC opines that

[w]hen the Commission begins the hearing, the Commissioners and their staff have been fully apprised of the issues they must resolve and can craft any questions they may have on issues they deem subject to further clarification. The rules and procedures are fashioned to produce a complete record fair to all parties and to provide the Commission with a record to enable the Commission to issue well-reasoned orders resolving issues before it.

Id. at ¶ 39. DEC also cautions the Commission that, if accepted by the Commission, the Public Staff's proffered Lawrence Supplemental Testimony and Exhibits would “undermine the Commission's orderly and organized management of matters, casts substantial scheduling uncertainty over future proceedings[.]” *Id.* at 2.

Public Staff

First, the Public Staff explains that “in the live testimony of Mr. Lawrence at the hearing held on May 31, 2023, the Public Staff provided notice to the [Commission] and the parties of its intent to file supplemental testimony in this proceeding regarding its review of plant performance.” Public Staff Motion, at 1. “The Public Staff believed a motion for leave to file supplemental testimony was unnecessary because the Commission and all the parties understood that additional testimony would be filed by the Public Staff.” *Id.* at 2.

Second, the Public Staff disagrees with DEC's position that intervening parties are not permitted to supplement their initial testimony with new insights gleaned through discovery conducted on the applicant's rebuttal testimony. The Public Staff contends that

DEC's rebuttal testimony caused new discovery to be issued which uncovered new evidence on the outage at issue. Therefore, the Public Staff was obligated to inform the Commission of the new information and nothing in the Scheduling Order suggests that additional adjustment cannot be

constitutes the last word and is the means through which DEC responds to arguments in direct testimony of intervenors.” DEC Motion, at 37.

made to the Company's application if the rebuttal discovery reveals new evidence making a new adjustment appropriate.

Id. at 3.

Next, the Public Staff contends that the Commission allows the modification of scheduling orders to permit the filing of supplemental testimony "when good cause is shown by the party requesting the modification and when no prejudice will result to the parties or the proceedings as a result of the modification[.]" wherein the Public Staff cites to the Commission's March 3, 2022 Order Allowing Supplemental and Supplemental Rebuttal Testimony, and Providing for Limited Discovery in Docket No. W-1300, Sub 60. The Public Staff asserts that good cause exists for the timing of the Lawrence Supplemental Testimony and Exhibit, including "the Public Staff's recent unprecedented workload[;]" the extraordinary nature of this proceeding compared to "an ordinary fuel rider[;]" a narrow window for investigation; and purported disagreements between DEC and the Public Staff as to the timing and completeness of information provided via formal and informal discovery processes. *Id.* at 4-9.

Further, the Public Staff contends that "DEC would not be prejudiced by allowing the Supplemental Testimony into the record[.]" *Id.* at 9. In this regard, the Public Staff argues that DEC was provided notice of witness Lawrence's intent to file supplemental testimony, and that "DEC had notice of the broad subject of the Supplemental Testimony." *Id.* at 9. More particularly, the Public Staff states that witness Lawrence's direct testimony stated that "I believe that this outage was preventable and was likely caused because someone working on the turbine did not follow proper procedures for using and removing a bladder valve." *Id.* at 9, citing to tr. vol. 2, 271. The Public Staff argues that DEC rebuttal witness Flanagan addressed witness Lawrence's opinion that the outage was preventable. The Public Staff also contends that DEC had notice during the evidentiary hearing that witness Lawrence had "enough information to make a recommendation on the Belews Creek outage[.]" and "could have cross-examined Mr. Lawrence regarding these facts and learned the contours of his investigation." *Id.* at 10, citing to tr. vol. 2, 246.

DISCUSSION AND CONCLUSIONS

Prior to an evidentiary hearing, the filing of supplemental testimony is not an uncommon occurrence before the Commission, and absent any objections raised by opposing parties, the Commission routinely allows these filings without further ado. Nonetheless, best practice dictates that such filings should either be accompanied by a cover letter indicating that counsel is authorized to represent that no other party objects to the late-filed supplemental testimony or, where an objection is likely to be raised, by a formal motion for leave to file the supplemental testimony and evidencing good cause.

The Lawrence Supplemental Testimony and Exhibits at issue here are not of such a routine nature. Clearly distinguishing the supplemental testimony at issue here from other routine filings is the fact that it was offered to the Commission *after the close of the evidentiary hearing* and introduced complex evidentiary and procedural issues.

Such an occurrence at the Commission is irregular, but not unprecedented. The application of DEC's sister company, Duke Energy Progress, LLC, for an adjustment to its base rates and for performance-based regulation is currently pending before the Commission in Docket No. E-2, Sub 1300. The evidentiary hearing in that matter adjourned on May 16, 2023; however, prior to adjourning the hearing, the Chair expressly held the record open for the purpose of receiving supplemental testimony and other late-filed exhibits requested by various commissioners. Tr. vol. 23, 322, Docket No. E-2, Sub 1300. Counsel for intervenor CIGFUR objected both during the hearing and subsequent to the post-hearing filing of supplemental testimony by the Public Staff and moved to strike the supplemental testimony filed post-hearing. See CIGFUR II's Motion to Strike and Request for Relief, ¶¶ 11-12, Docket No. E-2, Sub 1300 (Jul. 3, 2023). Upon review, the Commission denied CIGFUR's motion to strike, noting that "[t]he Commission clearly held the evidentiary record in this proceeding open for the limited purpose of receiving testimony regarding the Public Staff's audit of DEP's March 2023 update of the test year." Order on Post-Hearing Motions and Reconvening Hearing, 3, Docket No. E-2, Sub 1300 (Jul. 6, 2023). Nonetheless, citing to *Carolina Tel. & Tel. Co.*, also cited *supra* herein, the Commission determined, that to the extent that the supplemental testimony presented new evidence, the Commission would reconvene the hearing for the limited purpose of allowing cross-examination on the new evidence. The Commission further expressly identified which topics embraced by the supplemental testimony constituted new evidence subject to cross-examination and rebuttal.

The procedural history leading up to the Commission's decision to reopen the hearing in Docket No. E-2, Sub 1300 is distinguishable from the present case in a key respect. In Docket No. E-2, Sub 1300, the record was held open specifically, in part, to allow the Public Staff's supplemental testimony. In the present case, the Public Staff neither made a motion to hold the record open nor did the Presiding Commissioner do so *sua sponte*, and, accordingly, the record was closed when the hearing was adjourned. In fairness, the Commission recognizes that the Public Staff requested that the Commission reopen the record and accept the Lawrence Supplemental Testimony and Exhibits in the Public Staff Motion filed on July 11, 2023. However, the Commission also recognizes that the Public Staff indicated during the evidentiary hearing that it was open to deferring its recommendations on certain outages, including the Belews Creek Steam Station Unit 2 outage that began on April 22, 2022, until the 2024 fuel adjustment proceeding.

As provided by the jurisprudence of *Carolina Tel. & Tel. Co.*, once a party has objected to the late-filed supplemental testimony the Commission cannot accept the Lawrence Supplemental Testimony and Exhibits without providing all parties an opportunity to cross-examine witness Lawrence on the new evidence provided therein and an opportunity for the Public Staff to engage in redirect examination of its witness. In addition, as DEC bears the burden of proof, the Commission cannot accept the Lawrence Supplemental Testimony and Exhibits without also providing DEC the opportunity to offer rebuttal evidence.

The Commission recognizes the considerable workload facing the Public Staff as well as the extraordinary nature of this proceeding compared to an ordinary fuel rider

proceeding. In addition, the Commission recognizes and values the investigative work and recommendations of the Public Staff. However, workload concerns, the procedural schedule established in this case, and statutory deadlines for the effective date of the new rates — including the upcoming July 21, 2023 deadline for parties to file post-hearing briefs and proposed orders in this matter, and the September 1, 2023 deadline for the new rates to go into effect — compress the time and ability of the Commission, as well as the parties, to act on this evidence. In light of due process concerns and in order for the Commission to orderly conduct its business, the Commission cannot reconvene this proceeding and comply with its statutory deadlines.

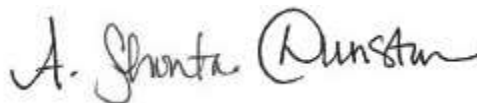
In light of the foregoing and the entire record herein, the Presiding Commissioner finds it appropriate to deny the Public Staff's motion to enter the Lawrence Supplemental Testimony and Exhibits into the record and to grant DEC's motion to strike the same in this proceeding. However, the Presiding Commissioner notes that the determination of whether to defer the consideration of certain outages during the test period at issue in this proceeding to the 2024 fuel adjustment remains open and the parties may address that issue in the post-hearing filings due in this proceeding on July 21, 2023.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 14th day of July, 2023.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in cursive script that reads "A. Shonta Dunston". The signature is written in black ink and is positioned above the printed name of the signatory.

A. Shonta Dunston, Chief Clerk