STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-7, SUB 1134
DOCKET NO. E-7, SUB 1276

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-7, SUB 1134 In the Matter of Application of Duke Energy Carolinas, LLC for Approval to Construct a 402 MW Natural Gas-Fired Combustion Turbine Electric Generating Facility in Lincoln County DOCKET NO. E-7, SUB 1276 In the Matter of Application of Duke Energy Carolinas, LLC, for Adjustment of Rates and Charges Applicable to Electric Service in North Carolina and Performance-Based Regulation	)	**NOTICE OF APPEAL AND EXCEPTIONS OF CIGFUR III**

To the Honorable Supreme Court of North Carolina:

Pursuant to Appellate Rule 18 and N.C.G.S. § 7A-29(b), the Carolina Industrial Group for Fair Utility Rates III ("CIGFUR III") hereby gives notice of appeal to the Supreme Court of North Carolina from (1) the 15 December 2023 Order Accepting Stipulations, Granting Partial Rate Increase, Requiring Public Notice, and Modifying Lincoln CT CPCN Conditions ("Order") entered by the North Carolina Utilities Commission; (2) the 23 October 2023 Order Denying Motion to Strike and Reconvening Hearing ("First Evidentiary Order"); and (3) the 24 October 2023 Order

Responding to Second Motion to Strike and Establishing Hearing Procedures ("Second Evidentiary Order").

Pursuant to N.C.G.S. § 62-90(a), CIGFUR III takes exception to the order on the following grounds, which CIGFUR III contends are unlawful, unjust, unreasonable, and/or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; in excess of the Commission's statutory authority; arbitrary and capricious; in violation of the due process rights of CIGFUR III as a party to the docket; and/or an abuse of discretion:

EXCEPTION 1

Finding of Fact 36 and the underlying Evidence and Conclusions supporting that finding are unjust, unreasonable, unlawful, and/or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; in excess of the Commission's statutory authority; and/or arbitrary and capricious.

In the Order, the Commission approved the Transmission Cost Allocation ("TCA") Stipulation entered into between DEC, the Public Staff, and an affiliated public utility which was not a party to the instant proceeding, "agree[ing] to a pro forma adjustment of approximately $20 million to increase the revenue requirement in the instant proceeding and a corresponding decrease to the revenue requirement in the [affiliated public utility's rate case]." (Order at 131). An increase or decrease in

a utility's approved revenue requirement translates directionally to increased or decreased base rates, respectively.

The Commission's ratemaking authority is not unlimited, and approval of the TCA Stipulation exceeds the Commission's ratemaking authority under both N.C.G.S. § 62-133 and N.C.G.S. § 62-133.16, inasmuch as the Commission has allowed two parties to the instant proceeding, together with a third non-party to the proceeding, to agree to include a $20 million pro forma adjustment to increase the revenue requirement of DEC (and to decrease the revenue requirement of the public utility that actually owns and operates the assets at issue). In other words, by approving the TCA Stipulation, the Commission has partially fixed rates based upon ascertaining the reasonable original cost or fair value of property that neither (1) is owned by DEC; nor (2) is used and useful in the provision of electric service to DEC's customers.

The Commission has only that authority granted to it by the General Assembly. *E.g., Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 736, 309 S.E.2d 209, 216 (1983). Neither the Commission, nor any party to the instant proceeding, identified any sound legal basis to allow the Commission to include a portion of the costs of assets not owned or operated by DEC in the provision of electric service to DEC's customers in DEC's approved revenue requirement. The Commission thus erred when it approved the TCA Stipulation because doing so exceeded the authority delegated to it.

EXCEPTION 2

Findings of Fact 41–42 and 69, and the underlying Evidence and Conclusions supporting those findings[1] are unjust, unreasonable, unlawful, and/or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; in excess of the Commission's statutory authority; and/or arbitrary and capricious.

The Commission failed to comply with the statutory constraints imposed on the Commission's authority to engage in performance-based regulation as set forth in N.C.G.S. § 62-133.16 ("PBR Statute"), which enabled the Commission to engage in performance-based regulation ("PBR"), as that term is defined by N.C.G.S. § 62-133.16(a)(7). More specifically, the Commission impermissibly concluded that a 10% reduction in interclass subsidies satisfies N.C.G.S. § 62-133.16(b). Under N.C.G.S. § 62-133.16(b), the Commission may approve a PBR application only if the approved PBR plan minimizes interclass subsidies to the "greatest extent practicable" by the conclusion of the multi-year rate plan ("MYRP") period. Before the introduction of PBR in 2021, the Company routinely requested—and the Commission routinely approved—interclass subsidy reductions of 25%. Even so, in this proceeding—which, along with the Commission's decision *In the Matter of: Application of Duke Energy Progress, LLC for Adjustment of Rates and Charges Applicable to Electrical Service in North Carolina and Performance Based Regulation*,

[1] The Evidence & Conclusions supporting Findings of Fact 41-42 are presented in the Order together with the Evidence & Conclusions supporting Findings of Fact 43-47.

Docket No. E-2, Sub 1300, are the first two electric general rate cases with PBR applications since the advent of PBR in North Carolina—the PBR plan proposed by the Company and approved by the Commission achieves only a 10% reduction in interclass subsidies over the MYRP period.

Given the Commission's historical practice of adjudicating general rate cases with 25% interclass subsidy reductions, the Commission's approval of only a 10% interclass subsidy reduction by the conclusion of the MYRP period, and N.C.G.S. § 62-133.16(b)'s mandate that the Commission reduce interclass subsidies to the greatest extent practicable by the conclusion of the three-year MYRP period, the MYRP approved by the Commission is impermissible as a matter of law.

EXCEPTION 3

Findings of Fact 41–42 and 69, and the underlying Evidence and Conclusions supporting those findings[2] are unjust, unreasonable, unlawful, and/or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; in excess of the Commission's statutory authority; and/or arbitrary and capricious.

The Commission impermissibly concluded that a 10% reduction in interclass subsidies satisfies N.C.G.S. § 62-133.16(b) and further violated N.C.G.S. § 62-133.16(b) by allocating DEC's total revenue requirement among customer classes in a manner that did not comply with the cost causation principle, as that term is

[2] The Evidence & Conclusions supporting Findings of Fact 41-42 are presented in the Order together with the Evidence & Conclusions supporting Findings of Fact 43-47.

defined by N.C.G.S. § 62-133.16(a)(1). Under N.C.G.S. § 62-133.16(b), the Commission may engage in PBR only if, among a few other non-discretionary requirements, (1) its approved PBR plan minimizes interclass subsidies to the "greatest extent practicable" by the conclusion of the MYRP period; and (2) the revenue requirement of the utility applicant is allocated in accordance with the cost causation principle. Before the introduction of PBR in 2021, the Company routinely requested—and the Commission routinely approved—interclass subsidy reductions of 25%. Even so, in this proceeding—which, along with the Commission's decision *In the Matter of: Application of Duke Energy Progress, LLC for Adjustment of Rates and Charges Applicable to Electrical Service in North Carolina and Performance Based Regulation*, Docket No. E-2, Sub 1300, are the first two electric general rate cases with PBR applications since the advent of PBR in North Carolina—the PBR plan proposed by the Company and approved by the Commission achieves only a 10% reduction in interclass subsidies over the MYRP period.

To reach its conclusion, the Commission relied heavily on the testimony of DEC witness Morgan Beveridge. (Order at 145–48). Even so, the Commission failed to adequately explain why witness Beveridge's testimony was credible when (1) witness Beveridge acknowledged that other customer classes have historically subsidized residential ratepayers; and (2) such a subsidy persisted even when DEC previously sought, and the Commission previously approved, a 25% reduction in interclass subsidies before the introduction of the PBR Statute, which requires that any such interclass subsidy be reduced to the "greatest extent practicable" by the conclusion of

the MYRP. § 62-133.16(b). As a result, the Commission failed to adequately explain why it approved DEC's proposed revenue apportionment among customer classes.

EXCEPTION 4

Findings of Fact 65–66 and the underlying Evidence and Conclusions supporting those findings are unjust, unreasonable, unlawful, and/or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; in excess of the Commission's statutory authority; and/or arbitrary and capricious.

The Commission's fuel rider analysis incorrectly applied the PBR statute, which, by its own terms, "shall operate independently, and be considered separately, from riders or other cost recovery mechanisms otherwise allowed by law, unless otherwise incorporated into such plan." N.C.G.S. § 62-133.16(g). The Commission has decided to discontinue use of the equal percentage method for allocating changes in fuel and fuel-related costs—as those are defined by § 62-133.2(a1)—for cost recovery among the different customer classes. From 2012 to 2023, the Commission has allocated such costs among DEC's customers based on an equal percentage increase or decrease methodology. Under the equal percentage methodology, DEC recovers fuel and fuel-related costs from customers "using a uniform percent increase or decrease per rate class such that each rate class will, on average, experience the same average monthly percent increase or decrease as the overall fuel and fuel-related costs change." (Order at 256) (internal citation omitted).

In the Order, the Commission has effectively undone 11 years of precedent to eliminate the equal percentage methodology in favor of a methodology purportedly based on the cost-causation principle. At the hearing, the Public Staff explained that it was advocating for the changed methodology to conform to N.C.G.S. § 62-133.16(b). The Commission credited the Public Staff's testimony when deciding to change the methodology used to allocate fuel and fuel-related costs among customer classes. But N.C.G.S. § 62-133.16—and the cost-causation principle as defined by N.C.G.S. § 62-133.16(a)(1)—do not apply to the fuel rider. In particular, the PBR Statute provides,

> Nothing in this section shall be construed to (i) limit or abrogate the existing rate-making authority of the Commission or (ii) invalidate or void any rates approved by the Commission prior to the effective date of this section. In all respects, the alternative rate-making mechanisms, designs, plans, or settlements shall operate independently, and be considered separately, from riders or other cost recovery mechanisms otherwise allowed by law, unless otherwise incorporated into such plan.

N.C.G.S. § 62-133.16(g). By assuming that the fuel rider needed to comply with N.C.G.S. §§ 62-133.16(a)(1) and (b), the Commission committed a legal error.

EXCEPTION 5

Findings of Fact 65–66 and the underlying Evidence and Conclusions supporting those findings are unjust, unreasonable, unlawful, and/or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; in excess of the Commission's statutory authority; and/or arbitrary and capricious.

First, even if the fuel rider was required to adhere to the cost causation principle, the Commission still erred when it rejected the historically accepted equal percentage methodology in favor of a voltage-differentiated methodology. Unrebutted evidence establishes that elimination of the equal percentage method of allocating fuel and fuel-related costs among customer classes would result in unjust and unreasonable rates for certain classes of non-residential customers. In his direct testimony, CIGFUR III witness Brian Collins explained that many of the costs recovered through the fuel rider are not fuel expenses but "basically capital costs." (Tr. vol. 15 at 973). As witness Collins explained, "To the extent th[o]se [capital] costs are included in the annual fuel adjustment, an equal percentage basis" would be appropriate, and an alternative cost-allocation methodology would result in certain rate classes subsidizing other classes' share of the Company's capital costs. (*Id.* at 973–74).

Second, discontinuation of the equal percentage method for allocating fuel and fuel-related costs recovered through the fuel rider ignores the substantial interclass subsidy that certain classes of non-residential customers are providing other customer classes in base rates.

Thus, the Commission failed to consider witness Collins' testimony, failed to explain why it failed to adequately consider witness Collins' testimony, and approved the Public Staff's recommendation to eliminate the equal percentage methodology without any evidence in the record to demonstrate that such a methodology would not result in undue prejudice, rate shock, or unjust and unreasonable rates for the

certain classes of non-residential customers, particularly in light of the historical and ongoing subsidies that persist in base rates where non-residential customers are largely subsidizing other classes of customers. This is particularly true where, as was the case in the instant proceeding, the Commission approved DEC's proposed revenue apportionment method (1) while also acknowledging that DEC's proposed revenue apportionment method assumes use of the equal percentage methodology for allocating fuel and fuel-related costs; and (2) despite the fact that the record is devoid of evidence showing how a voltage-differentiated method of allocating fuel and fuel-related costs would impact the approved revenue apportionment method.

EXCEPTION 6

The Commission's First Evidentiary Order and Second Evidentiary Order denying the joint motions to strike and the Commission's decision to admit Public Staff witness David Williamson's supplemental direct testimony and exhibits, errata testimony, and corrected exhibits over the objections of CIGFUR III and other parties were unjust, unreasonable, and unwarranted; arbitrary and capricious; an abuse of discretion; and in a manner inconsistent with applicable Commission Rules.

On 19 July 2023, the Public Staff timely filed the direct testimony of witness David Williamson. In witness D. Williamson's pre-filed direct testimony, however, witness D. Williamson announced—without the Public Staff having first sought leave from the Commission or otherwise having sought permission from the Commission—that he would be filing supplemental testimony, "illustrat[ing] the impacts associated

with revenue apportionment and rate design based on the Public Staff's proposed revenue requirement in this proceeding." (Tr. vol. 13 at 42).

On 1 August 2023, the Public Staff filed a letter in these dockets, notifying other parties and the Commission—without having first moved for leave or permission from the Commission—that it would be filing its supplemental testimony "no sooner than the start of the hearing on August 28, 2023."

On 21 August 2023, a Commission staff attorney emailed counsel for all parties for the purpose of scheduling a pre-hearing conference call. A pre-hearing conference call was subsequently held on 23 August 2023. During the pre-hearing conference call, the Commission staff attorney informed counsel for all parties that, among other things, it was the expectation of the Commission that any supplemental pre-filed testimony be filed in advance of the respective witness taking the stand to provide live testimony during the evidentiary hearing in the above-captioned matter.

The evidentiary hearing in this matter was held beginning on 28 August 2023 and concluding on 5 September 2023.

In spite of Commission staff's admonishment to counsel for all parties, as conveyed during the 23 August 2023 pre-hearing conference call, the Public Staff had still not pre-filed D. Williamson's supplemental testimony regarding the issue of revenue apportionment when he took the witness stand to provide live testimony on 31 August 2023. Counsel for CIGFUR III immediately brought this issue to the Presiding Commissioner's attention. (Tr. vol. 13 at 68-76).

On 11 October 2023, the parties filed Proposed Orders and Briefs (POBs) in the above-captioned docket.

On 13 October 2023, 46 days after the expert witness hearing of this matter began and 86 days after intervenor testimony was due to be filed in this proceeding, the Public Staff caused to be filed in these dockets the supplemental testimony and exhibits of witness D. Williamson. On October 20, 2023, 53 days after the expert witness hearing of this matter began and 93 days after intervenor testimony was due to be filed in this proceeding, the Public Staff caused to be filed in these dockets an errata sheet and corrected supplemental exhibits of witness D. Williamson.

In response to the supplemental filings of D. Williamson, CIGFUR III in turn joined a motion to strike on 17 October 2023, followed by a second joint motion to strike on 23 October 2023. By denying these motions and admitting the supplemental and corrected supplemental testimony and exhibits of witness D. Williamson (1) over the repeated and renewed objections of CIGFUR III and other parties; and (2) without granting leave to CIGFUR III to file supplemental testimony rebutting witness D. Williamson's testimony, the Commission deprived CIGFUR III of essential components of its due process rights.

Moreover, Findings of Fact 41-42 and the Evidence & Conclusions in support of those findings contained in the Order are in error due to the Order's reliance upon witness D. Williamson's supplemental testimony, given that such evidence that was not competent and should not have been admitted into the record.

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).

CIGFUR III demanded the opportunity to proffer supplemental testimony to rebut witness D. Williamson's Supplemental Testimony and Exhibits, and was denied the opportunity to do so, constituting an abuse of discretion and reversible error.

CONCLUSION

For the reasons set forth above, the Commission's Order, First Evidentiary Order, and Second Evidentiary Order are unlawful, unjust, unreasonable, and/or unwarranted; in excess of the Commission's statutory authority or jurisdiction; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; arbitrary or capricious; and/or an abuse of discretion. The Order, First Evidentiary Order, and Second Evidentiary Order should therefore be reversed as to the Exceptions set forth herein.

Respectfully submitted this the 13th of February 2024.

WARD AND SMITH, P.A.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing Notice of Appeal and Exceptions of CIGFUR III upon all parties of record by email transmission with the parties' consent.

This the 13th of February 2024.

/s/ Chris Edwards
Christopher S. Edwards