STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-7, SUB 1155

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Duke Energy Carolinas, LLC for Approval of Residential New Construction Program	))))	ORDER DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION: On November 8, 2021, after receiving comments, reply comments, and holding a hearing, the Commission issued an Order Requiring Implementation of Revised RNC Program and Renewal of Offer to Joint Market (RNC Order), in the above-captioned docket. In summary, the RNC Order approved Duke Energy Carolinas, LLC's (DEC's) revised Residential New Construction Program (Revised Program), as a new energy efficiency (EE) program. The Revised Program includes incentives for new residential construction that meets or exceeds the High Efficiency Residential Option (HERO), standards. There are four incentives available under the Revised Program, from which the participating home builder or homebuyer may choose only one. Three of the incentives are for fixed amounts, and the fourth, the HERO-Plus incentive, is based on the home's verified kilowatt-hour (kWh) savings.

The RNC Order included the following Finding of Fact No. 13:

> It has not been clearly shown that the RNC Program as modified by DEC (Revised Program), will result in fuel switching from natural gas to electricity, or that it will promote unfair or destructive competition.

On December 3, 2021, Piedmont Natural Gas Company, Inc. (Piedmont), and Public Service Company of North Carolina, Inc., d/b/a Dominion Energy North Carolina (PSNC, collectively LDCs), filed a motion pursuant to N.C. Gen. Stat. § 62-90 and Commission Rule R1-7 requesting a 30-day extension of time to file notice of appeal and exceptions to the Commission's RNC Order. The Commission granted the LDCs' motion by Order issued on December 7, 2021.

On December 30, 2021, the LDCs filed a Joint Motion for Reconsideration (Joint Motion). In essence, the LDCs contend that in making the above Finding of Fact No. 13 the Commission erroneously shifted the burden of proof to the LDCs and approved the HERO-Plus component of the Revised Program even though DEC failed to meet its burden of proving that the Revised Program will not result in fuel switching. Based on this contention, the LDCs requested that the Commission reconsider its decision and remove the HERO-Plus incentive from the Revised Program.

In support of their contentions, the LDCs stated that DEC filed data about the similar Duke Energy Progress, LLC (DEP) RNC program that had been in operation for several years. The DEP data was filed by DEC as Attachment H to DEC's Revised Program filing. The LDCs noted that the Public Staff described the data in DEC's Attachment H as "inconclusive and nearly impossible to verify." (Public Staff Comments, at 8), and that the Commission stated that "the DEP data is not optimal," but "in the absence of better data the Commission must use the evidence presented." (RNC Order, at 27). According to the LDCs, "When a party has the affirmative burden of proof, as DEC did here, then the 'absence' of evidence cannot suffice to satisfy that burden." (Joint Motion, at 7).

Moreover, the LDCs quoted the following conclusion by the Commission:

> [t]hat DEC presented prima facie evidence that the Revised Program is not likely to promote unfair or destructive competition between DEC and the LDCs, and that the LDCs did not come forward with sufficient evidence that shows otherwise.

RNC Order, at 31.

According to the LDCs, this statement directly contradicts any notion that DEC had the burden of proving the lack of unfair or destructive competition. Finally, the LDCs reiterated some of the same arguments that they made in the prior proceedings, all of which were considered by the Commission in the prior proceedings.

On January 24, 2022, DEC filed a response to the Joint Motion. In summary, DEC contended that the sentences from the RNC Order cited by the LDCs do not support the LDCs' argument that the Commission shifted the burden of proof to the LDCs. DEC stated that when the sentences are read in context they show that the Commission carefully considered the LDCs' evidence and arguments but did not find them sufficient to overcome DEC's evidence showing that the Revised Program did not promote unfair or destructive competition. Rather, DEC contended that after reviewing the relevant evidence in DEC's Revised Program application, the testimony that DEC presented at the January 27, 2020 hearing, the comments of the parties, and the record as a whole, the Commission determined that DEC had submitted prima facie evidence, which the LDCs were unable to effectively rebut or overcome. According to DEC, this process of weighing the evidence is precisely what the Commission is required to do.

In addition, DEC took issue with the LDCs' characterization of the Public Staff's comments about Attachment H. DEC stated that the Public Staff does not appear to refer to the whole of Attachment H as "inconclusive and nearly impossible to verify." Rather, DEC cited these further comments of the Public Staff on Attachment H:

> This information cites data on the number of homes in particular subdivisions where the installation or selection of natural gas service might have been adversely impacted by the DEP Program. . . . The Public Staff is not able to draw any discernable "causal effect" or determine whether the

> DEP Program hindered the extension of natural gas utility service or in cases where gas service was already available, to forgo building homes that included natural gas appliances, based on this limited information.

Public Staff Comments, at 8-9.

According to DEC, these comments appear to specifically refer to a subset of information in Attachment H, Response 6, that was provided by the LDCs, not by DEC, to show the effect, if any, of the DEP RNC Program on past fuel choices in new residential construction in DEP's service territory.

Finally, DEC recounted the additional evidence presented by its witnesses about the design of the RNC program, DEC's discussions with the LDCs, DEC's modifications to the program based on the LDCs' concerns about the HERO-Plus incentive, and the LDCs' legal arguments during the proceedings. DEC maintained that the Commission considered all of this in arriving at its conclusion that DEC had carried its burden of proving that the Revised Program will not result in fuel switching. As a result, DEC requested that the Commission issue an order denying the LDCs' Joint Motion.

On February 1, 2022, North Carolina Sustainable Energy Association (NCSEA), filed a letter stating that NCSEA reviewed both the Joint Motion for Reconsideration and DEC's Response, and that NCSEA concurs with DEC's analysis and conclusion that there are insufficient grounds to justify reconsideration of the RNC Order.

DISCUSSION

Pursuant to N.C. Gen. Stat. § 62-80:

> The Commission may at any time upon notice to the public utility and to the other parties of record affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it. Any order rescinding, altering or amending a prior order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original orders or decisions.

The Commission's decision to rescind, alter or amend an order upon reconsideration under N.C.G.S. § 62-80 is within the Commission's discretion. State ex rel. Utilities Comm'n v. MCI Telecommunications Corp., 132 N.C. App. 625, 630, 514 S.E.2d 276, 280 (1999). However, the Commission cannot arbitrarily or capriciously rescind, alter or amend a prior order. Rather, there must be some change in circumstances or a misapprehension or disregard of a fact that provides a basis for the Commission to rescind, alter or amend a prior order. State ex rel. Utilities Comm'n v. North Carolina Gas Service, 128 N.C. App. 288, 293-294, 494 S.E.2d 621, 626, rev. denied, 348 N.C. 78, 505 S.E.2d 886 (1998).

Under Commission Rule R8-68(e), in pertinent part:

> In determining whether to approve in whole or in part a new measure or program or changes to an existing measure or program, the Commission may consider any information it determines to be relevant, including any of the following issues.

Among the issues listed in the rule is whether the proposed program would promote unfair or destructive competition. In the context of the current case, the LDCs framed the issue as one of fuel switching. In the present motion, the LDCs contention that there was an "absence" of evidence presented by DEC on the fuel switching issue is inapposite, as it is based on a very small portion of the Commission's discussion of the data in Attachment H. A better understanding of the Commission's assessment of the Attachment H data is provided by the following discussion:

> The electric versus natural gas data provided by DEC is somewhat helpful. The data includes three tables, each accompanied by a pie chart. The first table shows the space heating fuel chosen in whole house incentive (WHI) homes under the HERO and HERO Plus choices. According to the tables, for each of four years - 2016 through 2019 - the number of homes that installed electric space heating is listed alongside the number of homes that installed gas space heating. The next two columns show the percentage of homes choosing electric space heating alongside the percentage of homes choosing gas space heating. The bottom line of the table shows the raw averages - 48.9% electric heated homes and 51.1% gas heated homes – based on the four year totals for each choice. Finally, the pie chart beside the table illustrates the percentages. The second table and pie chart breaks out the above statistics for WHI homes under the HERO Plus program. The result shown is 51.9% electric heated homes and 48.1% gas heated homes. The third table shows the same for WHI homes under the HERO program, with the result shown as 35.6% electric heated homes and 64.4% gas heated homes. (Id., Response 4) As previously discussed, the Public Staff expressed some doubt about the data in Attachment H, stating that "this data is inconclusive and nearly impossible to verify." Public Staff Comments, at 8. The Commission agrees that the DEP data is not optimal. For example, it would be more helpful to have data showing fuel choices by residential housing developers prior to the advent of the RNC incentives, thus enabling a before-and-after comparison. However, in the absence of better data the Commission must use the evidence presented.

RNC Order, at 27.

The evidence on which the Commission bases its findings and conclusions does not have to be "optimal." Rather, the Commission's orders must be based on substantial evidence. N.C. Gen. Stat. § 62-65; RNC Order, at 24. In the present case, the Commission stated that the burden of proof to show that the Revised Program would not promote unfair or destructive competition was on DEC. (RNC Order, at 25). DEC

presented substantial evidence on that issue, and the LDCs presented evidence that challenged DEC's evidence. Therefore, the Commission was required to weigh all the evidence and make its determination. The Commission carefully and thoroughly weighed the evidence and determined that on balance the evidence did not lead to the conclusion that the Revised RNC would cause fuel switching.

CONCLUSION

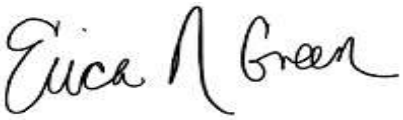
The LDCs have not shown a change of circumstances, any new fact, or a misapprehension or disregard of a fact or legal standard by the Commission, Further, they have not shown that the Commission shifted the burden of proof to them. As a result, the Commission finds and concludes that the LDCs have not shown a basis under N.C.G.S. § 62-80 for the Commission to rescind, alter or amend the RNC Order. Therefore, the LDCs' motion should be denied.

IT IS, THEREFORE, ORDERED that the LDCs' Motion for Reconsideration of the RNC Order shall be, and is hereby, denied.

ISSUED BY ORDER OF THE COMMISSION.

This the 29th day of April, 2022.

NORTH CAROLINA UTILITIES COMMISSION



Erica N. Green, Deputy Clerk

Chair Charlotte A. Mitchell and Commissioners ToNola D. Brown-Bland and Kimberly W. Duffley dissent.

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Commissioner ToNola D. Brown-Bland, joined by Chair Charlotte A. Mitchell and Commissioner Kimberly W. Duffley, dissenting:

I respectfully dissent from the decision denying the motion for reconsideration. In my opinion, it was inappropriate for the Commission to require DEC to implement the Revised Residential New Construction Program (Revised Program) given that, on June 7, 2019, DEC filed a motion requesting that the Commission allow DEC to withdraw its RNC Program application based on discussions with the LDCs regarding their concerns as to the competitive consequences of the proposed RNC Program design. Once the Commission's initial questions were answered and DEC's reasons for requesting to withdraw its application were made apparent and once it was also made clear that the withdrawal request was not motivated by illicit purpose, this matter should have resolved with the granting of DEC's motion to withdraw its application for approval of the (later revised) program. Instead, the motion to withdraw was, in effect, disregarded by the Commission, and DEC was compelled to move forward with a voluntary, non-mandatory program in opposition to the Company's previous business decision.

Further, with respect to the argument made by the LDCs in the Joint Motion for Reconsideration, although the Commission's RNC Order correctly recited that DEC, as the applicant, had the burden of proof to show that the Revised Program would not promote unfair or destructive competition, I agree with the movant LDCs that the Commission did not hold DEC to that burden and rather, inappropriately shifted the burden to the LDCs.

In determining whether to approve in whole or in part the application for the Revised Program, the Commission had authority to consider any information it deemed to be relevant, including the criteria set forth in Commission Rule R8-68(e). To approve a program in whole or in part the Commission is to review the evidence of record and determine whether the weight of the competent evidence supports approval (or approval in part) under the criteria set forth in R8-68(e). At all times during the application process the burden is on the applicant to make that demonstration to the Commission. Among the express criteria that may be considered under R8-68(e) is whether a proposed program promotes unfair or destructive competition.

The RNC Order stated that the "burden of proving that the Revised [RNC] Program will not promote unfair or destructive competition between DEC and the LDCs is on DEC." (RNC Order, at 25). However, as pointed out by the movant LDCs, Finding of Fact 13 in the RNC Order and discussion thereof suggests that the Commission effectively held the LDCs to the burden of proving that the HERO-Plus component of the RNC Program would promote unfair or destructive competition. Specifically, the RNC Order provides "that DEC presented prima facie evidence that the Revised Program is not likely to promote unfair or destructive competition between DEC and the LDCs, and that the LDCs did not come forward with sufficient evidence that shows otherwise." (RNC Order, at 31). I agree with the movant LDCs that this is inherently inconsistent. While DEC presented prima facie evidence, that alone does not dictate a decision in the applicant's favor. The

Commission's analysis does not end there. Instead, the Commission, in its discretion, is to determine the sufficiency of the evidence brought forth by DEC in support of its application. If DEC has ultimately failed to prove that the proposed program will not promote unfair and destructive competition, the Commission should deny the application. The Commission should not look to the LDCs to prove actual competitive harm as a means of helping the applicant with its burden. Thus, at no point during in its assessment of the application for the Revised Program should the Commission have considered that anyone other than DEC was required to prove or to persuade the Commission that the proposed HERO-Plus component of the RNC Program would not promote unfair or destructive competition. The RNC Order suggests that the Commission did just that.

I am persuaded by the LDCs that a kWh savings incentive offered to home builders prior to their having made a decision to build homes that will either accommodate gas or electric energy use for space and water heating de-neutralizes the choice and essentially pays the home builder to choose electric over gas. That such an incentive could possibly promote unfair or destructive competition is self-evident from the structure of the proposed incentive. Based on the record as a whole, I conclude that DEC could not establish either the absence of competitive harm or that the benefits of the HERO-Plus element of its program on balance outweigh the unfair harmful effects likely to result in the competition for fuel or energy choice in the residential market.

Approval of the Revised Program based on the LDCs' failure to present more,[1] rather than on DEC's presentation of competent evidence supporting its position, was an improper exercise of the Commission's discretion. While, as suggested by the Public Staff, it is difficult for either DEC or the LDCs to establish actual harm or no competitive harm even when available data from a similar program implemented by DEP is considered, that difficulty should be construed against DEC because it has the burden on that issue.

Therefore, in light of the foregoing, I would have approved the Revised Program, in part, by approving all aspects of the program except for the HERO-Plus component. For these reasons, as well as others more fully discussed in the dissent from the RNC Order, I would grant the motion to reconsider.

/s/ ToNola D. Brown-Bland
Commissioner ToNola D. Brown-Bland

[1] I note that at the time of the hearing the LDCs were not intervening parties in this proceeding and the Commission's Order Scheduling Hearing directed DEC to make available such DEC and DEP personnel who would be prepared to answer questions on topics identified by the Commission. The Commission's Order not only did not seek to obtain information from the LDCs but also expressly provided that by scheduling the hearing the Commission was not requesting sworn testimony and would not allow any cross-examination of "persons" (as opposed to witnesses) appearing to answer the Commission's questions, including questions on both DEC's application and its motion to withdraw the application. The LDCs volunteered to appear to help the Commission obtain the answers it was seeking. The Commission did not require or expect to receive evidence or information from the LDCs.