

**BEFORE THE NORTH CAROLINA UTILITIES COMMISSION**

**DOCKET NO. E-7, SUB 1304**

In the Matter of  
Application of Duke Energy Carolinas, )  
LLC, Relating to Fuel and Fuel-Related )  
Charge Adjustments for Electric Utilities )  
Pursuant to N.C. Gen. Stat. § 62-133.2 )  
and Commission Rule R8-55 )  
)

**JOINT TESTIMONY OF  
JAMES S. MCLAWHORN AND  
MICHELLE BOSWELL  
PUBLIC STAFF – NORTH  
CAROLINA UTILITIES  
COMMISSION**

**MAY 23, 2024**

1 **Q. Mr. McLawhorn, please state your name, business address, and**  
2 **current position.**

3 A. My name is James S. McLawhorn. My business address is 430 North  
4 Salisbury Street, Dobbs Building, Raleigh, North Carolina. I am the  
5 Director of the Energy Division of the Public Staff – North Carolina  
6 Utilities Commission (Public Staff).

7 **Q. Briefly state your qualifications and experience.**

8 A. My qualifications and experience are attached as Appendix A.

9 **Q. Ms. Boswell, please state your name, business address, and**  
10 **current position.**

11 A. My name is Michelle Boswell. My business address is 430 North  
12 Salisbury Street, Dobbs Building, Raleigh, North Carolina. I am the  
13 Director of Accounting of the Public Staff.

14 **Q. Briefly state your qualifications and experience.**

15 A. My qualifications and experience are attached as Appendix B.

16 **Q. What is the mission of the Public Staff?**

17 A. The Public Staff represents the concerns of the using and consuming  
18 public in all public utility matters that come before the North Carolina  
19 Utilities Commission (Commission). Pursuant to N.C. Gen. Stat. §  
20 62-15(d), it is the Public Staff's duty and responsibility to review,  
21 investigate, and make appropriate recommendations to the

1 Commission with respect to the following utility matters: (1) retail  
2 rates charged, service furnished, and complaints filed, regardless of  
3 retail customer class; (2) applications for certificates of public  
4 convenience and necessity; (3) transfers of franchises, mergers,  
5 consolidations, and combinations of public utilities; and (4) contracts  
6 of public utilities with affiliates or subsidiaries. The Public Staff is also  
7 responsible for appearing before State and federal courts and  
8 agencies in matters affecting public utility service.

9 **Q. What is the purpose of your direct testimony in this**  
10 **proceeding?**

11 A. The purpose of our direct testimony is to respond to the supplemental  
12 testimony of Duke Energy Carolinas, LLC (DEC) filed by witness  
13 Sigourney Clark on May 8, 2024. Specifically, we address DEC's  
14 proposal to alter the collection of 2022 test period fuel expenses from  
15 DEC's prior fuel proceeding in Docket No. E-7, Sub 1282 (Sub 1282).

16 **Q. Are you providing any exhibits with your testimony?**

17 A. No.

18 **I. Summary of Testimony**

19 **Q. Please provide a summary of your testimony.**

20 A. Our testimony discusses the Public Staff's opposition to DEC's  
21 request to true-up its recovery of the Experience Modification Factor

1 (EMF), which was approved by the Commission in Sub 1282. The  
2 EMF is a true-up allowed by law. To true-up the true-up as requested  
3 by DEC would: (1) redefine DEC's test period; (2) engage in what  
4 our legal counsel has advised us would be retroactive ratemaking;  
5 and (3) reopen the Agreement and Stipulation of Partial Settlement  
6 entered into between DEC and the Public Staff on May 31, 2023. In  
7 addition, DEC's request is neither supported by the fuel statute nor  
8 by the Commission in its Order dated August 23, 2023, in Sub 1282.

9 **Q. What are fuel and fuel-related costs?**

10 A. As defined by N.C. Gen. Stat. § 62-133.2, fuel and fuel-related costs  
11 (FFRC) are costs an electric utility incurs to provide electricity to its  
12 customers. This includes the cost of fuel burned in its power plants,  
13 the cost of fuel transportation to its power plants, the cost of certain  
14 environmental reagents used to treat emissions at its power plants,  
15 certain purchased power costs including transmission-related  
16 delivery costs, and gains and losses of the sale of fuel or fuel-related  
17 byproducts.

18 **Q. How does DEC recover FFRC?**

19 A. FFRC is recovered in three ways. First, pursuant to N.C.G.S. § 62-  
20 133, a reasonable base fuel component of operating expenses is  
21 fixed in rates as part of the Commission's final order in a general rate

1 case proceeding. This component remains unchanged in base rates  
2 until the next general rate case order.

3 Second, a utility forecasts their fuel costs over the next fuel year and  
4 recovers the incremental amount of this anticipated expense, over  
5 and above what is already included in the base fuel component  
6 discussed above, from ratepayers. The combination of the base fuel  
7 component and this incremental amount is referred to as the  
8 prospective rate.

9 Third, N.C.G.S. § 62-133.2 allows for the Commission to approve an  
10 annual increment or decrement to the base fuel component<sup>1</sup>  
11 established in the electric utility's most recent general rate case to  
12 reflect actual changes in FFRC, including the experienced over- or  
13 under-recovery of reasonable FFRC prudently incurred during the  
14 test period for the proceeding. Thus, the utility is allowed to compare  
15 the forecast to what actually transpired, and then set rates to recover  
16 that difference. Hence the Public's Staff referring to this as a "true-  
17 up." This statute refers to this component as the "experience  
18 modification factor" (EMF).

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<sup>1</sup> Fuel is the largest single variable component of electric rates, and its cost can be volatile, both of which led the General Assembly to enact the first fuel adjustment process more than 40 years ago.

1 **Q. Please discuss the true-up further.**

2 A. Regarding the EMF true-up, N.C.G.S. § 62-133.2 (d) states in part  
3 (emphasis added):

4 ... The Commission shall incorporate in its cost of fuel and  
5 fuel-related costs determination under this subsection the  
6 experienced over-recovery or under-recovery of reasonable  
7 costs of fuel and fuel-related costs prudently **incurred during**  
8 **the test period**, based upon the prudent standards set  
9 pursuant to subsection (d1) of this section, in fixing an  
10 increment or decrement rider. Upon request of the electric  
11 public utility, the Commission shall also incorporate in this  
12 determination the experienced over-recovery or under-  
13 recovery of costs of fuel and fuel-related costs through the  
14 date that is 30 calendar days prior to the date of the hearing,  
15 provided that the reasonableness and prudence of these  
16 costs shall be subject to review in the utility's next annual  
17 hearing pursuant to this section. The Commission shall use  
18 deferral accounting, and consecutive test periods, in  
19 complying with this subsection, and the over-recovery or  
20 under-recovery portion of the increment or decrement shall be  
21 **reflected in rates for 12 months**, notwithstanding any  
22 changes in the base fuel cost in a general rate case...

23 Commission Rule R8-55, which implements N.C.G.S. § 62-133.2,  
24 outlines how the annual FFRC hearings are to be conducted. R8-55  
25 states in part that an EMF may be used to modify FFRC to reflect the  
26 difference between reasonable and prudently incurred costs and the  
27 fuel-related revenues realized during the test period through the use  
28 of an increment or decrement rider that will remain in effect for a fixed  
29 12-month period following establishment.

1 **Q. Please explain the phrase “test period.”**

2 A. A test period, as defined by R8-55, is a 12-month period preceding  
3 the filing of an electric utility’s annual FFRC adjustment. Specifically  
4 for DEC, it is defined to be the calendar year, or in the case of the  
5 instant proceeding, January 1, 2023, through December 31, 2023.

6 **Q. Are electric utilities allowed to include costs outside of the 12-  
7 month test period as part of their annual FFRC adjustment?**

8 A. Yes. Per N.C.G.S. § 62-133.2 (d), the Commission may allow, at the  
9 utility’s request, the incorporation of experienced over- or under-  
10 recovery of fuel-related costs through the date that is 30 calendar  
11 days prior to the date of the hearing, subject to review for  
12 reasonableness and prudence in the utility’s next annual FFRC  
13 adjustment proceeding.

14 **Q. Does allowance of these costs up to 30 calendar days before  
15 the hearing redefine the test period in a proceeding?**

16 A. No. The FFRC adjustment proceeding test period is always a 12-  
17 month period which in DEC’s case is the calendar year. The updated  
18 costs described above will be part of the following year’s test period.  
19 That does not change regardless of the utility’s decision to update its  
20 FFRC beyond the test period. For example, in the instant proceeding,  
21 as described in witness Clark’s supplemental testimony filed on May  
22 8, 2024, DEC chose to update three months of cost data (January,

1 February, and March of 2024). While those costs can be included in  
2 this proceeding, they will be audited in DEC's next FFRC proceeding,  
3 keeping them properly within the test period (January 2024 through  
4 December 2024) to be used in the next rider.

5 **Q. Why do you say that DEC is attempting to redefine the test**  
6 **period in this proceeding?**

7 A. As we stated before, the test period in this proceeding is January 1,  
8 2023, to December 31, 2023. Only FFRC incurred during that period  
9 are eligible for review and consideration in an EMF in this  
10 proceeding.<sup>2</sup>

11 DEC, through the May 8, 2024, supplemental testimony of Witness  
12 Clark, is seeking to *again* true-up the cost recovery for FFRC  
13 incurred during the test period of January 1, 2022, to December 31,  
14 2022, from Sub 1282. The law provides for a one-time true-up of  
15 actual FFRC incurred via the EMF mechanism. DEC is requesting a  
16 "third bite of the apple"<sup>3</sup> so to speak. And in fact, on page 6, lines 22-  
17 23 of her supplemental testimony, DEC witness Clark states that  
18 DEC may seek a "fourth bite of the apple" if the Company finds it has

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<sup>2</sup> With the exception of the update that is allowed by statute, but which remains part of the 2025 test period.

<sup>3</sup> The first bite was the prospective forecast in Docket No. E-7, Sub 1263; the second bite was the EMF true-up from Docket No. E-7, Sub 1282; and the attempted third bite is the May 8, 2024, supplemental testimony filed in this docket.



1 further under-recovered in next year's case, and presumably these  
2 "bites" could apply to future cases and thus go on in perpetuity.

3 **Q. By providing for a true-up via the EMF do you believe that the**  
4 **statute provides for electric utilities to recover the exact amount**  
5 **of their FFRC?**

6 A. No. There is always the possibility of some over- or under-recovery  
7 since class usage cannot be known with complete accuracy. General  
8 Statute § 62-133.2, and Rule R8-55 implementing it, provides for a  
9 12-month test period of costs followed by one 12-month rider to  
10 reflect those costs. There is no mention of a full recovery of every  
11 dollar of costs. What DEC is attempting to do in its supplemental  
12 testimony is what our counsel has advised us is not permitted and  
13 essentially constitutes retroactive ratemaking.

14 **Q. What do you mean by retroactive ratemaking?**

15 A. Based on advice of counsel, we define retroactive ratemaking as  
16 seeking to go back and change rates approved by the Commission  
17 after the fact. In a rate proceeding, the Commission approves a  
18 reasonable level of prudent costs for various cost categories for  
19 recovery through rates. These rates are fixed until the next such  
20 proceeding.

21 If a utility is not earning its full rate of return, it has the ability to file a  
22 request with the Commission to adjust its rates going forward. Just

1 as the Commission cannot seek to recoup earnings from a utility that  
2 exceeds its Commission-approved rate of return during a particular  
3 period of time,<sup>4</sup> the utility cannot seek to recoup earnings it did not  
4 realize by charging rates after the fact for revenues it failed to collect.

5 Costs fluctuate in any given year after rates are set in a rate case. If  
6 the utility were to be allowed to seek to recover every dollar of any  
7 fluctuations of a particular cost, then it would only be appropriate to  
8 re-open the last general rate case and look at the actual costs  
9 incurred for all costs and compare them to costs that were used to  
10 set rates, including refunding to ratepayers when a cost decreases  
11 from the amount approved in the last proceeding. By way of an  
12 example, assume the Commission set a level for the ongoing cost of  
13 labor based on a utility's labor costs as presented in the general rate  
14 case, and after the new rates became effective, the utility then chose  
15 to proceed with layoffs as part of a company reorganization. Under  
16 the interpretation advanced by DEC, the ongoing level of costs for  
17 labor could be reassessed by the Commission, and the  
18 overcollection refunded to ratepayers.

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<sup>4</sup> Except as part of a multi-year performance based rate case request filed by the Company.

1 **Q. Does N.C.G.S. § 62-133.2 allow for single-issue ratemaking**  
2 **through the EMF true-up?**

3 A. Based on the advice of our counsel, historically there was no true-up  
4 for over- and under-recoveries. The General Assembly in 1987  
5 enacted very specific parameters and only allows the EMF true-up  
6 to be a one-time, 12-month rider based on the immediately preceding  
7 test period, which is echoed by the Commission’s Rule R8-55.

8 **Q. Previously, you referenced the Agreement and Stipulation of**  
9 **Partial Settlement entered into between DEC and the Public**  
10 **Staff on May 31, 2023, and approved by the Commission by**  
11 **order dated August 23, 2023, in Sub 1282. Please comment**  
12 **further.**

13 A. In Sub 1282, DEC experienced a \$998 million under-recovery (NC  
14 retail) for the 2023 test period, which covered January 1, 2022,  
15 through December 31, 2022. In its original filing, DEC proposed to  
16 recover that entire amount over the following 12-month billing period<sup>5</sup>  
17 as the statute allows.

18 During the course of the Public Staff’s investigation, there were  
19 discussions with DEC regarding potential mitigation strategies,  
20 including the possibility of extending the recovery period beyond 12-  
21 months. DEC referenced the potential for “serious detrimental

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<sup>5</sup> The next 12-month billing period was September 1, 2023 – August 31, 2024.

1 impacts to the Company's credit rating" and stated that it must  
2 conclude all current fuel under-recovery "by the end of calendar year  
3 2024 to maintain financial health"<sup>6</sup>, and offered a 4-month extension  
4 of the EMF collection period, including 4% annual interest during the  
5 extension period.<sup>7</sup> The Stipulation also provided for use of DEC's  
6 updated April 2023 Spring forecast to set the prospective billing  
7 period component of the fuel rate. The Stipulation did not allow for  
8 the recovery of any under-collected amounts or refund any over-  
9 collected amounts.

10 **Q. Why do you contend that DEC is attempting to reopen the 2023**  
11 **settlement and stipulation in this proceeding?**

12 A. The Stipulation was for the sole purpose of resolving the EMF  
13 component of rates for DEC retail customers and thereby achieving  
14 the full and final resolution of DEC's 2022 fuel cost recovery.  
15 Nowhere in the Stipulation did the parties mention the possibility of a  
16 third, fourth, or more attempts to recover the incurred FFRC from a  
17 past proceeding. DEC did not ask to amend the Stipulation and  
18 unilaterally ignored the agreement in its supplemental filing in an

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<sup>6</sup> Agreement and Stipulation of Partial Settlement filed May 31, 2023, in Docket No. E-7, Sub 1282 (Stipulation), paragraph 12.

<sup>7</sup> Interest is not contemplated on EMF under-collections, but because DEC voluntarily offered to extend their collection period by four months, the Stipulation provided for interest on the extended period collections. In this case, the interest amount to be collected from customers is \$6.656 million.

1 attempt to do what we have been advised by counsel is not allowed.

2 This is a breach of the Stipulation between DEC and the Public Staff.

3 **Q. Is this the first time an electric utility has sought recovery of**  
4 **costs after the close of a FFRC proceeding?**

5 A. Mr. McLawhorn has been a member of the Public Staff's Energy  
6 Division (or its predecessor) for over 35 years, and Ms. Boswell has  
7 been a member of the Public Staff Accounting Division for  
8 approximately 24 years. This is the first time that we are aware of an  
9 electric utility attempting to recover an under-recovered FFRC  
10 recovery beyond an initial EMF rider and outside a settlement.

11 **Q. Do you have any additional concerns regarding the Company's**  
12 **request to recover the calculated under-recovered amount?**

13 A. Yes. We are reluctant to address our concerns on the merits because  
14 we do not believe DEC's proposal is allowed and therefore the merits  
15 need not be reached. Nevertheless, we address a few of the merits  
16 out of an abundance of caution. First, the Company is seeking  
17 recovery of approximately \$8 million, which includes amounts for  
18 periods from September 1, 2023, through March 31, 2024. If an  
19 additional true-up of the Sub 1282 EMF is considered, logically it  
20 should only include amounts from a new test period since the annual  
21 fuel rider review on EMF is concluded by the EMF period.

1           Second, the Company is seeking a collection based upon a partial  
2           period for which it states the causation was weather-related. It is  
3           inappropriate to include a request based on partial data for which the  
4           results could change by the end of the period.

5   **Q.    What is your recommendation to the Commission?**

6   A.    We recommend that the Commission reject DEC's attempt to take a  
7           third bite of the apple, reject DEC's proposed new EMF, reject  
8           alteration or recovery of the 2023 EMF amount beyond the currently  
9           stipulated recovery period, and reaffirm that for this and future FFRC  
10          annual proceedings for electric utilities within its jurisdiction that  
11          recovery of, or refund of, test period fuel expenses is limited to one  
12          single true-up.

13 **Q.    Does this conclude your testimony?**

14 A.    Yes, it does.



**QUALIFICATIONS AND EXPERIENCE**

**JAMES S. MCLAWHORN**

I graduated with honors from North Carolina State University with a Bachelor of Science Degree in Industrial Engineering in May of 1984. I received the Master of Science Degree in Management with a finance concentration from North Carolina State University in December of 1991. While an undergraduate, I was selected for membership in both Tau Beta Pi and Alpha Pi Mu engineering honor societies.

I began my employment with the Electric Division of the Public Staff in November of 1988. I became Director of the Electric Division in October of 2006, and, with the merger of the Electric and Natural Gas Divisions, I assumed my present position as Director of the Energy Division in August of 2020. It is my responsibility to supervise the review of, and make policy recommendations to Public Staff senior management on, all electric and natural gas utility matters that come before the Commission.

I have testified previously before the Commission in numerous proceedings.





**QUALIFICATIONS AND EXPERIENCE**

**MICHELLE BOSWELL**

I graduated from North Carolina State University in 2000 with a Bachelor of Science degree in Accounting. I am a Certified Public Accountant.

As Director of the Accounting Division of the Public Staff, I am responsible for the performance, supervision, and management of the following activities: (1) the examination and analysis of testimony, exhibits, books and records, and other data presented by utilities and other parties under the jurisdiction of the Commission or involved in Commission proceedings; and (2) the preparation and presentation to the Commission of testimony, exhibits, and other documents in those proceedings. I have been employed by the Public Staff since September 2000.

I have performed numerous audits and/or presented testimony and exhibits before the Commission regarding a wide range of electric, natural gas, and water topics. I have performed audits and/or presented testimony in multiple REPS, fuel, DSM/EE, JAAR, and CPRE cost recovery rider proceedings; 2008 Compliance Reports for North Carolina Municipal Power Agency 1, North Carolina Eastern Municipal Power Agency, GreenCo Solutions, Inc., and EnergyUnited Electric Membership Corporation; four recent Piedmont Natural Gas (Piedmont) rate cases; the 2016 rate case of Public Service Company of North Carolina; the 2012 and 2019 rate cases for Dominion Energy North Carolina (DENC, formerly Dominion North Carolina Power); the 2013, 2017, 2019, and 2023 DEP rate cases; the 2017, 2019, and 2024 DEC rate cases; multiple fuel; several Piedmont, NUI Utilities, Inc.



(NUI), and Toccoa annual gas cost reviews; the merger of Piedmont and NUI; and the merger of Piedmont and North Carolina Natural Gas, merger of CWS and Southwest, and many water and sewer rate cases.



**CERTIFICATE OF SERVICE**

I certify that I have served a copy of the foregoing on all parties of record or to the attorney of record of such party in accordance with Commission Rule R1-39, by United States mail, postage prepaid, first class; by hand delivery; or by means of facsimile or electronic delivery upon agreement of the receiving party.

This the 23<sup>rd</sup> day of May, 2024.

Electronically submitted  
/s/William S. F. Freeman