

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. E-2, SUB 1300

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

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| In the Matter of | |
| Application by Duke Energy Progress, LLC, for |) ORDER DENYING MOTION |
| Adjustment of Rates and Charges Applicable to |) FOR RECONSIDERATION |
| Electric Utility Service in North Carolina |) |

BY THE COMMISSION: On October 6, 2022, Duke Energy Progress, LLC (DEP), filed its Application to Adjust Retail Rates and Charges for Performance-Based Regulation, and Request for an Accounting Order (the Application) in the above-captioned docket.

On March 27, 2023, various intervenors filed testimony on DEP's Application.

On May 4, 2023, a hearing for the purpose of receiving expert witness testimony on the Application commenced.

On June 9, 2023, various intervenors filed post-hearing filings.

On July 24, 2023, the hearing for the purpose of receiving expert witness testimony on the Application was reconvened.

On August 18, 2023, the Commission issued an Order Accepting Stipulations, Granting Partial Rate Increase, and Requiring Customer Notice in the above-captioned docket authorizing DEP to adjust its rates and charges for retail electric service in North Carolina (Rate Case Order).

On October 16, 2023, the Carolina Industrial Group for Fair Utility Rates II (CIGFUR) filed a Motion for Reconsideration requesting that the Commission reconsider its Findings of Fact Nos. 74-75 and Evidence and Conclusions for Findings of Fact Nos. 74-75 in the Rate Case Order.

On October 20, 2023, the Public Staff filed a response to CIGFUR's Motion for Reconsideration.

STANDARD OF REVIEW

As provided in N.C. Gen. Stat. § 62-80, "[t]he 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.” 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, 293-94, 494 S.E.2d 621, 626, *rev. denied*, 348 N.C. 78, 505 S.E.2d 886 (1998).

SUMMARY OF THE PARTIES’ POSITIONS

CIGFUR’s Motion for Reconsideration

CIGFUR’s motion requests that the Commission reconsider its determinations in the Rate Case Order that the equal percentage method of allocating fuel and fuel related costs does not follow the cost causation principle and that the use of this method should be discontinued for future fuel rider proceedings.

CIGFUR provides three bases for its argument that the Commission should reconsider its decision on this issue. CIGFUR first argues that the Commission disregarded applicable law by not addressing CIGFUR’s post-hearing argument that subsection (g) of N.C.G.S. § 62-113.16 (the PBR Statute) does not apply to the fuel rider.

CIGFUR’s second basis for reconsideration is that the Commission misapprehended the evidence in the record because, while the Rate Case Order correctly cites the language of the PBR Statute, and Public Staff witness Lucas’s direct prefiled testimony correctly cites the PBR Statute, on cross examination witness Lucas incorrectly stated a portion of the PBR Statute pertinent to the issue of application of the equal percentage method of cost allocation of fuel and fuel related costs.

CIGFUR’s third and final basis for reconsideration is that the Commission should consider new evidence. The new evidence CIGFUR cites is cross examination testimony of Public Staff witnesses McLawhorn and Lucas in Docket No. E-7, Sub 1276, Application of Duke Energy Carolinas, LLC, for Adjustment of Rates and Charges Applicable to Electric Service in North Carolina and Performance-Based Regulation (DEC Rate Case). Witness McLawhorn testified at the evidentiary hearing in that docket that witness Lucas misspoke at the evidentiary hearing in this docket by using the word “eliminate” when referring to interclass cross subsidies in fuel rates.

Public Staff Response

The Public Staff filed in opposition to CIGFUR’s motion and asserts, first, that the Commission did not disregard applicable law. The Public Staff argues that CIGFUR’s argument that subsection (g) of the PBR Statute does not apply to the fuel rider ignores the fact that the base fuel rate is established in a general rate case. Further, the Public Staff

points out that under N.C.G.S. § 62-133.2(f), the statute that governs the fuel rider proceeding, the Commission has the discretion to determine the appropriate cost allocation methodology of fuel rates in a rate case.

Regarding CIGFUR's second basis for reconsideration, the assertion that the Commission misapprehended the evidence, the Public Staff argues that "misstatements or misinterpretations of the law do not alter the law as written or otherwise bind the Commission" and that the Commission acted within its discretion and relied on the entirety of the record in making its determination on the equal percentage cost allocation method.

Finally, the Public Staff argues that CIGFUR's assertion that the Commission should reconsider its decision based on new evidence in the form of testimony from Public Staff witnesses McLawhorn and Lucas in the DEC Rate Case is without merit because "there is nothing in the [Rate Case] Order that suggests that the Commission made its determination solely on that one statement."

DISCUSSION AND CONCLUSIONS

In reaching the conclusions below, the Commission has carefully considered the entire record before it, including all the pleadings and materials provided by the parties and each party's respective positions and arguments on each issue.

In the Rate Case Order the Commission found that "the use of the equal percentage method of allocating fuel and fuel related costs does not follow the cost causation principle." Order at 226. The Commission made this determination based on the entirety of the record, not based on testimony of a witness for the Public Staff regarding interclass cross subsidies. As is more fully discussed below, the Commission finds that no new evidence or other basis upon which to overturn the Commission's decision on reconsideration has been presented. Therefore, the Commission finds good cause to deny CIGFUR's Motion for Reconsideration.

Disregard of Applicable Law

The Commission is not persuaded that its determination regarding the equal percentage method disregards the applicable law. CIGFUR argues that subsection (g) of the PBR Statute provides that the PBR Statute "does not apply to the fuel rider." Subsection (g) of the PBR Statute, entitled "Commission Authority Preserved" states in its entirety:

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.

Ignoring all other parts of this subsection, CIGFUR argues that the portion of this subsection that provides that 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” prohibits the Commission from using the cost causation principles outlined in the PBR Statute when considering the equal percentage cost allocation method as applied in the fuel rider.

The Commission disagrees with this assertion. Only by ignoring the remainder of subsection (g) can one arrive at CIGFUR’s interpretation of the subsection. Reading the subsection as a whole, the Commission concludes that the purpose and intent of the subsection is to make clear that the PBR Statute does not “limit or abrogate the existing rate-making authority of the Commission[.]” It is not, as CIGFUR would have the Commission interpret, to limit the Commission’s authority related to or analyses of appropriate cost allocation methodologies.

As the Public Staff points out, the Commission has existing authority to set base fuel rates in rate cases. Therefore, the Commission is acting within its discretion by applying cost-causation principles to fuel costs and determining the appropriate cost allocation methodology within this general rate case.

Finally, the Commission notes that CIGFUR is aggrieved that its argument on this point was not addressed in the Rate Case Order. The Commission does not, and is not required to, address every argument of statutory interpretation that is raised in the pleadings before it. As the Commission stated in the Rate Case Order, “...while the Commission has read and fully considered the parties’ post-hearing briefs, it has not in this Order attempted expressly to summarize or discuss every contention advanced or authority cited in the briefs.” Rate Case Order at 20.

Misapprehension of Evidence

Subsection (b) of the PBR Statute requires that, when approving performance-based regulation, the Commission “allocate[] the electric public utility’s total revenue requirement among customer classes based upon the cost causation principle, including the use of minimum system methodology by an electric public utility for the purpose of allocating distribution costs between customer classes, and interclass subsidization of ratepayers is minimized to the greatest extent practicable by the conclusion of the MYRP period.” CIGFUR points out several instances in the transcript of the evidentiary hearing where Public Staff witness Lucas stated that interclass subsidies must be “eliminated” rather than “minimized to the greatest extent possible.” CIGFUR thus argues that in giving the Public Staff testimony “substantial weight” in its decision-making, the Commission misapprehended the evidence in this proceeding. The Commission disagrees.

The Commission quoted in the Rate Case Order from witness Lucas’s direct prefiled testimony, in which he recited the language from subsection (b) of the PBR Statute, including the use of the word “minimize,” verbatim. Moreover, the Rate Case Order, with specific regard to the Findings of Fact that discuss the equal percentage cost allocation

method, provided clearly that the evidence supporting the findings of fact was found in numerous sources, including DEP's Verified Application and Form E-1; the testimony and exhibits of DEP witnesses Hager and Jiggetts, the testimony of Public Staff witnesses Lucas, McLawhorn, and the panel of Zhang and Boswell, the testimony of CIGFUR witness Phillips, and the entire record in this proceeding. Rate Case Order at 225. For CIGFUR to imply that the Commission relied solely on Public Staff witness Lucas' testimony in which he misstated the statutory language, or that the witness's human error negates all the other evidence of record on which the Commission's conclusion was based, is patently inconsistent with the Rate Case Order and strains credulity. The record as a whole includes ample evidence, including from witness Lucas himself in his direct prefiled testimony, upon which the Commission based its decision and cited in the Rate Case Order. Moreover, the Rate Case Order notes that the Commission afforded substantial weight to the testimony of the Public Staff regarding the cost causation principle set forth in N.C.G.S. § 62-133.16, as well as their demonstration of the distortion that can be created by equal percentage fuel adjustments. *Id.* at 226. The Commission never indicated that it gave that substantial weight to the witness's inaccurate recitations of the statutory language.

CIGFUR asserts that "the Commission failed to reconcile—or even acknowledge—the material, significant, repeated inconsistencies contained as between different Public Staff witnesses' testimony on this issue, as well as the inconsistencies contained within Lucas' own testimony, with regard to the appropriate interpretation and standard for applying N.C.G.S. § 62-133.16(b) and (a)(1)." There was no reconciliation necessary. Again, reading the entire record yielded clarity on the Public Staff's position, with which the Commission ultimately agreed, and yielded clarity on the unfortunate but not uncommon occurrence of a witness making a mistake in live testimony. CIGFUR asserts that this error by the Public Staff witness led the Commission astray resulting in the Commission's turning a blind eye to the rest of the evidence of record on this issue. If the Commission were to have done so, it would have failed in its duty to exercise its discretion and weigh the evidence to reach a decision regarding application of the equal percentage cost allocation method.

New Evidence

With respect to the third basis for its request, CIGFUR alleges that, on August 31, 2023, at the expert witness hearing for the DEC Rate Case, CIGFUR's counsel "used excerpts of the transcripts from the evidentiary hearing in the DEP Rate Case to solicit new evidence germane to the issue of fuel and fuel-related cost allocation decided in the DEP Rate Case." The new evidence is: (1) Public Staff witness McLawhorn's testimony that witness Lucas misspoke at the DEP Rate Case hearing and that he did not intend to use the word "eliminate" in reference to interclass subsidization of ratepayers; and (2) Public Staff witness Lucas's statement that his testimony in the DEC Rate Case regarding this issue constituted a "material change" from his testimony in the DEP Rate Case.

The Commission is unpersuaded that it should reconsider its decision based upon consideration of the new evidence that CIGFUR proffers. As discussed above, the Commission considered all evidence of record on the issue when reaching its conclusions.

The new evidence CIGFUR offers-- one Public Staff witness acknowledging that another Public Staff witness misspoke when describing a part of the PBR Statute—is not due more weight than the remainder of the evidence of record on this issue.

Again, as cited in the Rate Case Order, Public Staff witness Lucas states in his direct prefiled testimony that “N.C.G.S. § 62-133.16(b) requires the Commission to allocate the utility’s total revenue requirement among customer classes based on the cost causation principle and minimize cross subsidies ‘to the greatest extent practicable.’” Rate Case Order at 226. CIGFUR’s argument rests on the fact that during cross examination witness Lucas indicated that the statute requires the Commission to *eliminate* rather than *minimize* cross subsidies. As the Public Staff correctly notes in its response to CIGFUR’s motion, nothing in the Rate Case Order suggests that the Commission made its determination on the issue of the equal percentage cost allocation methodology for fuel and fuel-related costs among customer classes based on witness Lucas’s misspoken statements. Rather, the Commission made its determination on the entirety of the record, including the PBR Statute itself as clearly and correctly cited in the Rate Case Order. Taking all evidence of record into consideration, CIGFUR’s questioning of Public Staff witness Lucas during the DEC Rate Case hearing did not show that it had “successfully impeached” witness Lucas as CIGFUR stated in its Motion for Reconsideration. However, the Commission does agree with witness Lucas’s statement in the DEC Rate Case evidentiary hearing that, while he used the wrong word on the stand, it did not create any confusion. DEC Rate Case Tr. vol. 13, 160.

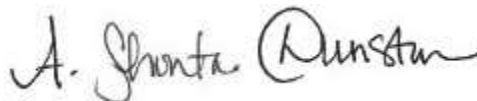
Considering the foregoing, and the entire record in this proceeding, the Commission denies CIGFUR’s Motion for Reconsideration.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 31st day of October, 2023.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in black ink, appearing to read "A. Shonta Dunston". The signature is written in a cursive, flowing style.

A. Shonta Dunston, Deputy Clerk