

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-2, SUB 1300

In the Matter of:) **NORTH CAROLINA JUSTICE**
) **CENTER, NORTH CAROLINA**
Application of Duke Energy) **HOUSING COALITION, SOUTHERN**
Progress, LLC for Adjustment of) **ALLIANCE FOR CLEAN ENERGY,**
Rates and Charges Applicable to) **NATURAL RESOURCES DEFENSE**
Electric Service in North Carolina) **COUNCIL, AND VOTE SOLAR'S**
and Performance-Based Regulation) **REPLY IN OPPOSITION TO CIGFUR**
) **II'S MOTION FOR A STAY PENDING**
) **APPEAL**

NOW COME The North Carolina Justice Center, North Carolina Housing Coalition, Southern Alliance for Clean Energy, Natural Resources Defense Council, and Vote Solar (NC Justice Center, *et al.*), by and through undersigned counsel and pursuant to N.C. Gen. Stat. § 62-95, Rules 2 and 8 of the North Carolina Rules of Appellate Procedure, and Rule R1-5 of the North Carolina Utilities Commission Rules, and hereby reply in opposition to Carolina Industrial Group for Fair Utility Rates II's (CIGFUR II) Motion for Stay Pending Appeal (the Motion). In support of this reply, NC Justice Center, *et al.* respectfully show as follows:

1. On October 6, 2022, Duke Energy Progress, LLC (DEP or the Company) filed its Application to Adjust Retail Rates and for Performance-Based Regulation, and Request for an Accounting Order in the above-captioned docket, along with supporting direct testimony, exhibits, and forms, in the above-captioned proceeding.

2. On August 18, 2023, the North Carolina Utilities Commission (Commission) issued its Order Accepting Stipulations, Granting Partial Rate Increase, and Requiring Public Notice (Final Order) in this docket.

3. On September 12, 2023, the Commission issued its Order Granting Motion for Extension of Time to File Notice of Appeal in this docket, ordering that all parties be granted an extension of time up to and including Tuesday, October 17, 2023, to file notice of appeal of the Final Order.

4. On October 17, 2023, CIGFUR II filed its Notice of Appeal and Exceptions to the Order and the Motion.

5. Pursuant to N.C.G.S. § 62-95, the Commission may grant a stay pending judicial review “where it finds that justice so requires.” In past cases, the Commission has denied “such extraordinary relief” unless a stay is necessary to “prevent irreparable harm.” See, e.g., *Order Denying Motion for Stay*, Application of Dominion North Carolina Power for a Certificate of Environmental Compatibility and Public Convenience and Necessity, Docket No. E-22, Sub 437 (Oct. 24, 2007) (citing the utility’s argument “that there is no evidence of irreparable harm”); *Order Denying Motions*, In the Matter of Application of Progress Energy Carolinas, Inc. for a Certificate of Environmental Compatibility and Public Convenience and Necessity, Docket No. E-2, Sub 839 (Jan 28, 2005) (holding that “the Intervenor’s Motion should be denied on the basis that they will suffer no irreparable harm if a stay is not granted”); see also *Order Denying Motion to Stay Rate Increase and Requesting Comments*, In the Matter of Application of Duke Energy Carolinas, LLC, For Adjustment of Rates and Charges Applicable to Electric Service in North

Carolina, Docket No. E-7, Sub 989 (May 20, 2013) (describing a stay as “extraordinary relief”).

6. For guidance in determining whether to grant such relief, North Carolina courts have turned to a four-factor test employed by federal courts, weighing (1) whether the party seeking a stay has made a strong showing that it is likely to succeed on the merits; (2) whether the party will be irreparably harmed absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Hilton v. Braunskill*, 481 U.S. 770, 107 S.Ct. 2113 (1987); see, e.g., *Weishaupt-Smith v. Town of Banner Elk*, 264 N.C. App. 618, 623, 826 S.E.2d 734, 738 (2019) (stating “[w]e find guidance on this question in case law interpreting the analogous federal appellate rule”); *Ellison v. Alexander*, 207 N.C. App. 401, 405, 700 S.E.2d 102, 106 (2010) (noting the persuasive authority of federal case law); *Vizant Techs., LLC v. YRC Worldwide Inc.*, No. 15 CVS 20654, 2019 WL 995792, at *4 (N.C. Super. Mar. 1, 2019) (citing to the four-factor test in *Hilton v. Braunskill*).

7. The Motion fails to satisfy this standard. As explained in detail below, (1) CIGFUR II has failed to demonstrate that it is likely to succeed on the merits of its appeal challenging Customer Assistance Program (CAP or CAP Pilot); (2) CIGFUR II has failed to show that it would experience irreparable harm in the absence of a stay; (3) issuance of the stay, and thus delayed implementation of CAP, would substantially injure NC Justice Center, *et al.* and their members and/or constituents; and (4) denying the Motion and promptly implementing CAP is in the public interest.

8. CIGFUR II has failed to make a strong showing that it is likely to succeed on appeal. “Upon any appeal, the rates fixed or any rule, finding, determination, or order made by the Commission under [Chapter 62] is *prima facie* just and reasonable.” N.C.G.S. § 62-94(e). And the Commission’s decision is “entitled to great deference given that its members possess an expertise in utility ratemaking that makes them uniquely qualified to decide the issues that are presented for their consideration.” *State ex rel. Utilities Commission v. Stein*, 375 N.C. 870, 900, 851 S.E.2d 237, 256 (2020) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48, 103 S. Ct. 2856, 2869 (1983)). If the Commission has made “adequate findings of fact, supported by competent, substantial evidence” in view of the entire record and pursuant to statutory requirements, the Supreme Court must not reverse the Commission’s decision even if it “would have reached a different conclusion upon the evidence.” *State ex rel. Utilities Commission v. Stein*, 375 N.C. 870, 900, 851 S.E.2d 237, 256 (2020) (quoting *State ex rel. Utils. Comm’n v. Morgan*, 277 N.C. 255, 266–67, 177 S.E.2d 405, 412–13 (1970)). Here, the Commission has clearly made adequate findings of fact supported by competent, substantial evidence—meaning “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State ex rel. Utils. Comm’n v. Carolina Util. Customers Ass’n*, 348 N.C. 452, 460, 500 S.E.2d 693, 700 (1998). The extensive record in this case is more than adequate to support the implementation of the CAP Pilot. See, e.g., *Order Accepting Stipulations, Granting Partial Rate Increase, and Requiring Public Notice*, In the Matter of Application of Duke Energy Progress, LLC For Adjustment

of Rates and Charges Applicable to Electric Service in North Carolina and Performance Based Regulation, Docket No. E-2, Sub 1300 (Aug. 18, 2023) at 25, 107-12; see *also* public witness testimony, tr. vol. 1, 19, 21-22, 32, 41, 44, 48, 51, 54-55; tr. vol. 2, 26-27, 32-34; tr. vol. 3, 21, 61-63, 74-75; tr. vol. 4, 24, 26, 39, 45; tr. vol. 5, 19, 40, 48; tr. vol. 6, 25, 27. Considering this substantially high bar, CIGFUR II is unlikely to succeed on appeal.

9. CIGFUR II has failed to show that it will be irreparably harmed absent a stay. To implement the CAP Pilot, the industrial customers that CIGFUR II represents will be required to pay an additional \$1.70 per month. For large industrial customers, \$1.70 per month is tantamount to a rounding error on their monthly bills. CIGFUR II's members are likely paying more in legal fees to challenge CAP than they would ever pay in the CAP rider. Even with the additional cost of \$1.70/month, the energy bills of CIGFUR II's members may *decrease* overall due to CAP. As the Commission found, the CAP Pilot will likely contribute to a reduction in DEP's uncollectible amounts, which are otherwise collected from all customers, including CIGFUR II's members. Had the Commission elected not to impose the \$1.70/month cost on industrial customers, those customers would have received this benefit from the CAP Pilot without having paid anything, creating its own form of cross-subsidy.

10. On the other hand, issuing the stay—and, therefore, delaying the implementation of CAP—would substantially injure the other parties interested in this proceeding, including NC Justice Center, *et al.* and its members and/or the low-income customers they represent. Given the well-developed record and

numerous public witness statements on this point, CIGFUR II should know well the ongoing struggles of many DEP customers to afford essential electric utility service, as further illustrated in the following quotes from testifying DEP customers¹:

This is, by any measure, a huge rate increase. The requested base rate increase is disproportionately burdensome on residential customers. While the overall rate increases for all three years is roughly 18 percent, the increase for residential customers is 21 percent. **No commercial or industrial customer class is facing nearly as large a rate increase as the residential class.** For instance, the requested rate increase for the largest usage industrial customers is only 11 percent. Tr. Vol. 1, 19 (emphasis added).

- I retired in 2017. And I do live on a fixed income just like most of the people that spoke. And so with the food prices going up, gas prices going up, Duke prices going up, and everything else prices going up, it's been quite difficult. Tr. vol. 3, 74-75.

- **[T]he average bill may increase by about \$25, \$20 a month. That may seem like nickel and dimes to a lot of people, but that is the cost of insulin.** That is the cost of a patient going to pay a co-pay. That is the cost of somebody being able to buy maybe three pills. Tr. vol. 4, 24 (emphasis added).

- For college students who balance their education with part-time or full-time jobs and family responsibilities, the financial burden of housing or utility costs can cause immense stress. Tr. vol. 4, 26.

- So you're asking us to pay more money and we paying money already that we shouldn't even be

¹ There are many more statements from the public hearings demonstrating the difficulties DEP customers face affording essential public utility service and demonstrating the inaccuracy of CIGFUR II's claim that no party would be harmed by a delay in the implementation of the CAP Pilot. See, e.g., tr. vol. 1, 19, 21-22, 32, 41, 44, 48, 51, 54-55; tr. vol. 2, 26-27, 32-34; tr. vol. 3, 21, 61-63, 74-75; tr. vol. 4, 24, 26, 39, 45; tr. vol. 5, 19, 40, 48; tr. vol. 6, 25, 27.

paying because we not getting better service, and its wrong. **It's wrong for you to ask for more money. People are struggling, and the service isn't getting any better.** Tr. vol. 4, 39 (emphasis added).

- I work at a church part-time as an administrative assistant and our church is in the business of helping others. We have many, many people that come several times a month needing assistance with paying their electric bill. Tr. vol. 4, 45.

- I am against the rate hike, because every month my bill is \$500 plus. I am retired. I don't make the income that I used to make. This hurts the low income, the middle class. We just came through a pandemic. [...] This increase is not good for our consumers and not good for me. Tr. vol. 5, 19.

- **We cannot afford an increase in our electricity bills.** I cannot afford an increase in my electricity bills. When prices rise, marginalized communities suffer most, people of color who have historically been used and kept from creating generational wealth will now have yet another obstacle in our way towards achieving stability. Tr. vol. 5, 40 (emphasis added).

- But my utility bill is roughly about one-third of what I pay in rent[]. And what I pay for all of my regular bills is about a little over half of what my rent is. Tr. vol. 5, 48.

- My mom is 90 years old and on a limited fixed income. With that income, she has other obligations to meet, as I'm sure others do. For example, other utilities. She has warmth, she has gas. She has medicine, she has property taxes, homeowner's insurance and groceries. Tr. vol. 6, 25.

- **Suffering. That is what this rate hike would cause.** Suffering. For many, the more money spent on the utility bills to keep the heat on in the winter months means less money for food on the table. Tr. vol. 6, 27 (emphasis added).

CIGFUR II's unsupported and casual statement that no party would be harmed by its proposal to suspend implementation of CAP is shocking. CIGFUR II participated in the Low-Income Affordability Collaborative (LIAC), the stakeholder process that inspired the creation of CAP. The affordability challenges faced by low-income customers generally—and those who would receive the benefits of the CAP program specifically—were thoroughly documented throughout the LIAC process. In addition, CIGFUR II has participated in other Commission proceedings in which the struggles of low-income customers to afford their essential public utility service were made part of the record. In the two DEP general rate case proceedings before this one, NC Justice Center, *et al.* introduced testimony from John Howat, of the National Consumer Law Center, who raised the issue of low-income affordability with data specific to DEP's customers and who provided information about programs like the CAP Pilot that have been approved in other jurisdictions. For years, North Carolina customers have needed the relief that the CAP Pilot will bring. The notion that no party would be harmed by a delay in implementing the CAP Pilot is unfounded.

11. Denying the Motion is in the public interest. Many of NC Justice Center, *et al.*'s members and/or constituents are low-income DEP customers and are disproportionately burdened by high electric bills, particularly during a time of persistent inflation. Any delay in implementing CAP all but guarantees that those customers will continue to struggle paying their electric bills and potentially risk disconnection.

Respectfully submitted this 19th day of October, 2023.

/s/ David L. Neal
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CERTIFICATE OF SERVICE

I certify that all parties of record have been served with the foregoing Reply in Opposition to CIGFUR II's Motion for a Stay Pending Appeal either by electronic mail or by deposit in the U.S. Mail, postage prepaid.

This the 19th day of October, 2023.

/s/ David L. Neal
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