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July 24, 2023

VIA ELECTRONIC FILING

Ms. A. Shonta Dunston
Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4300

**Re: Duke Energy Carolinas, LLC Post-Hearing Brief
Docket No. E-7, Sub 1282**

Dear Ms. Dunston:

Please find enclosed Duke Energy Carolinas, LLC (“DEC” or the “Company”) Post-Hearing Brief for filing in the above-referenced proceeding.

If you have any questions, please do not hesitate to contact me. Thank you for your assistance.

Sincerely,

A handwritten signature in blue ink that reads "Ladawn S. Toon". The signature is fluid and cursive, with the first name being the most prominent.

Ladawn S. Toon

Enclosure

cc: Parties of Record

OFFICIAL COPY

JUL 24 2023

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. E-7, SUB 1282

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of)	
Application of Duke Energy Carolinas,)	
LLC, pursuant to G.S. 62-133.2 and)	DUKE ENERGY CAROLINAS LLC’S
NCUC Rule R8-55 Relating to Fuel and)	POST-HEARING BRIEF
Fuel-Related Charge Adjustments for)	
Electric Utilities)	

POST-HEARING BRIEF

NOW COMES Duke Energy Carolinas, LLC (“DEC” or the “Company”), by and through counsel, and submits this Post-Hearing Brief (“Brief”) to the North Carolina Utilities Commission (“Commission”) in the above-captioned docket. In accordance with the Commission’s July 14, 2023 *Order Ruling on Supplemental Testimony Proffered Post-Hearing* (“Order”), the Company is addressing whether it is appropriate to defer the consideration of certain outages during the test period at issue in this proceeding to a subsequent fuel proceeding.

There is no basis in law to support the Public Staff’s unilateral attempt to hold over outages occurring in the test period from one fuel case to a future case. The fuel cost recovery construct and related regulatory process is well-defined by law in N.C.G.S. § 62-133.2(d) and Commission Rule R8-55 and through extensive Commission precedent. The fuel recovery construct provides for a well-defined and orderly annual process allowing for timely recovery of prudently incurred fuel costs. There is no provision in the applicable law or Commission precedent that permits a party to unilaterally alter the annual fuel cost recovery construct, and the Company has identified no instance in which the Commission

has ever held over an outage from one fuel proceeding to another without the consent of the utility, which the Company has not granted in this case. Timely recovery of prudently incurred fuel costs is a bedrock aspect of the regulatory construct in North Carolina and the Public Staff's attempt to unilaterally alter that construct should be rejected.

PROCEDURAL AND FACTUAL BACKGROUND

On February 28, 2023, DEC filed an application pursuant to N.C. Gen. Stat. § 62-133.2 and Commission Rule R8-55 regarding fuel and fuel-related cost adjustments for electric utilities.

On March 16, 2023, the Commission issued an *Order Scheduling Hearing, Requiring Filing of Testimony, Establishing Discovery Guidelines, and Requiring Public Notice* ("Scheduling Order"), which established a comprehensive procedural schedule consistent with N.C. Gen. Stat. § 62-133.2 and Commission Rule R8-55 and past precedent.

On May 9, 2023, the Public Staff caused to be filed in the above-captioned docket the pre-filed direct testimony of Evan D. Lawrence. Tr. vol. 2, pp 260-289. In his pre-filed testimony, Mr. Lawrence addresses four outages occurring in the test period: (1) McGuire Nuclear Station Unit 2, February 21, 2022 ("McGuire February 2022 Outage"), (2) Belews Creek Steam Station Unit 2, April 22, 2022 ("Belews Creek April 2022 Outage"), (3) Belews Creek Steam Station Unit 2, August 31, 2022 ("Belews Creek August 2022 Outage"), and (4) W.S. Lee Combined Cycle Plant, December 11, 2022 ("Lee December 2022 Outage"). Tr. vol. 2, pp 267-276. Mr. Lawrence alleges that all four of the outages in question were "preventable" (despite, by his own admission, having not completed his investigation). Tr. vol. 2, p 263. Mr. Lawrence ultimately does reach a conclusion with respect to the McGuire February 2022 Outage, electing not to recommend a disallowance.

Tr. vol. 2, p 270. However, Mr. Lawrence further asserts that the “Public Staff has been unable to complete its investigation into...[certain] outages...” and he was therefore unable to make a recommendation with respect to the Belews Creek April 2022 Outage, Belews Creek August 2022 Outage, and Lee December 2022 Outage. Tr. vol. 2, p 275.

On May 18, 2023, in accordance with the Commission’s Scheduling Order, the Company filed the rebuttal testimony of Company Witness Jeffrey Flanagan. Mr. Flanagan’s testimony addressed both the Public Staff’s allegations regarding the provision of information, as well as the substantive allegation regarding the allegedly “preventable” nature of the outages. Tr. vol. 2, p 76.

In accordance with the Commission’s Scheduling Order, the evidentiary hearing in this matter was called to order on May 30, 2023. On June 30, 2023, nearly two months following the initial deadline for the Public Staff testimony and one month after the Commission closed the evidentiary record, the Public Staff caused to be filed the Supplemental Testimony of Mr. Lawrence. In his supplemental testimony, Mr. Lawrence made a recommendation with respect to the Belews Creek April 2022 Outage but did not address the Belews Creek August 2022 Outage or the Lee December 2022 Outage.

On July 6, 2023, DEC filed its Motion to Strike Public Staff’s Filing of Supplemental Testimony & Request for Relief in the Alternative (“Motion”). On July 11, 2023, the Public Staff filed its Motion and Response to DEC’s Motion (“Response”).

On July 14, 2023, the Commission issued its Order allowing DEC’s motion to strike the Public Staff’s proffered supplemental testimony, noting that the “determination of whether to defer the consideration of certain outages during the test period at issue in this proceeding to the 2024 fuel adjustment remains open and the parties may address that

issue in the post-hearing filings due in this proceeding on July 21, 2023.” On July 20, 2023, the Public Staff, without objection from the other parties to the proceeding, requested a one business day extension to Monday, July 24, for the parties to file proposed orders and/or briefs.

On July 21, 2023, the Commission issued its Order granting the one business day extension.

On July 24, 2023, DEC and the Public Staff filed a joint partial proposed order and filed separate briefs regarding the Commission’s future consideration of the three outages in the 2024 fuel adjustment proceeding.

DISCUSSION AND ARGUMENT

- I. **The Public Staff should not be permitted to hold over outages from one fuel proceeding to a future fuel case proceeding.**
 - a. **There is no basis in N.C.G.S. § 62-133.2, Commission Rule R8-55 or the Commission’s Scheduling Order for deferral of issues from one fuel case to another.**

The fuel cost recovery construct, established by N.C.G.S. § 62-133.2 and Commission Rule R8-55 and through Commission precedent, provides a well-defined annual process by which the Company’s fuel costs are assessed on an annual basis and set for recovery. As part of this annual process, N.C.G.S. § 62-133.2(d) specifies that the “Commission shall provide for notice of a public hearing with reasonable and adequate time for investigation and for all intervenors to prepare for hearing.” The Scheduling Order in this proceeding did, in fact, provide “adequate time for investigation” that was commensurate with the time allotted in all recent fuel proceedings. The Public Staff has not asserted that the “time for investigation” in this proceeding was different than the amount of time typically allotted or otherwise “inadequate” as a matter of law. N.C.G.S.

§ 62-133.2(d) further provides that in “reaching its decision, the Commission shall consider all evidence required under subsection (c) of this section as well as any and all other competent evidence that may assist the Commission in reaching its decision.” There is nothing in N.C.G.S. § 62-133.2(d) that suggests that parties may withhold evidence or conclusions for presentation in a future proceeding.

Commission Rule R8-55 further affirms the structured nature of the annual fuel cost recovery process, establishing a number of clear timing and schedule requirements. Included within this framework is this burden shifting process contemplated in Commission Rule R8-55(k). This burden shifting process with respect to test period costs is clearly contemplated as occurring within each annual fuel proceeding and conversely does not contemplate test period issues being deferred to future proceedings. Even in a scenario in which the Company’s nuclear capacity factor falls below the threshold levels, Commission Rule R8-55(k) contemplates that resolution of any disputed disallowances will occur within that hearing and not in a future hearing.¹ For clarity of the record, the Company’s performance exceeded the performance thresholds in this case, making it even more egregious that the Public Staff seeks to defer these outages to a future proceeding.

The Company has not identified a single instance in which an outage occurring in the test period has been held over to a future fuel cost recovery proceeding without the utility’s express agreement to do so. Test-year fuel and fuel-related costs have already been incurred, are accruing interest, and are now ripe for recovery in accordance with existing statutes. Inching the chalk-line backwards and allowing for open-ended, beyond

¹ “The utility shall have the opportunity to rebut this presumption at the hearing and to prove that its test year cost of fuel and fuel-related costs were reasonable and prudently incurred. To the extent that the utility rebuts the presumption by the preponderance of the evidence, *no disallowance will result.*” Commission Rule R8-55(k)(emphasis added).

test-year outage reviews effectively erodes the statutory review periods set by the General Assembly for fuel and fuel-related cost recovery proceedings and is not in the public interest in this proceeding.

In sum, the Public Staff's attempt to effectively alter the well-established annual fuel review process should be rejected as fundamentally inconsistent with all applicable law and precedent. The Public Staff has cited no basis in law for its requested procedural approach for a simple reason—none exists. Fuel cost recovery proceedings are governed by long-standing procedural rules and nothing in the timeline for this proceeding should have been a surprise to the Public Staff or any other intervenor. In fact, the annual process and associated timelines for fuel cost recovery has been in place for nearly four decades and the Public Staff and all parties are well aware of the amount of time allotted for investigation and should not be permitted to bypass such timelines to the detriment of the Company.

b. Prior Commission Precedent Confirms that the Public Staff is not permitted to Have a Second Bite at the Apple in a subsequent proceeding.

Prior Commission precedent confirms that the Public Staff is not permitted to have a “second bite at the apple,” revisiting issues in later, subsequent proceedings when such issues were squarely before the Commission in an earlier proceeding. In Docket No. E-7, Sub 1146 (“2017 Rate Case”), the potential sale of the hydroelectric facilities was presented for consideration, as 95% of the capital costs DEC incurred for the facilities between 2015 and 2017 was included as plant in rate base. In a later docket (Docket No. E-7, Sub 1181 et al.), DEC filed a petition by DEC to obtain approval to transfer its Certificate of Public Convenience and Necessity (“CPCN”) for hydroelectric facilities to a

third party. In the transfer proceeding the Public Staff moved that the 2017 Rate Case proceeding be reopened to allow the Public Staff to investigate and potentially argue that the improvements made on the hydroelectric facilities prior to transfer should not have been included in rate base.

The Commission rejected the Public Staff's attempt to relitigate issues from the 2017 Rate Case in the subsequent proceeding:

Nevertheless, the Commission is not persuaded that there is a change of circumstances, or a misapprehension or disregard of the fact that supports reconsideration of that portion of the Sub 1146 Rate Order that approved DEC's capital expenditures on the hydro plants. The Commission appreciates the dilemma in which the Public Staff found itself after being informed on the eve of the rate case that DEC was contemplating selling the hydro plants. As the Public Staff noted, electric rate cases are huge proceedings that involve thousands of pages of documents, and present multiple and immediate complex issues. For this reason, the Commission does not fault the Public Staff for being unable to piece together timely discovery or testimony on this potential issue during the pendency of the rate case. On the other hand, the issue was not hidden from the Public Staff. Indeed, DEC flagged the issue, albeit late in the process, for the Public Staff's attention. As previously noted, the hearing in the rate case began on March 5, 2018, and it lasted several days. The Commission concludes that the Public Staff had a reasonable opportunity to ask DEC questions about the hydro capital expenditures and DEC's potential sale of the plants during the rate case hearing.

Id. at p 27.

In other words, having had an opportunity to contest an issue in one proceeding, The Public Staff was barred from contesting the same issue in a subsequent proceeding. Notably, there is no suggestion in the Commission's order in the later docket (Docket No. E-7, Sub 1181) that the Public Staff would have been provided a "second bite at the apple" had they made a deferral request in the earlier proceeding. Instead, the order confirms that the Public Staff and all parties must address the issues squarely presented for decision in

such proceeding and cannot simply pick and choose those issues that it chooses to address at that time and those issues that it would prefer to address a later date.

As noted above, in the 2017 Rate case the Public Staff was expected to conclude its review and investigation of a complex issue, involving voluminous filings, in a timely manner over the course of several days, the Commission finding that the issue was known to the Public Staff. Furthermore, that the Public Staff had a reasonable opportunity to inquire further during the course of the hearing, which lasted several days. Whereas, in the case of this fuel proceeding, the Public Staff had several months to review, investigate and prepare for the outages it now questions. The Commission was not persuaded in 2017 to allow the Public Staff to relitigate matters, and the Company recommends that the Commission should not be persuaded now to permit the Public Staff to defer its investigation.

- c. Putting aside the fact that there is no legal basis on which to defer this outage, the Public Staff's proffered reasons for failing to take positions in this proceeding within the timeframe contemplated by law are woefully insufficient.**

Once again, the Company does not believe that deferral of consideration of an outage by the Public Staff to a future proceeding is permitted by law without the utility's consent. Putting aside the legal question, the Public Staff's proffered justifications for its failure to complete its review within the well-established timelines of the fuel proceeding are not compelling.

The reasons for the Public Staff's failure to complete the audit within the required timeline are set forth partially in Mr. Lawrence's testimony and then further explained in

the Public Staff's Response.² Utilizing the headers from the Public Staff's Response, the purported justifications are addressed in turn below:

- **Workload:** The Public Staff's Response asserts that the current workload on the Public Staff justifies the deferral.³ There is no basis in law for this assertion (and the Public Staff does not cite any law or precedent). While the Company acknowledges that this is a uniquely active time in the regulatory calendar and appreciates the substantial demands on the Public Staff, a high workload is not a sufficient basis for ignoring the required timelines for fuel proceedings.
- **Discovery:** The Public Staff's Response asserts that alleged shortcomings by DEC with respect to discovery justify the deferral. As the Company explained extensively in the Rebuttal Testimony of Jeffrey Flannagan⁴ and in its Motion,⁵ the Company disagrees as a factual matter with the allegation that its discovery responses were deficient in any way. The Company further explained in the Rebuttal Testimony and Motion that the Public Staff itself refused to reschedule the meeting in question. In any event, the Commission has in place well-established procedures for dealing with discovery disputes during the proceeding to prevent exactly this sort of after-the-fact attempt to seek procedural relief where none is appropriate. Had the Public Staff elected to raise a formal discovery dispute during the hearing at the time of the supposedly deficient discovery, the Commission would have had ample opportunity to assess the issue and, if a deficiency was confirmed, to make appropriate schedule adjustments as needed. Instead, the Public Staff has made generalized allegations of deficiency (all of which were contested by Company Witness Flannagan), elected not to pursue the remedies established by the Commission and now seeks a remedy not authorized by the Commission or permitted under law.
- **Outage:** Apparently as a basis for their failure to take a position within the timeframe allotted by law, the Public Staff asserts that the underlying facts of the outage at issue are out of the ordinary. The Public Staff does not explain what an "ordinary" outage is or explain what law or precedent would support the position that an out of the ordinary outage allows a party to ignore the Commission's procedural schedule or the statutorily-established timeline for the proceeding.

² The Public Staff's Response provides explanations for why the Public Staff should have been permitted to file supplemental testimony in this docket but are presumably also the Public Staff's justification for submitting testimony in the next proceeding as well.

³ Public Staff's Motion and Response to DEC's Motion, pp. 4-6.

⁴ Revised Rebuttal Testimony of Jeffrey Flanagan, filed May 26, 2023.

⁵ Duke Energy's Motion to Strike Public Staff Supplemental Testimony and Request for Relief in the Alternative, filed July 6, 2023.

- **Impact:** Specifically with respect to the Belews Creek April 2022 Outage (which was the subject of the Motion and Response), the Public Staff once again asserts that new information was gathered after the Company’s rebuttal testimony that allowed Mr. Lawrence to reach a recommendation. As explained in the Motion, gathering new information was insufficient basis for filing supplemental testimony outside of the Commission’s Scheduling Order. Furthermore, as was pointed out in the Motion, there is no evidence in Mr. Lawrence’s supplemental testimony that his recommendation even relied on the new information. This point is only underscored by the Response, which fails to identify with any specificity the “new” information relied on. In other words, the Public Staff had all of the information it needed to make a recommendation in accordance with the schedule.

In addition to the foregoing reasons, Mr. Lawrence also cites to an ongoing investigation into Winter Storm Elliott. While there is an open docket with respect to Winter Storm Elliott, there is no indication from the Commission that any aspect of that docket was intended to supplant or alter the routine administration of the annual fuel cost recovery proceeding. As of the date of this filing, the Commission has not yet ordered any additional actions on the part of the Company, including but not limited to requiring the filing of late-filed exhibits, requests for briefs, or establishing a procedural schedule. There are currently no outstanding data requests for the Winter Storm Elliott outage event. The Public Staff’s reliance on an open investigation for Winter Storm Elliott as a means to hold over test-year outages to future test years, absent agreement among the parties, is unwarranted and unsubstantiated.

d. The Public Staff’s position offers no meaningful limiting principle

As described above, the deferral of decision on these outages is not permitted by law and moreover, the justifications offered by the Public Staff for its failure to adhere to the Commission’s schedule are not compelling. However, there are further practical reasons for rejecting the Public Staff’s request in that granting this deferral would simply

open Pandora's box for similar requests in all manner of future regulatory proceedings. The Public Staff offers no meaningful limiting principle or meaningful objective standard for this asserted ability to unilaterally defer issues to future proceedings nor explains why other parties and even the Company should not be permitted to take similar procedural actions.

For instance, asserting that because of an excessive workload, a party should be permitted to completely ignore the Commission's Scheduling Order and applicable law and defer the Commission's determination of an issue that is ripe for decision simply because a party does not have "enough time" is—to put it mildly—a completely unworkable standard. There is no meaningful way to assess what does and does not constitute an excessive workload. If granted to the Public Staff, there is no logical reason why other parties would not similarly be entitled to such relief even though such an outcome would create havoc in future proceedings. Certainly the Commission and the Company have a long track record of granting reasonable schedule accommodations where such accommodations do not impact the ability of the Commission to issue its decisions in accordance with any applicable legal requirement with respect to timing. The Public Staff does not have the legal right to do an "end around" of the statutory framework. Granting that right to the Public Staff would not only be contrary to law, but would also turn all future scheduling orders into mere suggestions that can be ignored by parties based solely on a party's subjective assessment of their current workload. The subjective approach is only highlighted by the Public Staff's actions in this case, in which it unilaterally determined that it did, in fact, have enough time to complete its investigation of one outage (McGuire February 2022 Outage) but then attempted to defer one outage recommendation

(Belews Creek April 2022 Outage) until after the hearing (which the Commission rejected in its July 14, 20223 Order) while seeking to defer two other outages to a future fuel proceeding. This arbitrary, pick-and-choose approach is inconsistent with the law and untenable as a practical matter.

e. The Company would be prejudiced if the Public Staff were permitted to unilaterally hold over these outages.

Furthermore, the Company would be prejudiced by deferral of these outages to a future proceeding. The basic structure of most litigated proceedings gives the Company the final response through the opportunity to submit rebuttal testimony. In this scenario, the Public Staff's approach in which Mr. Lawrence asserted in his initial direct testimony that the outages were "preventable" forced the Company to rebut such assertions. But by withholding his final recommendation, Mr. Lawrence will now be able to fine-tune his opinions prior to submitting them in a future proceeding. This approach provides an inequitable procedural advantage—effectively an "end-around" of the standard cadence of the litigated proceeding—that is simply inconsistent with the Scheduling Order and would prejudice the Company

The Company has, as set forth in the Rebuttal Testimony of witness Flanagan, demonstrated that it provided all outage information requested by the Public Staff within the discovery period and prior to the filing date for their direct testimony to permit the Public Staff to conclude its investigation of alleged imprudent outages during the test period for this docket. The only reference to Company provided discovery in the Public Staff's attempt to file Supplemental Testimony by witness Lawrence was from PSDR-21, which the Company provided to the Public Staff on April 27, 2023 prior to the filing of the Public Staff's direct testimony on May 9, 2023. The Company stated in its Motion at p.

13 that “the Public Staff has failed to identify one single reason or fact why it was not in a position to recommend a disallowance in its May 9, 2023 direct testimony.” In the Public Staff’s Response the Public Staff did not respond or counter the Company’s position that witness Lawrence made no reference to any “important information” that was not available as of the filing of direct testimony on May 9, 2023. The Company is the party requesting an adjustment in its rates for fuel and fuel related costs and the Company has met its burden of proof. As set forth in its Application the Company incurred significant costs during the 2022 test period and pursuant to N.C.G. S. 62-133.2(d) and Commission Rule R8-55 it should not have to wait until mid-2024 to learn if any of these costs could be disallowed because the Public Staff’s claims that its workload or “out of the ordinary outages” did not allow them sufficient time to complete their investigations in time for the evidentiary hearing in this docket.

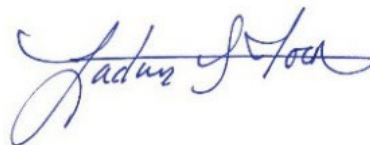
II. There is no evidence in the record to support any disallowance of costs.

For clarity of the record, with the granting of the Motion, there is now no disallowance recommendation before the Commission in this proceeding. Therefore, the Company reaffirms its request to establish the rates set forth in the Joint Partial Proposed Order of Duke Energy Carolinas, LLC and the Public Staff Approving Fuel Charge Adjustment filed on July 24, 2023.

CONCLUSION

For the reasons set forth above, DEC respectfully requests that the Commission find and conclude that holding over an outage occurring in the test period without the consent of the utility is not permitted by law.

Respectfully submitted this 24th day of July, 2023.



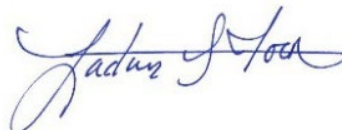
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ATTORNEY FOR DUKE ENERGY
CAROLINAS, LLC

CERTIFICATE OF SERVICE

I certify that a copy of Duke Energy Carolinas, LLC's Post-Hearing Brief, in Docket No. E-7, Sub 1282, has been served by electronic mail, hand delivery or by depositing a copy in the United States mail, postage prepaid, properly addressed to parties of record.

This the 24th day of July, 2023.



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