

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. E-7, SUB 1276

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	
Application of Duke Energy Carolinas, LLC, for) ORDER RESPONDING TO
Adjustment of Rates and Charges Applicable to) SECOND MOTION TO STRIKE
Electric Service in North Carolina and) AND ESTABLISHING HEARING
Performance-Based Regulation) PROCEDURES

BY THE PRESIDING COMMISSIONER: On October 23, 2023, the Presiding Commissioner issued an Order Denying Motion to Strike and Reconvening Hearing that is responsive to the joint motion of Blue Ridge EMC, Haywood EMC, Piedmont EMC, and Rutherford EMC (collectively, Blue Ridge et al.), and the Carolina Industrial Group for Fair Utility Rates III (CIGFUR, together with Blue Ridge et al., Joint Movants) to strike the supplemental testimony and exhibits of Public Staff witness David Williamson (witness Williamson), which was filed with the Commission on October 17, 2023 (Motion to Strike) (Order Denying Motion to Strike). The Order Denying Motion to Strike also addresses the filings of various parties which are responsive to witness Williamson's supplemental testimony and exhibits and the Motion to Strike. In addition to denying the Motion to Strike, the Order Denying Motion to Strike scheduled the evidentiary hearing in this matter previously adjourned on September 5, 2023, to reconvene on Monday, October 30, 2023, at 1 p.m.; provided for Duke Energy Carolinas, LLC (DEC), to file rebuttal testimony responsive to witness Williamson's supplemental testimony and exhibits; and provided discovery procedures related to DEC's supplemental rebuttal testimony.

While the Presiding Commissioner was considering the Motion to Strike and related filings, on Friday, October 20, 2023, the Public Staff filed an errata sheet and corrections to witness Williamson's Supplemental Exhibits 1 and 2 (Corrected Supplemental Exhibits).

Further, on the morning of October 23, 2023, before the Presiding Commissioner issued the Order Denying Motion to Strike, Joint Movants filed a Second Joint Motion to Strike and Request for Relief (Second Motion). The Order Denying Motion to Strike notes that the Presiding Commissioner intended to address the Second Order "as soon as practicable."

SECOND JOINT MOTION TO STRIKE AND REQUEST FOR RELIEF

The Second Motion alleges that the Corrected Supplemental Exhibits "*materially revised* the Public Staff's recommendations regarding revenue apportionment that witness D. Williamson had previously caused to be pre-filed in this docket for the first time on October 13, 2023." Second Motion, ¶ 22 (emphasis original). In the Second Motion,

Joint Movants restate their earlier objections regarding the timing of witness Williamson's supplemental filings – inclusive of the Corrected Supplemental Exhibits – arguing that the Public Staff “failed to comply with the Commission’s Scheduling Order issued in this docket by filing . . . after the deadline set by the Commission for the filing of Public Staff and other Intervenor testimony in the instant rate case[;]” “failed to comply with Commission Rule R1-24(g)(2)” by filing the supplemental testimony and exhibits fewer than more than 30 days prior to the hearing; and did not obtain leave from the Commission prior to filing the supplemental filings. *Id.* at ¶¶ 29-32. Joint Movants further contend that the Public Staff violated Commission Rules R1-5(f) and R1-7(a)(3) by not receiving leave from the Commission prior to filing witness Williamson’s Corrected Supplemental Exhibits. Also, the Joint Movants argue that the Corrected Supplemental Exhibits “were filed in the absence of corresponding sworn testimony and/or verification and, therefore, the D. Williamson Corrected Supplemental Exhibits are not competent evidence, even assuming for the sake of argument that they are otherwise admissible evidence (which they are not).” *Id.* at ¶ 33. Finally, Joint Movants renew their earlier argument that witness Williamson’s revenue apportionment recommendations were not dependent on completion of the Public Staff’s audit of the DEC’s May 2023 and June 2023 updates.

Based upon the foregoing reasons, Joint Movants allege that they are unduly prejudiced by having to litigate the recommendations contained in witness Williamson’s supplemental testimony and exhibits, including the Corrected Supplemental Exhibits, on an abbreviated timeline. See *id.* at ¶¶ 38-40. More particularly, Joint Movants contend that they are being denied adequate time to prepare their litigation strategy including conducting sufficient discovery, preparing for cross-examination, and preparing strategy regarding the use of CIGFUR witness Collins. See *id.* at ¶¶ 39-40. Joint Movants note that the parties to this proceeding were given informal notice on Tuesday, October 17, 2023, see Attachment B to the Second Motion, that the Commission was holding time to reconvene the hearing, pending its decision on Joint Movants’ Motion, on Monday, October 30, 2023. Joint Movants contend that if the Commission reconvenes the hearing on October 30, 2023,

[s]uch a truncated amount of time does not allow for multiple rounds of discovery. Perhaps more concerning, it deprives counsel for Joint Movants of their ability to have the benefit of knowing the Public Staff’s position on this very important and material issue when developing their cross-examination strategy as to all of the other parties’ respective revenue apportionment witnesses. Moreover, it deprives CIGFUR III of its ability to have the benefit of knowing the Public Staff’s position on this very important and material issue when developing its strategy in defending its own expert witness on the witness stand.

Id. at ¶ 41. Joint Movants allege that they are being “deprived of the opportunity to mount what could have otherwise been an effective rebuttal case and/or to otherwise discredit D. Williamson’s supplemental testimony and corrected supplemental exhibits[.]” *Id.* at ¶ 42.

Joint Movants again request an opportunity to file supplemental direct testimony and present their own witness at the reconvened evidentiary hearing, alleging that absent such an opportunity CIGFUR “will be deprived of the same opportunity it would otherwise have been afforded to mount a rebuttal case and/or to otherwise discredit D. Williamson’s testimony and exhibits.” *Id.* at ¶ 43. For the first time, Joint Movants allege that CIGFUR would not have requested to excuse its witness Collins had witness Williamson’s supplemental testimony and exhibits, including the Corrected Supplemental Exhibits, been timely filed. See *id.* at ¶¶ 39-40.

Joint Movants provide an alternative procedural schedule, which they acknowledge “is an impossibility, given it would violate the statutory deadline for the Commission issuing a final order in this matter,” however, they nonetheless contend that following the alternative timeline is the only way to make Joint Movants whole in the event that the Commission denies the Motion to Strike. *Id.* at ¶¶ 44-45. Joint Movants assert that “[b]ecause it would be impossible to put Joint Movants in the same position they would otherwise have been in from a due process perspective, the only appropriate, proper, and fair resolution to this issue is to strike D. Williamson’s supplemental testimony and corrected exhibits in their entirety.” *Id.* at ¶ 46. Joint Movants renew their contentions that admitting witness Williamson’s supplemental testimony and exhibits into evidence “at this extremely late stage in the proceeding would cause incurable prejudice to Joint Movants” and that “would unquestionably violate the due process rights of other parties, including Joint Movants.” *Id.* at ¶¶ 47-48.

In support of their procedural arguments, the Joint Movants cite to Supreme Court precedent

The North Carolina Supreme Court has repeatedly held that:

The procedural rules of an administrative agency are binding upon the agency which enacts them as well as upon the public.... To be valid, the action of the agency must conform to its rules which are in effect at the time the action is taken, particularly those designed to provide procedural safeguards for fundamental rights.

Refining Co. v. Board of Aldermen, 284 N.C. 458, 467-68, 202 S.E.2d 129, 135 (1974); *George v. Town of Edenton*, 294 N.C. 679, 242 S.E.2d 877 (1978).

Id. at ¶ 49.

In concluding, the Joint Movants renew their prior requests for relief and alternative requests consistent with the Motion to Strike with the following exceptions: that the Commission strike witness Williamson’s Corrected Supplemental Exhibits, filed on October 20, 2023, (along with his supplemental testimony and exhibits filed on October 13, 2023); or, in the alternative, (1) that the Commission reconvene the hearing no sooner than November 20, 2023; (2) that the Commission permit the parties to conduct at least

25 days' worth of discovery; (3) that the Commission recall all parties' revenue apportionment witnesses so that these parties can be cross-examined on witness Williamson's revenue apportionment testimony; and (4) the Commission permit all parties to supplement their previously-filed post-hearing briefs and proposed orders within at least 10 days after the close of any reconvened hearing.

DISCUSSION AND CONCLUSIONS

To the extent that the Second Motion renews arguments and requests from the original Motion, the Presiding Commissioner has considered these renewed requests and the totality of the record in full, finds that no new circumstances or facts have arisen so as to warrant reconsideration of the Order Denying Motion to Strike, and declines to deviate from the rulings contained in the Order Denying Motion to Strike. Similarly, for the same reasons that the Presiding Commissioner found it appropriate to deny the Motion to Strike with regard to witness Williamson's October 13, 2023 supplemental testimony and exhibits, the Presiding Commissioner declines to strike witness Williamson's October 20, 2023 prefiled Corrected Supplemental Exhibits.

The Second Motion contains several new contentions. First, Joint Movants contend that the Public Staff violated Commission Rule R1-5(f) by not receiving leave from the Commission prior to filing witness Williamson's Corrected Supplemental Exhibits. Rule R1-5(f) states that "[a]ny pleading may be amended or corrected or any omission supplied prior to notice of hearing. After notice of hearing, it will be in order to move for leave to amend in accordance with Rule R1-7." Here, witness Williamson's Corrected Supplemental Exhibits were filed on October 20, 2023. On October 23, 2023, the Presiding Commissioner issued the Order Denying Motion to Strike, which formally noticed the hearing to reconvene on October 30, 2023. Therefore, based upon the foregoing, the Presiding Commissioner finds that the Corrected Supplemental Exhibits were not filed in violation of Commission Rule R1-5(f) because the filing preceded the notice of hearing.

Next, Joint Movants contend that the Public Staff violated Commission Rule R1-7(a)(3) by not receiving leave from the Commission prior to filing witness Williamson's Corrected Supplemental Exhibits. Commission Rule R1-7(a) states in pertinent part that "[m]otions *may* be addressed to the Commission: . . . (3) [t]o make additional parties, to strike improper parties, or to substitute parties, *or for leave to amend pleadings[.]*" (Emphasis added.) The Presiding Commissioner notes that the language of Rule R1-7(a)(3) is discretionary not mandatory. Furthermore, as a practical matter, parties before the Commission routinely file corrections to prefiled testimony and exhibits without seeking leave. Finally, the Presiding Commissioner notes that the Commission's July 26, 2023 Order Rescheduling Hearing and Providing Additional Hearing Procedures (Order Providing Additional Hearing Procedures) states that "any corrections to witness' prefiled testimony or exhibits must be filed with the Commission at least one business day prior to calling the witness to the stand," and does not require parties to seek leave from the Commission prior to filing the corrections. Order Providing Additional Hearing

Procedures at 3. Accordingly, the Presiding Commissioner finds the Joint Movants' objections founded on Commission Rule R1-7(a)(3) to be without merit.

The Joint Movants argue that the Corrected Supplemental Exhibits "were filed in the absence of corresponding sworn testimony and/or verification and, therefore, the D. Williamson Corrected Supplemental Exhibits are not competent evidence, even assuming for the sake of argument that they are otherwise admissible evidence (which they are not)." *Id.* at ¶ 33. The Presiding Commissioner notes that Ordering Paragraph No. 6(b) of the Order Providing Additional Hearing Procedures provides procedures for any corrections to witness' prefiled testimony or exhibits and requires that:

[A]ny corrections to witness' prefiled testimony or exhibits must be filed with the Commission at least one business day prior to calling the witness to the stand, each party shall file in the docket the following: a. [a]n errata filing of any corrections to the witness' prefiled testimony, and a complete copy of the witness' corrected testimony; and b. [a]n errata filing of any corrections to the witness' prefiled exhibits, and a complete copy of the corrected exhibit.

Consistent with this directive, the Presiding Commissioner finds it appropriate to direct the Public Staff to refile the witness Williamson's Corrected Supplemental Exhibits and errata accompanied by his original prefiled supplemental testimony as soon as practicable but no later than Friday, October 27, 2023.

As noted above, for the first time, Joint Movants' Second Motion alleges that CIGFUR would not have requested to excuse its witness Collins had witness Williamson's supplemental testimony and exhibits, including the Corrected Supplemental Exhibits, been timely filed. See Second Motion at ¶¶ 39-40. The Order Denying Motion to Strike discussed in detail the timing of the Public Staff's notices regarding its intent for witness Williamson to file supplemental testimony, including its provision of a date certain for the supplemental filings on the record during the hearing on August 29, 2023, as well as CIGFUR's motion to excuse its witness Brian C. Collins from appearing at the evidentiary hearing on August 31, 2023. See Order Denying Motion to Strike, 3-4, 9. The Presiding Commissioner again finds Joint Movants' characterization of the circumstances surrounding CIGFUR's request to excuse its witness Collins inaccurate and the arguments predicated upon these characterizations without merit.

Contending that they are being denied adequate time to prepare their litigation strategy including conducting sufficient discovery, preparing for cross-examination, and preparing strategy regarding the use of CIGFUR witness Collins, in the alternative to their motion to strike, the Joint Movants request "at least 25 days' worth of additional discovery." Second Motion at ¶¶ 39-40. Despite acknowledging the Commission's looming statutory deadline to issue a final order in this case, Joint Movants request 25 days to conduct discovery on witness Williamson's supplemental testimony and exhibits. Given that the Commission's March 16, 2023 Order Scheduling Investigation and Hearings, Establishing Intervention and Testimony Due Dates and Discovery

Guidelines, and Requiring Public Notice (Scheduling Order) only afforded that “[f]ormal discovery requests related to the prefiled direct testimony of the Public Staff or intervenors shall be served no later than five calendar days after the filing of that party’s testimony,” the Presiding Commissioner finds the Joint Movants’ request for an extended discovery period to be unreasonable under the circumstances. Scheduling Order at 4. Nonetheless, consistent with the Scheduling Order and for the avoidance of doubt, the Presiding Commissioner notes that the parties have until Wednesday, October 25, 2023, to serve discovery requests on witness Williamson’s Corrected Supplemental Exhibits.

Furthermore, the approaching statutory deadline for the Commission to issue its final order likewise renders the Joint Movants’ request that the hearing not be reconvened until no sooner than November 20, 2023, impracticable when this would allow the Commission fewer than 25 days to prepare and issue the hearing transcript, receive and consider post-hearing supplemental filings, and deliberate on and issue a final order. Affording parties before the Commission reasonable time to prepare for hearing must be balanced with adequate time for the Commission to render its decision. The Presiding Commissioner finds that reconvening the hearing on October 30, 2023, fairly and reasonably balances these interests. For the same reasons, the Presiding Commissioner declines to grant the Joint Movants’ request that parties be given “at least 10 days after the close of any reconvened hearing” to supplement their post-hearing filings. Second Motion at ¶ 22.

Joint Movants’ Second Motion requests supplemental alternative relief in the form of allowing for “cross-examination of all other parties’ revenue apportionment witnesses.” *Id.* With the exception of the Public Staff’s witnesses who were forecasted to potentially file supplemental testimony, all other witnesses to this proceeding have been excused. As discussed in the Order Denying Motion to Strike, only DEC is permitted to present rebuttal witnesses in response to the Public Staff’s supplemental testimony and exhibits. Accordingly, the Presiding Commissioner declines to recall additional witnesses for the purpose of hearing rebuttal evidence on witness Williamson’s supplemental testimony and exhibits.

Finally, the Joint Movants’ cite to Supreme Court precedent stating that “procedural rules of an administrative agency are binding upon the agency which enacts them as well as upon the public[.]” *Id.* at 21, *citing to* *Refining Co. v. Board of Aldermen*, 284 N.C. 458, 467-68, 202 S.E.2d 129, 135 (1974); *George v. Town of Edenton*, 294 N.C. 679, 242 S.E.2d 877 (1978). The Second Motion invokes several Commission Rules which they allege the Public Staff has violated. The Presiding Commissioner has already analyzed the application of those rules to the immediate circumstances and found them to be inapplicable.

The Presiding Commissioner further notes that Commission Rule R1-30 states that “[i]n special cases, the Commission may permit deviation from these rules insofar as it finds compliance therewith to be impossible or impracticable.” The Presiding Commissioner finds that the present circumstances – the Public Staff having to audit a total capital spend of \$1.1 billion for DEC’s May 2023 and June 2023 update – to constitute such a “special case” warranting application of Commission Rule R1-30 and the timing and content of witness Williamson’s supplemental testimony and exhibits to be reasonable deviations consistent with Rule R1-30.

As stated in the Order Denying Motion to Strike, the North Carolina Supreme Court has held that where the Commission permits a late-filed exhibit, opposing parties have the right to demand that the hearing be reopened to allow for cross-examination of witnesses regarding the information presented by the late-filed exhibit or to present rebuttal evidence. *State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 269, 148 S.E.2d 100, 109-10 (1966). While not precisely applicable to late-filed supplemental testimony, *Carolina Tel. & Tel. Co.* provides due process safe-guards that enable the Commission to consider evidence presented after a hearing has been adjourned, which is precisely the present circumstance. In *Carolina Tel. & Tel. Co.*, the Supreme Court indicated that the Commission may consider late-filed evidence provided that parties are provided with an opportunity to cross-examine witnesses regarding the information presented by the late-filed exhibit or to present rebuttal evidence during a reconvened hearing. While the *Carolina Tel. & Tel. Co.* decision only requires that one of these remedies be afforded, here the Commission is providing Joint Movants and all other parties with the opportunity to (1) cross-examine witness Williamson on his supplemental testimony and exhibits and (2) to elicit rebuttal testimony from DEC's rate design witnesses – who DEC has already forecasted do not agree with witness Williamson's revenue apportionment recommendation. See October 19, 2023 DEC Response to Joint Motion to Strike and Request for Relief.

IT IS, THEREFORE, ORDERED as follows:

1. That Joint Movant's Second Motion is denied;
2. That the Public Staff shall refile witness Williamson's Corrected Supplemental Exhibits and errata accompanied by his original prefiled supplemental testimony as soon as practicable but no later than Friday, October 27, 2023;
3. That Ordering Paragraph Nos. 2-5 of the Order Providing Additional Hearing Procedures are hereby rescinded with regard to the reconvened hearing;
4. That parties shall come to the hearing prepared with enough paper copies of all potential cross-examination exhibits and potential redirect examination exhibits to provide copies to the Commission as follows:
 - a. Court reporter – one copy;
 - b. Commissioner – seven copies;
 - c. Commission staff – ten copies;
5. That the next business day after the close of the record, each party shall file in Sub Docket No. E-7, Sub 1276A, the following:
 - a. A list of that party's cross-examination and redirect exhibits moved into the record, noted by date and by witness;

b. A copy of that party's cross-examination and redirect examination exhibits moved into the record, marked as identified during the hearing; and

6. That by no later than Friday, October 27, 2023, DEC and the Public Staff shall file in Sub 1276A summaries of their respective witnesses' testimony. In lieu of reading the witness' summary into the record, the witness' testimony, errata, and summary should be moved into the record at the time the witness is made available for cross-examination.

ISSUED BY ORDER OF THE COMMISSION.

This the 24th day of October 2023.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in black ink that reads "A. Shonta Dunston". The signature is written in a cursive, flowing style.

A. Shonta Dunston, Chief Clerk