**BEFORE THE NORTH CAROLINA UTILITIES COMMISSION**

DOCKET NO. G-9, SUB 743

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| In the Matter of | ) |
| | ) |
| Application of Piedmont Natural Gas Company, LLC, for General Rate Increase | ) |

BRIEF OF FAYETTEVILLE PUBLIC WORKS COMMISSION

Fayetteville Public Works Commission ("FPWC"), an intervenor in this Piedmont Natural Gas Company, LLC ("Piedmont") general rate proceeding, is filing this Brief to address a single issue: Paragraph 32 of the Stipulation between Piedmont, the Public Staff - North Carolina Utilities Commission, Carolina Utility Customers Association, Inc., and Carolina Industrial Group for Fair Utility Rates IV filed in this proceeding on August 13, 2019 (the "Stipulation"). FPWC is opposed to Stipulation Paragraph 32 because it's unnecessary, legally unwarranted, overbroad, and potentially unduly discriminatory in its application. FPWC therefore asks the Commission to reject Stipulation Paragraph 32 even if the Commission elects to adopt the remainder of the Stipulation, on which FPWC takes no position.

Stipulation Paragraph 32 provides as follows:

> **32. Electric Generation Contract and Other Special Contract Customer Contributions to Overall Systems Support.** Piedmont agrees to implement a system support volumetric rate component, to be implemented on a prospective basis, in all special and electric generation contract sales or transportation service arrangements filed with the Commission after the effective date of rates in this proceeding. Such volumetric rate component shall be included in future special and electric generation contract arrangements unless and to the extent that Piedmont and the Public Staff agree, and the Commission ultimately concludes, that it is just and reasonable and not unduly discriminatory to exclude such rate component from a special or electric generation contract arrangement in discrete circumstances. The purpose of the special and electric generation contract volumetric rate component is to ensure that special and electric

> generation contract customers provide adequate support for existing Piedmont infrastructure and operations and are not subsidized by Piedmont's other customers. If Piedmont and the Public Staff are unable to agree to the nature and design of the special or electric generation contract volumetric rate component to be implemented hereunder, Piedmont and the Public Staff will bring this matter to the Commission for resolution.

In summary, the Public Staff (with the consent of the other parties to the Stipulation) is using Stipulation Paragraph 32 to ask the Commission to (1) issue a general declaratory order about the inclusion of volumetric rate components in special contracts that are themselves the subject of a case-specific declaratory order proceedings; and (2) include in the general declaratory order an exception to the volumetric rate component requirement whenever such an exception is "just and reasonable and not unduly discriminatory."

The reason such a general declaratory order is unnecessary is evident in a review of the Commission's existing procedure for handling special contracts. In the dockets of which the Commission took judicial notice during the hearing in this proceeding, Docket Nos. G-9, Sub 568, 572, 574, 578, 579, 588, 593, 597, 598, 603, 605, 613, 619, 620, 621, 624, 625, 628, 638, 640, 652, 654, 656, 657, 709, 711, 718, and 720 (collectively, the "Dockets"), and in the testimony of Public Staff witness Julie Perry on cross-examination (Tr. Vol 6, pages 234-243), it's clear that whenever Piedmont negotiates a special contract for the local distribution of natural gas to a retail customer, Piedmont files the special contract under seal with the Commission and requests approval of the special contract. The Public Staff then has the opportunity to review the contract and take discovery and to determine whether to present the contract to the Commission as a consent item in the weekly staff conference or to contest the special contract. If the Commission approves the special contract, the Commission's standard practice has been in the Dockets to issue an order that "for ratemaking purposes . . . neither constitutes

approval of the amount of any compensation paid pursuant to the Agreement, nor prejudices the right of any party to take issue with any provision of the Agreement in a future proceeding[,]" (Order Allowing Agreement to Become Effective, Decretal Paragraph 2, Docket No. G-9, Sub 720 (Issued July 23, 2018), or includes substantially similar language.

This standard Commission process thus already affords the Public Staff (and potentially other intervenors with an interest in the proceeding) at least three (3) bites at the apple to address any concerns they may have with a proposed special contract: (1) after the special contract is filed, the Public Staff can evaluate it and the negotiate with Piedmont or oppose it; (2) when the special contract is presented to the Commission for approval, the Public Staff can contest the requested approval; and (3) in a rate proceeding, since the Commission's approval order is without prejudice for ratemaking purposes. Neither the Public Staff nor any other party to the Stipulation has articulated a valid reason why a fourth bite at the apple in the form of a general declaratory order about special contracts set forth in Stipulation Paragraph 32 is necessary or appropriate.

According to Public Staff witness Julie Perry:

> So I think what we're trying to do here is sort of set the notion that -- that, you know, there needs to be a system contribution. It's fine to have some fixed part of the contract, and we think that there should be a system contribution, and we think it should be usage-based. If they bring something in and we say no, you know, and they have to go back to their customers and say, you know, Public Staff isn't going to support it, it's going to be this -- and it does get to be a long drawn out We've done it, not necessarily with Piedmont, with other utilities, and sometimes it takes a year or so to get all this ironed out. So yes, you're right, we do have a bite of the apple a few times, but I think to get these things done and be in good faith, we're trying to put it out there that this is going to be our position. And so herein lies the problem. You know - - and we're not asking the Commission to do anything, just --we will be doing this on a case-by-case basis. We're just letting them know that we are trying to get

to an end resolve with this issue that we've had. (Tr. Vol 6 pages 242-243).

If the purpose of Stipulation Paragraph 32 is merely to notify the Commission of the Public Staff's position, as Ms. Perry asserted, then her testimony alone in this rate proceeding has accomplished that goal and there is no need to adopt Stipulation Paragraph 32. Moreover, the fact that, as Ms. Perry explained, special contracts will be handled on a "case-by-case" basis by the Public Staff cuts against any justification for the Commission to adopt a general declaratory order to requiring a volumetric rate component for all special contracts, especially when the general rule also contains an undefined exception that allows the volumetric rate component to be excluded when it's "just and reasonable and not unduly discriminatory" that may be as broad as the rule itself.

The existing three bites at the apple have already proven themselves to be sufficient for the Public Staff to address their concerns about special contracts. For example, Ms. Perry testified on cross-examination, the Public Staff was able to work with Piedmont to revise a special contract in Docket No. G-9, Sub 722 prior to its presentation to the Commission for approval. According to Ms. Perry:

> Based on these concerns [relating to the degree of system contribution provided for by the agreed rates], and discussions between Piedmont and the Public Staff, Piedmont and DEC have agreed to revise the rates and charges under the agreement, including a new usage-based incremental facilities volumetric charge designated to address the Public Staff's concerns. (Tr. Vol 6 page 235).

The Public Staff has ultimately consented to each of the special contracts filed by Piedmont in the Dockets. If the Public Staff ever concludes that a specific special contract should not be approved by the Commission because the special contract lacks a volumetric rate component, the Public Staff can always withhold its consent and explain

to the Commission the basis for its concerns. The Public Staff has also been able to convince the Commission to adopt ratemaking modifications in response to existing to special contracts. According to Ms. Perry:

> When the IMR came up, we were saying all classes of customers should be providing some safety, and some portion of the IMR should be assigned to special contracts. Well, since you can't open the contracts back up, we have taken sort of a special contract approach, which I calculate in each rate case based on the contracts that are included in the rate case at the time, and we just -- not that we disallow IMR for the company, we just credit an amount each year so that they're sort of apportion -- so it basically assumes you're allocating a piece to the special contracts that they're not able to collect until the next rate case. (Tr. Vol 6 pages 240-241).

The Public Staff is effectively seeking to impose through Stipulation Paragraph 32 a general declaratory order about the special contracts to be addressed in case-specific declaratory orders despite the absence of any existing general dispute between Piedmont and the Public Staff or any other party about the special contracts. Such general pronouncements seem to be inherently imprudent in a rate proceeding, especially when the issue to be addressed by the general declaratory order was not even raised publicly in this proceeding until the Stipulation was filed.

In North Carolina, declaratory orders are not appropriate in the absence of an actual controversy. As the North Carolina Supreme Court explained in *Gaston Board of Realtors, Inc. v Harrison,* 311 N.C. 230, 316 S.E.2d 59 (1984):

> [T]his Court has held on a number of occasions that courts have jurisdiction to render declaratory judgments only when the pleadings and evidence disclose the existence of an actual controversy between parties having adverse interests in the matter in dispute. We have described an actual controversy as a "jurisdictional prerequisite" for a proceeding under the Declaratory Judgment Act, the purpose of which is to "preserve inviolate the ancient and sound juridic concept that the inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status or other legal

> relations." . . . Although it is not necessary that one party have an actual right of action against another to satisfy the jurisdictional requirement of an actual controversy, it is necessary that litigation appear unavoidable. Mere apprehension or the mere threat of an action or a suit is not enough. Thus the Declaratory Judgment Act does not "require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise. (cites omitted).

In this proceeding, the Public Staff has, by their own admission in the testimony quoted above, effectively asked the Commission for an advisory opinion on special contracts without any actual pending general dispute. Such an advisory opinion in the form of a general declaratory order set forth in Stipulation Paragraph 32 is thus legally unwarranted.

In addition, the functional declaratory ruling that the Public Staff is seeking (all special contracts must have a volumetric rate component unless they don't need it) is overbroad and ill-defined. If, as the Public Staff repeatedly acknowledged on cross-examination, there are many different kinds of special contracts negotiated by Piedmont, including but not limited to electric generation contracts, bypass contracts, and construction contracts (Tr Vol 6 pages 223 - 227), all of which need to be evaluated on a case-by-case basis, imposing a general rule with an exception that is potentially as large as the rule itself serves no real purpose. Moreover, since the exception to the general rule about volumetric rate components has no parameters whatsoever other than the existing statutory standards of "just and reasonable and not unduly discriminatory," the imposition of a general rule together with an exception that is devoid of identifiable limitations invites disparate treatment among customers and thus creates an unnecessary risk of discrimination.

Finally, since Stipulation Paragraph 32 is "to be implemented on a prospective

basis," Stipulation Paragraph 32 creates a real risk of imposing temporal discrimination by treating a special contract to be negotiated in or after 2020 significantly differently than a special contract that was negotiated and approved before 2019 even if all of the other relevant facts and circumstances are identical. In light of the fact that the Atlantic Coast Pipeline is expected to be built in the near future and presents significant economically beneficial opportunities to eastern North Carolina, the proposed change in the rules of the game represented by Stipulation Paragraph 32 has the potential to unduly and harshly penalize eastern North Carolina once the pipeline is built and is therefore unjustified.

WHEREFORE, FPWC requests that the Commission enter an order rejecting Stipulation Paragraph 32.

Respectfully submitted this the 25th day of September, 2019.

FAYETTEVILLE PUBLIC WORKS COMMISSION

By: /s/ *James P. West*
James P. West, Chief Legal Officer
N.C. State Bar No. 18019
P. O. Box 1089
Fayetteville, NC 28302-1089
910-223-4909

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the foregoing Brief of Fayetteville Public Works Commission was served on all parties of record by either hand delivery, email, or depositing the same in the United States mail, postage prepaid.

This the 25th day of September, 2019.

By: /s/ *James P. West*
James P. West