

**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 Adjustment of Rates and Charges)	JOINT MOTION TO
Applicable to Electric Service in North)	STRIKE AND REQUEST
Carolina and Performance Based Regulation)	FOR RELIEF

NOW COME 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 III or CIGFUR) (together with Blue Ridge et al., Joint Movants), by and through the undersigned counsel, and submit this Joint Motion to Strike and Request for Relief (Joint Motion) in the above-captioned docket. In support of their Joint Motion, Joint Movants respectfully show unto the Commission as follows:

1. Pursuant to N.C. Gen. Stat. § 62-133.16(d)(3), the Commission has 300 days to issue its decision in an electric general rate case with application for performance-based regulation.
2. On February 16, 2023, the Commission issued an order declaring a general rate case, suspending the proposed new rates, establishing the test year period, and advising that an order scheduling hearings and providing public notice would be issued at a later date.
3. Calculating 300 days from February 16, 2023, the Commission has until Wednesday, December 13, 2023, to issue its final decision in the instant general rate case.

4. On March 16, 2023, the Commission issued an Order Scheduling Investigation and Hearings, Establishing Intervention and Testimony Due Dates and Discovery Guidelines, and Requiring Public Notice (Scheduling Order).
5. In its Scheduling Order, the Commission directed in pertinent part “[t]hat the direct testimony and exhibits of intervenors and the Public Staff shall be filed on or before Wednesday, July 19, 2023[.]” Scheduling Order, at Ordering Paragraph 14.
6. On July 19, 2023, Public Staff witness David Williamson (witness D. Williamson) caused to be pre-filed in the above-captioned docket direct testimony.
7. In witness D. Williamson’s pre-filed direct testimony, he testified, in pertinent part: “In supplemental testimony, I will illustrate the impacts associated with revenue apportionment and rate design based on the Public Staff’s proposed revenue requirement in this proceeding.” Tr. vol. 13, p. 42.
8. On August 1, 2023, the Public Staff filed a letter in the above-captioned docket, unilaterally declaring that it would not be complying with the Scheduling Order issued in the instant docket:

The Public Staff, therefore, hereby notifies the Commission, DEC, and other parties in this docket that it anticipates filing its supplemental testimony, addressing both the May 2023 and June 2023 updates, as soon as possible, but no sooner than the start of the hearing on August 28, 2023.

9. On August 21, 2023, a Commission Staff Attorney emailed counsel for all parties for the purpose of scheduling a pre-hearing conference call. A true and accurate copy of that email is identified and attached hereto as Attachment A.
10. A pre-hearing conference call was in fact held at 4 p.m. on Wednesday, August 23, 2023.
11. During the August 23, 2023 pre-hearing conference call, the Commission Staff Attorney informed counsel for all parties that, among other things, it was the expectation of the Commission that any supplemental pre-filed testimony be filed in advance of the respective witness taking the stand during the evidentiary hearing held in the above-captioned matter.
12. The evidentiary hearing in this matter was held beginning on Monday, August 28, 2023, and concluding on Tuesday, September 5, 2023.
13. When witness D. Williamson took the witness stand on August 31, 2023, he still had not caused to be pre-filed in this docket his supplemental testimony regarding the issue of revenue apportionment.
14. This issue was brought to the Presiding Commissioner's attention before witness D. Williamson was made available for cross-examination on August 31, 2023:

MS. CRESS: Yes. Commissioner Duffley, Blue Ridge does have a procedural and evidentiary matter to bring to the Commission's attention now that Mr. Williamson's direct testimony has been entered into the record.

COMMISSIONER DUFFLEY: Please, proceed.

MS. CRESS: Thank you. Mr. Williamson indicated in his direct testimony his intent to file supplemental testimony with respect to the issue of revenue apportionment, and the Public Staff's recommendations regarding how the final revenue requirement in this rate case will be apportioned among the retail customer classes.

Blue Ridge reserved time to cross-examine this witness regarding those anticipated recommendations, which based on the prehearing conference, we understood from Commission staff that it was the Commission's expectation that a witness's testimony be filed in advance of the witness taking the stand. As we sit here today, it is my understanding, unless something has changed in the Docket that I'm not aware of, that Mr. Williamson has still not filed that supplemental testimony containing those recommendations regarding the revenue apportionment issue. And it's further my understanding that he intends to do so as part of the supplemental filings that the Public Staff has indicated on the record they will be making in mid-October.

And, with all due respect, Blue Ridge takes the position that that is unfair to allow one party to basically have the last word after all of the other parties' witnesses have already been excused and all of the other evidence has been heard. The other parties have already been litigating this issue throughout the week, this week, and it is – it is essentially allowing one party to play by a different set of rules than the other parties to this case.

And for all of those reasons, Blue Ridge would object to the Public Staff being allowed to file this supplemental testimony on this issue at that late date in mid-October, and is looking to the Commission for guidance on how to proceed today in light of the fact that its cross time was reserved to cross about that one specific issue and that testimony is not in the record.

COMMISSIONER DUFFLEY: Mr. Felling?

MR. FELLING: Thank you, presiding Commissioner Duffley. The Public Staff has been – has made every effort

to be as transparent as we can in our plan and updates to the Commission and to the parties along the way on both the difficulties we've had with fully auditing the supplemental updates that have been made to the Company's Application, and the kind of voluminous work that can be involved in that. And recognizing that that is an unusual circumstance that, you know, it puts all parties in a unique position, but this is – our plan has not been a secret. We filed a letter on how to proceed or how we intended to proceed on the Docket on August 1st, note with copies to all Intervenors notifying them that we would not be filing supplemental testimony for the parties that needed to do so until during or after the hearing.

We have updated the Commission along the way, even throughout this hearing. We have identified the specific witnesses, including Public Staff witness Williamson, and provided a date certain on when that that testimony would be filed, so –

COMMISSIONER DUFFLEY: And that date certain is?

MR. FELLING: I believe we indicated that that was October 13th.

COMMISSIONER DUFFLEY: Okay.

MR. FELLING: I think we gave that update on Tuesday morning at the Commission's request.

COMMISSIONER DUFFLEY: Correct.

MR. FELLING: And so, I also would note that there's been numerous witnesses who – Public Staff witnesses, who are in the same position as Mr. Williamson, who will be providing supplemental testimony who have already been testified and been released by the Commission, and there hasn't been a similar objection. So, I would note that, you know, to the extent that this objection should have been made earlier, it's now being made just with respect to Mr. Williamson. But, you know, we'll defer – this was also a similar instance that occurred in the DEP rate case hearing where supplemental testimony was filed. So, certainly acknowledge that it's an

unusual circumstance, but this is not one that has surprised or should prejudice any party based on kind of the procedure that we've followed along the way. So, I would ask that that motion be denied.

MS. CRESS: May I briefly be –

COMMISSIONER DUFFLEY: Yes.

MS. CRESS: -- heard in response? Thank you.

Just two quick points. The reason why this request or this objection, rather, is being lodged with respect to this witness and not with respect to the Public Staff's other witnesses, who intend to file supplemental testimony, is because this is an issue that does not require completion of the Public Staff's audit or its investigation into the Company's updates for them to file this testimony and take a position on this issue.

In the DEP rate case, they ended up – the Public Staff ended up supporting the methodology that the Company had proper testimony regarding 10 months prior to the testimony being filed as a supplemental filing six weeks after the close of the evidentiary hearing. It required reconvening of the hearing, which I believe that will be a very similar, if not identical, request that would have to be made by the parties in this rate case, but it is our position that that still does not make Blue Ridge or CIGFUR III, for that matter, whole because our – we will not have an opportunity to rebut that evidence through either our own witnesses or other parties' witnesses at that late stage in the game. And it, essentially, gives the Public Staff the final word, after having seen this issue be litigated during the evidentiary hearing and having the benefit of seeing the parties' proposed orders and briefs, and seeing the arguments that are taken throughout, and for those reasons, it, frankly – I understand everything Mr. Felling said, but it remains that this is a due process issue.

MR. FELLING: Presiding Commissioner –

COMMISSIONER DUFFLEY: I have one question. What CIGFUR witnesses do you still have that haven't

been dismissed or released that would be used to rebut Mr. Williamson's testimony?

MS. CRESS: Well, respectfully, if Mr. Williamson is going to be allowed to file supplemental testimony, then CIGFUR III does intend to request an opportunity to have our witness, who has previously filed testimony on this same issue, be heard at the same time that cross examination of Mr. Williamson, as to that supplemental testimony, occurs.

COMMISSISONER DUFFLEY: Okay. Mr. Felling?

MR. FELLING: Thank you, presiding Commissioner Duffley. Just to clarify a few things there. The Public Staff has never issued a recommended revenue apportionment or recommended rates before we had the recommended revenue requirement. And so, in the DEP case, the agreement that Ms. Cress referenced that we came to with the Company occurred after we had already reached our recommended revenue requirement, which we have not done in this case. So, the notion that the Public Staff can, at this point, propose recommended revenue apportionment and rates is not correct based on Public Staff policy, and that was something that had been addressed. Also, CIGFUR III questioning with the Reed and Byrd panel, I think I elicited some questions about their familiarity with whether the Public Staff had ever had a recommended revenue apportionment before we had a recommended revenue requirement, which they were not aware of that, any circumstance where we had, so.

COMMISSIONER DUFFLEY: Okay. Thank you. I am not going to make a ruling at this time to the extent your objection is a motion, but it's my understanding that any of your reserved cross was for the supplemental, and you do not have questions at this time for Mr. Williamson?

MS. CRESS: That's correct. And we would just request that we reserve the right to cross-examine on any potential supplemental filings that occur from this witness.

COMMISSIONER DUFFLEY: I note that request.

MS. CRESS: Thank you. Moving on, then, I believe I'm also next up on the list for CIGFUR III.

COMMISSIONER DUFFLEY: Correct. You may proceed.

MS. CRESS: Thank you. And just for the record, CIGFUR III does join Blue Ridge in the objections that were just lodged, which I will not repeat.

COMMISSIONER DUFFLEY: Duly noted.

MS. CRESS: Thank you.

Tr. vol. 13, pp. 68-76.

15. At the conclusion of witness D. Williamson's live testimony on August 31, 2023, Presiding Commissioner Duffley stated "Mr. Williamson, you may step down for now." *Id.* at 99.
16. On the last day of the evidentiary hearing, Presiding Commissioner Duffley stated:

Lastly, it's my understanding that the Public Staff intends to file supplemental testimony and schedules of Witnesses Boswell and Zhang, D. Williamson, McLawhorn, Metz, Thomas, T. Williamson and Michna resolving DEC's May and June updates by October 13th, 2023. We will hold the record open for the purpose of receiving the late-filed exhibits that have been requested by the Commissioners and the supplemental testimony and schedules of the Public Staff on DEC's May and June updates.

We will provide all of you with additional time to update your proposed Orders or provide supplemental proposed Orders on the items or matters addressed in supplemental testimony. The date for the proposed Orders will not be extended due to this additional supplemental testimony or late-filed exhibits.

And with that, unless there any questions, this
hearing is adjourned for now.

Tr. vol. 16, pp. 422-23.

17. On October 11, 2023, the parties filed Proposed Orders and Briefs in the above-captioned docket.
18. On October 13, 2023—46 days after the evidentiary hearing in the above-captioned proceeding began—witness D. Williamson caused to be filed in this docket his Supplemental Testimony (D. Williamson Supplemental Testimony), providing for the first time in this docket the Public Staff’s recommended revenue apportionment among retail customer classes.
19. The Public Staff did not first obtain leave from the Commission to file the Supplemental Testimony of D. Williamson. Indeed, instead of obtaining leave from the Commission, D. Williamson unilaterally declared pre-filed direct testimony that he would be submitting late-filed supplemental testimony.
20. The D. Williamson Supplemental Testimony violates Commission Rule R1-24(g). Under Rule R1-24(g)(2), the Public Staff was obligated to file “*all* testimony, exhibits and other information which is to be relied upon at the hearing *20 days in advance of the scheduled hearing*” (emphasis added). In other words, to comply with Commission Rules, D. Williamson’s supplemental testimony should have been filed no later than August 8, 2023. The Rule permits only one exception to this 20-day

requirement, which does not apply to the instant docket. See Rule R1-24(g)(5).

21. Rather than comply with the Commission's Scheduling Order, Commission Staff's admonishments during the pre-hearing conference call, or Commission Rule R1-24, the Public Staff has filed the D. Williamson Supplemental Testimony 46 days after the expert witness hearing in this matter began. This decision was made unilaterally, announced by the Public Staff without first seeking leave or permission from the Commission.
22. Unlike other late-filed supplemental testimony proffered by the Public Staff in this proceeding, D. Williamson's recommendations regarding revenue apportionment submitted as part of his supplemental testimony did not depend upon the Public Staff's completion of its audit of the Company's summer updates. That the Public Staff has in this rate case attempted to make revenue apportionment a function of the total revenue requirement underscores the subjective, arbitrary, and capricious nature of the Public Staff's "guiding principles" and its revenue apportionment methodology, which are evidently subject to change depending on the magnitude of the total revenue requirement.
23. As the Commission has previously noted,

The Commission's orders establishing procedural schedules are critical to the orderly and organized management of matters coming before the Commission. In general, the Commission modifies procedural schedules only when good cause is shown by the party

requesting modification and when no prejudice will result to the parties or the proceeding as a result of the modification. The Commission has allowed the filing of supplemental testimony in limited instances, where the need to file such supplemental testimony is driven by the subject matter of the testimony, such as cost updates in general rate case proceedings or settlement reached by parties prior to evidentiary hearing.

Order Allowing Supplemental and Supplemental Rebuttal Testimony, and Providing for Limited Discovery, Docket No. W-1300, Sub 60, at p. 2 (March 3, 2022) (finding no emergent circumstances justifying supplemental testimony, but nevertheless allowing it given that the parties were working together cooperatively and no other party opposed the relief sought).

24. Instead of requesting leave from the Commission to file out of time, or requesting modification of the Scheduling Order and deferring to the Commission to make findings that “good cause” has been shown justifying the modification to the Scheduling Order, the Public Staff unilaterally decided to treat the procedural deadlines ordered in this general rate case—the same procedural deadlines with which all other parties to this docket have had to comply—as mere suggestions or guidelines.
25. To allow the admission into evidence of the supplemental testimony and exhibits of witness D. Williamson at this late stage in the proceeding would cause undue prejudice to other parties who have already spent time and resources litigating an issue of great materiality and import: revenue apportionment among retail customer classes.

26. To allow the admission into evidence of the supplemental testimony and exhibits of witness D. Williamson at this late stage in the proceeding would violate the due process rights of other parties, including Joint Movants.
27. For all these reasons, and in the interests of fairness, due process, avoiding undue prejudice of other parties, and the orderly and organized management of matters coming before the Commission, the supplemental testimony of witness D. Williamson filed in the above-captioned docket on October 13, 2023 should be stricken from the record and should not be considered by the Commission in its deliberations in this matter.
28. The prejudice and due process implications caused by allowing witness D. Williamson's testimony into the record at this late stage in the proceeding, particularly under these circumstances, is likely incurable and indefensible. However, in the event the Commission is inclined to deny Joint Movants' motion to strike, Joint Movants respectfully request the following relief in the alternative:
 - a. The opportunity to conduct additional discovery;
 - b. The opportunity to present rebuttal evidence by way of leave to allow all other parties to file supplemental rebuttal testimony;
 - c. Reconvening of the evidentiary hearing in this matter to allow for cross-examination of D. Williamson;
 - d. The opportunity to supplement previously-filed proposed orders and briefs at least three weeks after the close of any reconvened hearing;and

- e. For any such other and further relief as the Commission may deem just and proper.

WHEREFORE, Joint Movants respectfully pray for the following relief:

I. That their Motion to Strike the Supplemental Testimony and Supplemental Exhibits of Public Staff witness D. Williamson, filed in this docket on October 13, 2023, be granted; and

II. In the event Joint Movants' Motion to Strike is denied, CIGFUR respectfully requests the alternative relief requested in Paragraph 28 and all of its subparts.

Respectfully submitted, this the 17th day of October, 2023.

BAILEY & DIXON, LLP

/s/ Christina D. Cress
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*Attorneys for CIGFUR III and
Blue Ridge et al.*

CERTIFICATE OF SERVICE

The undersigned attorney for CIGFUR III and Blue Ridge et al. hereby certifies that she caused the foregoing *Motion to Strike and Request for Procedural Relief* to be served upon all parties of record to Docket No. E-7, Sub 1276, as set forth in the Service List for such docket maintained by the NCUC Chief Clerk's Office, by electronic mail.

This the 17th day of October, 2023.

/s/ Christina D. Cress
Christina D. Cress

From: [Hicks, Warren](#)
To: [Snowden, Benjamin L.](#); [Dodge, Tim R](#); michael.youth@ncemcs.com; [Charles Bayless](#); mdq@lewis-roberts.com; [Marcus W. Trathen](#); [John Burns](#); kboehm@bklawfirm.com; jkyler@bklawfirm.com; benroyster@rovsterlaw.com; [David Neal](#); mmagarira@selcnc.org; tgooding@selcnc.org; [Cathy Cralle Jones](#); [Andrea Bonvecchio](#); justin.somelofske@sierraclub.org; aj@jenkinsatlaw.com; brian.beverly@youngmoorelaw.com; temoore@ncdoj.gov; [Christina Cress](#); [Jeffries, James H. IV](#); [Athens, Kristin M.](#); jack.jirack@duke-energy.com; [Butler, Melissa O](#); [Jagannathan, Molly McIntosh](#); dmertz@ncdoj.gov; csedwards@wardandsmith.com; [Conant, Douglas](#); [Ethan Blumenthal](#)
Cc: [Hicks, Warren](#)
Subject: E-7, Sub 1276: Prehearing Conference
Date: Monday, August 21, 2023 4:40:50 PM
Attachments: [image001.png](#)
Importance: High

Good afternoon,

I am emailing the counsel of record for parties to DEC's multi-year rate case proceeding (E-2, Sub 1276 along with consolidated docket E-7, Sub 1134).

Prior to the hearing beginning on Monday, August 28, the Commission would like to hold a brief pre-hearing conference call to discuss a few logistical/procedural matters with the parties pertaining to the [proposed witness](#) list filed on 8/14.

Each party should make sure they have at least one representative counsel on the call.

I am requesting that DEC set up and circulate a conference call for this purpose for **this Wednesday, August 23 at 3 p.m.**

If any party cannot make the selected date and time work, please let me know ASAP.

Thanks,
Warren

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