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DOCKET NO. E-7, SUB 831

Clerk's Office  
N.C. Utilities Commission

In the Matter of  
Application of Duke Energy Carolinas, LLC, )  
for Approval of Save-a-Watt Approach, )  
Energy Efficiency Rider and Portfolio of )  
Energy Efficiency Programs )

PUBLIC STAFF'S  
RESPONSE TO MOTION  
FOR CLARIFICATION AND  
RECONSIDERATION

NOW COMES THE PUBLIC STAFF – North Carolina Utilities Commission (Public Staff), by and through its Executive Director, Robert P. Gruber, and, pursuant to the Commission's April 6, 2010 *Order Allowing Comments* in this docket, responds to the Motion for Clarification and Reconsideration of the Commission's *Order Approving Agreement and Joint Stipulation of Settlement Subject to Certain Commission-Required Modifications and Decisions on Contested Issues (SAW Order)*, filed by Duke Energy Carolinas, LLC (Duke) on March 10, 2010 in this docket.

### I. Background

On June 12, 2009, Environmental Defense (ED), the Southern Environmental Law Center (SELC), the Natural Resources Defense Council (NRDC) (collectively, the Environmental Intervenors), the Public Staff, and Duke filed an Agreement and Joint Stipulation of Settlement (Settlement Agreement or Agreement). (The Environmental Intervenors, the Public Staff, and Duke are, collectively, the Stipulating Parties.) On June 19, 2009, the Public Staff filed the settlement testimony of James S. McLawhorn; the Environmental Intervenors filed the settlement testimony and exhibits of John D. Wilson; and Duke filed the settlement testimony and exhibits of J. Danny Wiles, Theodore E. Schultz, and Stephen M. Farmer.

On June 18, 2009, the Commission issued an order requiring both Duke and the Public Staff to file (a) Modified Internal Rate of Return (MIRR) analyses consistent with the Settlement Agreement and (b) testimony regarding the outstanding issue between the Stipulating Parties as to the appropriate jurisdictional allocation method to use in determining the North Carolina retail demand-side management (DSM) / energy efficiency (EE) rider. The June 18, 2009 Order also scheduled a hearing to consider the Settlement Agreement. Duke filed the MIRR analyses and an exhibit of Raiford L. Smith. On July 2, 2005, the Public Staff filed the supplemental testimony and exhibits of witness Michael C. Maness.

On July 30, 2009, the Commission entered a pre-hearing order requesting verified information from the Stipulating Parties, which Duke responded to on August 10, 2009. The Commission entered a second pre-hearing order on August 14, 2009, requesting verified information from the Environmental Intervenors and the Public Staff, which both responded to on August 18, 2009.

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The case came on for hearing as ordered on August 19, 2009. On August 28, 2009, Duke filed late-filed exhibits in response to questions posed by the Commission during the hearing. The Public Staff filed late-filed exhibits on September 1, 2009.

The Public Staff requested an extension of time to file proposed orders and briefs, which the Commission allowed by order issued October 1, 2009. The Stipulating parties jointly filed a proposed order, and other intervenors filed proposed orders and briefs on October 7, 2009.

On February 9, 2010, the Commission issued the SAW Order, in which the Commission modified the Settlement Agreement with respect to the recovery of net lost revenues. With respect to Paragraph G.1. of the Settlement Agreement, which pertained to the recovery of net lost revenues, the Commission added the following provision: "Programs or measures with the primary purpose of promoting general awareness and education of energy efficiency as well as research and development activities are ineligible for recovery of net lost revenues."<sup>1</sup> The Commission further modified Paragraph G.1. to provide that:

Utility activities shall be closely monitored by the Company to determine if they are causing a customer to increase demand or consumption, and the Company shall identify and keep track of all of its activities that cause customers to increase demand or consumption, whether or not those activities are associated with demand-side management or energy efficiency programs, as provided in the Settlement Agreement, so that they may be evaluated by the parties and the Commission for possible confirmation as "found revenues."

On March 10, 2010, Duke filed a Motion for Clarification and Reconsideration (Motion) of the two aforementioned modifications to Paragraph G.1. In its Motion, Duke requests that:

- (1) The Commission clarify the meaning of "Programs or measures with the primary purpose of promoting general awareness and education of energy efficiency as well as research and development activities [that] are ineligible for the recovery of net lost revenues";
- (2) The Commission exclude education and awareness programs that produce quantified capacity, energy savings, or both from its definition of "Programs or measures with the primary purpose of promoting energy efficiency as well as research and

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<sup>1</sup> The Commission also modified Paragraph G.1. to add that, "Pilot programs or measures are also ineligible for the recovery of net lost revenues, unless the Commission approved the Company's specific request that a pilot program or measure be eligible for the recovery of net lost revenues when the Company seeks approval of that pilot program or measure." Duke does not request clarification or reconsideration of this modification.

development activities [that] are ineligible for the recovery of net lost revenues”;

(3) The Commission clarify which “utility activities shall be closely monitored by the Company to determine if they are causing a customer to increase demand or consumption”;

(4) The Commission exclude from its definition of “utility activities [that] shall be closely monitored by the Company to determine if they are causing a customer to increase demand or consumption” those activities that are independent of Duke’s EE and DSM programs; and

(5) The Commission eliminate the condition that Duke be required to identify and track its activities that cause customers to increase demand or consumption that are not associated with DSM or EE programs.

## **II. Issues Concerning General Awareness and Education Programs**

Duke argues that the Commission should clarify the meaning of general awareness and education programs that are ineligible for the recovery of net lost revenues. In support of its request, Duke notes that it is unable to find any guidance on the meaning of programs that promote general awareness or education. Moreover, Duke argues, the Commission has not identified programs in Duke’s portfolio that would qualify as such. Duke acknowledges that the Commission has excerpted its provision on general awareness and education programs from its *Order Approving Agreement and Stipulation of Partial Settlement, Subject to Certain Commission-Required Modifications*, in Docket No. E-2, Sub 931 (PEC Order), but contends that the PEC Order does not define or clarify what qualifies as a general awareness and education program either. Therefore, Duke requests the Commission to clarify whether such general awareness and education programs ineligible for recovery of net lost revenues include those for which Duke can demonstrate verified kW or kWh reductions.

If the Commission determines that even those general awareness and education programs for which Duke can show verified kW or kWh reductions are ineligible for the recovery of net lost revenues, Duke seeks reconsideration. Duke cites Commission Rule R8-68 in support of its argument, indicating that the Commission should allow Duke to recover measured and verified net lost revenues resulting from various energy efficiency programs. According to Duke, it will lose revenue if it is unable to recover net lost revenues, which could discourage it from implementing such programs. Duke provides an example of such a program: The Home Energy Comparison Report. Duke plans to file for approval of this new EE program, which will assist residential customers in assessing their energy usage by supplying them with comparative usage data for similar residences in the same geographic area. The program includes recommendations for more efficient energy use and identifications of those customers who could benefit the most by investing in new energy efficiency measures and participating in other Duke programs. Duke warns that, absent recovery of net lost revenues, reductions in energy use resulting from the Home Energy Comparison Report

will impair its ability to recover sufficient revenues to cover its fixed costs, creating a financial disincentive to implementing this program.

Duke contends that general education and awareness programs help to transform the market by making customers receptive to specific program offerings, as well as providing information to customers about how they can save money on their utility bills through other EE programs or energy savings activities. Duke believes that if the programs are specifically designed to result in quantified capacity or energy savings, no logical reason exists for their wholesale exclusion from net lost revenue recovery.

Duke concludes by noting that the modified save-a-watt (SAW) compensation mechanism is based exclusively upon actual capacity and energy savings achieved, as measured and verified by an independent third party. Duke assumes the risk, it argues, of recovering its EE and DSM costs and any management incentive, including net lost revenues for EE programs, based on its actual performance if the Commission does not allow its Motion with respect to general awareness and education programs.

The Public Staff does not agree that the Commission should clarify the meaning of general education and awareness programs or that the Commission should reconsider its decision that Duke shall not recover net lost revenues for implementing such programs. The Public Staff believes that the Commission's modification of Paragraph G.1. speaks for itself. Moreover, if the language is unclear, the PEC Order, cited by the Commission in support of its modification, discussed general education and awareness programs and should resolve any uncertainty.

In the PEC Order, the Commission approved, with modifications, certain provisions in the Agreement and Stipulation of Partial Settlement entered into by Progress Energy Carolinas, Inc. (PEC), Wal-Mart Stores East, LP, and the Public Staff (PEC Stipulation). Those provisions addressed the recovery of program costs, net lost revenues, and other utility incentives for general awareness and education programs. The Commission directed the Public Staff to monitor and review PEC's administrative and general (A&G) costs on an ongoing basis, "with particular emphasis on the effectiveness of the Company's general EE education programs", and report its findings to the Commission during PEC's future DSM and EE cost recovery proceedings.<sup>2</sup>

With respect to the recovery of program costs, the Commission found that it was appropriate for PEC to amortize incremental A&G costs supporting its DSM and EE programs. This finding was based on PEC's response to the Commission's March 3, 2009 *Post-Hearing Order Requiring Further Information and Granting Extension of Time* (PEC Post-Hearing Order) in Docket No. E-2, Sub 931. In discussing PEC's general awareness and education programs, the Commission specifically emphasized PEC's response as follows:

The Company has launched this campaign [Save the Watts] in an aggressive manner for the purpose of raising awareness and educating

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<sup>2</sup> PEC Order, at p. 9.

customers about energy savings opportunities while it awaits the approval and launch of its DSM and EE programs. . . . However, PEC plans to continue developing and implementing generic energy efficiency education and awareness programs, including but not limited to K-12 education, residential custom energy reports, online customer audit tools, etc. . . . PEC cannot quantify any measurable direct energy reduction benefits from the Save the Watts campaign.

PEC Order at pp. 27-28. Because PEC was seeking to defer these costs under G.S. 62-133.9(d)(1), the Commission had to determine whether the costs were intended to produce "future benefits." *Id.* at p. 28. Therefore, the Commission defined general awareness and education programs to be similar to PEC's Save-the-Watts campaign, residential customer energy reports, and online audit tools, noting the lack of measurement and verification (M&V) of any future direct energy reduction benefits resulting from such programs.

The Commission further approved portions of the PEC Stipulation that provided that PEC could not recover net lost revenues or program performance incentives for general awareness and education programs.<sup>3</sup>

According to the Commission's rationale in the PEC Order, general awareness and education programs should not be eligible for the recovery of net lost revenues, because they are designed to inform customers about benefits of EE and DSM generally and are unassociated with any specific DSM or EE program designed to directly result in quantifiable energy or capacity savings. The Public Staff believes that no further clarification is needed.

Whether a program is a general awareness and education program, however, is a question of fact for the Commission to resolve. Duke describes its Home Energy Comparison Report as a program with the primary purpose of promoting general awareness and education about EE. Nevertheless, Duke appears to contend that this program produces verified kW and kWh savings. This program is not before the Commission, and, in fact, has not yet been filed for approval. The Public Staff believes that, instead of issuing a statement of general application in this proceeding, the Commission may appropriately determine whether a proposed program is a general awareness and education program on a case-by-case basis when the program is submitted for approval. At that time, the Commission may consider comments or testimony regarding the nature of the program, focusing specifically on the extent, if any, that actual measured and verified kW and kWh savings result directly from the proposed program.

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<sup>3</sup> In this respect, Duke differs from PEC. Duke recovers an amount based on its avoided costs from implementing EE or DSM programs. This amount is intended to recover both the program costs and provide a utility incentive. Duke recovers net lost revenues for EE programs separately. Duke is expressly prohibited only from recovering the net lost revenues from general awareness and education programs; PEC may recover neither net lost revenues nor a utility incentive for general awareness and education programs.

The Commission considered a similar issue in Docket No. E-100, Sub 113. In that docket, the Commission was requested to include studies on energy usage in the definition of "participation incentives." The Public Staff opposed the request, explaining that such activities should not be recoverable through the annual DSM/EE riders, because they did not constitute a DSM or EE program. The Public Staff acknowledged, however, that such studies could result in participation in specific new DSM and EE programs. If an energy study or audit resulted in participation in specific new DSM or EE programs, the Public Staff predicted that it would likely not oppose the recovery of the costs of the study or audit. The Commission concluded that it would determine whether an energy study or audit qualified as a participation incentive on a case-by-case basis. *Order Adopting Final Rules*, Docket No. E-100, Sub 113, issued Feb. 29, 2008, at pp. 96-97 (Rulemaking Order). The Public Staff recommends that the Commission likewise determine at the time of program approval whether that program's primary purpose is to promote general awareness and education. If the Commission adopts this recommendation, the Public Staff believes that no amendment or clarification of the SAW Order is required.

### **III. Issues Concerning the Definitions of Net Lost Revenues and Found Revenues**

Duke next argues that the Commission did not provide sufficient guidance regarding its modification to Paragraph G.1. of the Settlement Agreement concerning what constitutes a utility activity that increases consumer demand or consumption, thus offsetting net lost revenues. Duke acknowledges that the Commission referred to the Public Staff's Responses to the Second Pre-Hearing Order Requiring Verified Information, but Duke asserts that those responses do not clarify which utility activities would qualify. Therefore, Duke requests that the Commission clarify the meaning of a utility activity that causes a customer to increase demand or consumption.

To the extent that the Commission defines "utility activities [that] shall be closely monitored by the Company to determine if they are causing a customer to increase demand or consumption" to include activities other than EE or DSM programs, Duke requests reconsideration. Duke also requests reconsideration of the Commission's requirement that it identify and track changes in revenues that occur as a result of actions of customers that increase or decrease their energy usage independently of EE or DSM programs.

In support, Duke contends that several types of changes to revenues may be construed erroneously as being caused by utility activities. Duke cites changes in the economy or in customers' actions that cause them to alter their energy usage. Duke also indicates that some changes in energy usage are directly related to Duke's EE and DSM programs. With regard to the first type, Duke argues that those changes do not result from activity by Duke's public utility operations; they are customer driven. If the Commission requires Duke to count revenue changes under this first type as "found" revenues, even if the changes result from economic changes, then the Commission

must allow Duke to count customer-driven decreases that occur when a plant or business closes or when a customer reduces energy usage in response to an increase in electricity rates. Duke believes that considering increases and decreases on a case-by-case basis is incorrect and creates a tremendous administrative burden, including lengthy and contested proceedings over what constitutes "found revenues." Duke advocates limiting the recovery of net lost revenues to the results of those actions taken by customers in response to Duke's EE or DSM programs. Duke can, it argues, measure and verify areas where there may have been increases in energy usage and those impacts would be used to reduce the level of lost sales and lost revenues.

Duke also contends that the 36 month limit on the recovery of net lost revenues accounts for the possibility of any increase in revenues resulting from any activity of Duke that causes customers to increase demand or energy consumption. Duke has recommended that the definition of net lost revenues in Commission Rule R8-68 be amended to provide for the 36 month limit to eliminate the complexities and burden associated with attempting to identify and track found revenues. Therefore, Duke concludes that issues of lost and "found" revenues should be restricted to the activities associated with Duke's EE and DSM programs.

The Public Staff disagrees. Duke, the Environmental Intervenors, and the Public Staff agreed to the following in the Settlement Agreement:

#### **G. Net Lost Revenues**

1. Net lost revenues mean revenue losses, net of marginal costs avoided at the time of the lost kilowatt-hour sale(s) incurred by the Company's public utility operations as a result of a new demand-side management or energy efficiency measure. *Net lost revenues shall also be net of any increases in revenues resulting from any activity by the Company's public utility operations that cause a customer to increase demand or energy consumption, whether or not that activity has been approved pursuant to R8-68.* When authorized by Commission Rule R8-69, net lost revenues shall be recovered for 36 months for each vintage year, except that the recovery of net lost revenue will end upon Commission approval of (1) an alternative recovery mechanism, or (2) the implementation of new rates in a general rate case or comparable proceeding to the extent that rates set in a rate case or comparable proceeding are set to explicitly or implicitly recover those net lost revenues.

Settlement Agreement, Exhibit B, p. 22. (Emphasis added).

The agreed-upon language is not limited to increases in revenues resulting from EE or DSM programs only; in fact, it explicitly recognizes that some of those increases might result from utility activities not approved under Commission Rule R8-68. Thus,

Duke's proposed clarification of the Settlement Agreement provisions regarding recovery of net lost revenues appears to result in the partial revocation of one of the limitations that the Stipulating Parties unanimously agreed would apply to Duke's recovery of net lost revenues.<sup>4</sup>

This provision of the Settlement Agreement mirrors in large part Commission Rule R8-68(b)(5), which also provides, in pertinent part, that "[n]et lost revenues shall also be net of any increases in revenues resulting from any activity by the electric public utility that causes a customer to increase demand or energy consumption, whether or not that activity has been approved pursuant to Rule R8-68." The Commission has never found that Rule R8-68 limits "found" revenues to only those that result from DSM or EE activities.

Moreover, the Commission carefully reviewed this provision of the Settlement Agreement prior to issuing the SAW Order. On August 14, 2009, it issued a *Second Pre-Hearing Order Requiring Verified Information* in this docket. The Commission requested the parties *inter alia*, to provide examples of activities that could cause revenue increases and result in reductions to net lost revenues.

The Public Staff filed its responses to the Commission's second pre-hearing Order on August 18, 2009. In its responses, the Public Staff verified that "The terms of the Settlement Agreement reflect the Public Staff's position on the recovery of net lost revenues, *and the Stipulating Parties have agreed that those terms govern Duke's recovery of net lost revenues throughout the Settlement Agreement's duration.*" Public Staff's Responses to Second Pre-Hearing Order Requiring Verified Information, Aug. 18, 2009, at p. 2 (emphasis added). The Public Staff identified a utility program promoting plug-in hybrid electric vehicles or a balanced bill program as examples of activities that may cause a customer to increase demand or consumption, and it recommended that utility activities be closely monitored to determine if they are causing an increase in demand or consumption. *Id.* at 3. Neither Duke nor the Environmental Intervenors expressed any disagreement with the Public Staff's explanation of net lost revenue recovery contained in Paragraph G.1. at the evidentiary hearing or in the proposed order they jointly filed on October 7, 2009, addressing the Settlement Agreement.

In addition, Duke has provided no compelling new reason for the Commission to reconsider the scope of its definition of net lost revenues contained in Paragraph G.1. Duke essentially made the same argument it makes here in response to the Commission's July 30, 2009 *Pre-Hearing Order Requesting Verified Information* in this docket. In Duke's August 10, 2009 response, it acknowledged that its position with respect to "found" revenues differed from the other Stipulating Parties. Duke's position

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<sup>4</sup> The Public Staff discussed the interplay of the definition of net lost revenues with the 36-month limitation on the recovery of net lost revenues contained in its settlement agreements with Duke and with Progress Energy Carolinas, Inc. in its April 1, 2010 Reply Comments in Docket No. E-100, Sub 113, pp. 17-21. The Public Staff respectfully incorporates those comments herein by reference.



there, as here, was that definitions of lost and found revenues should be limited to actions taken in response to Duke's EE or DSM programs. As the Public Staff has already noted, however, the Settlement Agreement did not reflect Duke's August 10, 2009 position on the recovery of net lost revenues; instead Paragraph G.1. of the Settlement Agreement was, with the agreement of the Stipulating Parties, intended to reflect the negotiated resolution that "found" revenues shall include "any increases in revenues resulting from any activity by the Company's public utility operations that cause a customer to increase demand or energy consumption, whether or not that activity has been approved pursuant to R8-68," which is essentially the Public Staff's position on recovery of net lost revenues.

The Public Staff's position on the recovery of net lost revenues has not changed. As the Public Staff has previously stated in its August 18, 2009 Responses to Second Pre-Hearing Order Requiring Verified Information, Duke's described restriction on the types of programs that would be covered by Paragraph G.1. of the Settlement Agreement is too narrow. Duke should be allowed to recover measured and verified net lost revenues from its energy efficiency programs, essentially as provided in Rule R8-68. The Public Staff recognizes that an electric public utility will lose revenue (net of related fuel and variable operations and maintenance expenses) when implementing certain energy efficiency programs, which could discourage it from implementing such programs. The Public Staff does not believe that revenues "lost" due to an energy efficiency program continue in perpetuity, nor do they exist in a vacuum. Instead, they are offset by gains in revenues that occur for various reasons, so that the negative impact of the measure on the utility's reasonable return on rate case is limited.

As it did in its response to the Commission's July 30, 2009 *Pre-Hearing Order Requesting Verified Information* in this docket, Duke discusses in its Motion here two types of changes in revenues – those that occur as a result of changes in the economy or actions of consumers, which should not be counted as "found" revenues, and those that occur as a result of Duke's EE and DSM programs and measures, which should be. The Public Staff does not disagree with Duke's position that these types of "natural" changes are not to be considered as activities "by the Company's public utility operations that cause a customer to increase demand or energy consumption," and instead are generally accounted for by the 36 month limitation on the recovery of net lost revenues. With respect to the second type of change, Duke indicates that increases in revenues due to certain DSM or EE programs would be classified as "found revenues" under Paragraph G.1. Clearly, these programs would fall into category of the applicable utility activities. Other activities, however, in addition to those associated with Duke's EE and DSM programs could cause revenue to increase and result in reductions to net lost revenues. Revenues from these activities should also be counted as "found." As witness Maness testified during the August 19, 2009 evidentiary hearing in this docket, the recovery of net lost revenues is intended to replace revenues that Duke has lost from enacting an energy efficiency program. (Aug. 19, 2009, SAW proceeding, T. Vol. 1, p. 221). Recovery of net lost revenues is intended to make the company "whole," not to provide a bonus in addition to a utility incentive for implementing DSM and EE programs. (See, *id.*). If the utility engages in

activities that increase its net revenues to levels that would not otherwise naturally occur, it is entirely appropriate that the allowed amount of net lost revenues recovery be reduced to avoid overcompensating the utility being made more than whole, just as if the net revenue increase had resulted from some aspect of an EE program. The net revenue increase from such an activity should be treated in the same manner as an increase resulting from a DSM/EE program. Therefore, for the foregoing reasons, the Public Staff recommends that the Commission deny Duke's request to clarify or reconsider its modifications and conclusions regarding Paragraph G.1. of the Settlement Agreement.

The Public Staff notes that the Commission directed it to work cooperatively to develop practices and procedures which will ensure, to the maximum extent possible, that Duke is able to identify and track those activities, whether or not they are associated with DSM or EE programs. The Public Staff acknowledges that it has not yet met with Duke on this matter. Therefore the Public Staff respectfully suggests that it meet with Duke (and the Environmental Intervenors to the extent they wish to be involved) as expeditiously as possible to discuss identifying and tracking the activities and report the results of that meeting to the Commission within 120 days of the Commission's order in response to Duke's Motion.

Respectfully submitted, this the 23rd day of April, 2010.

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CERTIFICATE OF SERVICE

I certify that a copy of this Response has been served on all parties of record or their attorneys, or both, by depositing a copy in the United States Mail, first class postage prepaid, properly addressed.

This the 23rd day of April, 2010.

  
Kendrick C. Fentress