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November 4, 2019

VIA ELECTRONIC FILING

Ms. Kimberley A. Campbell, Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, NC 27699-4300

RE: Proposed Order and Post-Hearing Brief of Duke Energy Progress, LLC
Docket No. E-2, Sub 1204

Dear Ms. Campbell:

Enclosed for filing in the above-referenced docket please find the *Proposed Order and Post-Hearing Brief* of Duke Energy Progress, LLC ("DEP"). An electronic copy is being emailed to briefs@ncuc.net.

Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions.

Sincerely,

Jack E. Jirak

Enclosures

cc: Parties of Record

CERTIFICATE OF SERVICE

I certify that a copy of the Proposed Order and Post-Hearing Brief of Duke Energy Progress, LLC, in Docket No. E-2, Sub 1204, has been served by electronic mail, hand delivery or by depositing a copy in the United States mail, postage prepaid to parties of record.

This the 4th day of November, 2019.

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STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1204

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	)	
	)	
Application of Duke Energy Progress, LLC Pursuant to G.S. 62-133.2 and NCUC Rule R8-55 Relating to Fuel and Fuel-Related Charge Adjustments for Electric Utilities	)	**PROPOSED ORDER OF DUKE ENERGY PROGRESS, LLC**

HEARD: Monday, September 9, 2019, at 2:00 p.m. in the Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

BEFORE: Commissioner Charlotte A. Mitchell, Chair
Commissioner ToNola D. Brown-Bland
Commissioner Daniel G. Clodfelter
Commissioner Lyons Gray

APPEARANCES:

For Duke Energy Progress, LLC:

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For North Carolina Sustainable Energy Association ("NCSEA"):

Benjamin W. Smith, Esq.
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For Carolinas Industrial Group for Fair Utility Rates II ("CIGFUR II"):

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For Fayetteville Public Works ("FPWC"):

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For the Using and Consuming Public:

Dianna Downey, Esq.
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BY THE COMMISSION: On June 11, 2019, Duke Energy Progress, LLC ("Duke Energy Progress," "DEP," or the "Company"), 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, along with the testimony and exhibits of Dana M. Harrington, Brett Phipps, Regis Repko, Kenneth D. Church, and Kelvin Henderson.

Petitions to intervene were filed by the North Carolina Electric Membership Corporation ("NCEMC") on June 24, 2019, by Fayetteville Public Works ("FPWC") on July 1, 2019, by Carolina Utility Customers Association, Inc. ("CUCA") on July 22, 2019, by the Sierra Club on August 1, 2019, by the North Carolina Sustainable Energy Association ("NCSEA") on August 9, 2019, and by Carolina Industrial Group for Fair Utility Rates II ("CIGFUR") on August 19, 2019. The Commission granted NCEMC's and FPWC's petitions to intervene on July 2, 2019, CUCA's petition to intervene on July 24, 2019, NCSEA's petition to intervene on August 13, 2019, the Sierra Club's petition to intervene on August 15, 2019, and CIGFUR's petition to intervene on August 20, 2019.

On June 20, 2019, the Commission entered an *Order Scheduling Hearing, Requiring Filing of Testimony, Establishing Discovery Guidelines, and Requiring Public Notice*. That order provided that direct testimony of intervenors should be filed on or before August 19, 2019, that rebuttal testimony should be filed on or before August 28, 2019, and that a hearing on this matter would be held on September 9, 2019.

The intervention of the Public Staff is recognized pursuant to N.C. Gen. Stat. § 62-15(d) and Commission Rule R1-19(e). On September 6, 2019 and September 13, 2019, DEP filed affidavits of publication indicating that public notice had been provided in accordance with the Commission's procedural order.

On August 19, 2019, the Public Staff filed the testimony of Jay B. Lucas, Jenny X. Li, and Dustin R. Metz, in accordance with N.C. Gen. Stat. § 62-68. On August 28, 2019, the Company filed the rebuttal testimony of Kelvin Henderson and the panel of Barbara Coppola and John Halm.

On September 5, 2019, the Public Staff filed a motion requesting that Public Staff witness Li and Metz be excused from appearance at the evidentiary hearing, and DEP filed a motion requesting that DEP witnesses Regis Repko, Kenneth D. Church, and Kelvin Henderson, be excused from appearance at the evidentiary hearing, representing that all parties to the proceeding had agreed to waive cross-examination of the witnesses. On September 6, 2019, the Commission granted the motion, excusing DEP witnesses Repko, Church, and Henderson from appearing at the evidentiary hearing.

The case came on for hearing as scheduled on September 9, 2019. The application, prefiled direct testimony and exhibits of DEP's and Public Staff's witnesses were received into evidence.

Based upon the Company's verified application, the testimony, and exhibits received into evidence at the hearing and the record as a whole, the Commission makes the following:

FINDINGS OF FACT

1. Duke Energy Progress is a duly organized corporation existing under the laws of the State of North Carolina, is engaged in the business of developing, generating, transmitting, distributing, and selling electric power to the public in North Carolina, and is subject to the jurisdiction of the Commission as a public utility. Duke Energy Progress is lawfully before this Commission based upon its application filed pursuant to N.C. Gen. Stat. § 62-133.2.

2. The test period for purposes of this proceeding is the 12 months ended March 31, 2019 ("test period").

3. NCUC Rule R8-55(d)(3) allows the Company to update the fuel and fuel-related cost recovery balance up to thirty (30) days prior to the hearing. The Company elected this option and supplemented the direct testimony and exhibits to include the fuel and fuel-related cost recovery balance as of the 15 months ended June 30, 2019.

4. In its application and direct testimony including exhibits in this proceeding, DEP requested a total decrease of $89 million to its North Carolina retail revenue requirement associated with fuel and fuel-related costs, excluding the regulatory fee. The fuel and fuel-related cost factors requested by DEP included an Experience Modification Factor ("EMF") to take into account fuel and fuel-related cost under-recoveries experienced during the test period, with an overall under-recovery of $110 million experienced during the test period ending March 31, 2019.

5. In its direct supplemental testimony and exhibits in this proceeding, DEP updated its requested decrease in the North Carolina retail revenue requirement associated with fuel and fuel-related costs, excluding the regulatory fee, to $47 million, which included an updated under-recovered EMF to $151 million through the period ending June 30, 2019.

6. The Company's appropriate North Carolina retail jurisdictional fuel and fuel-related expense under-collection for purposes of the EMF was $151,035,306, consisting of under-recoveries of $63,138,790, $4,209,287, $26,020,608, $55,725,485, and $1,941,135, for the Residential, Small General Service, Medium General Service, Large General Service, and Lighting classes, respectively.

7. Gypsum is a byproduct produced in the electric generation process and the input leading to gypsum is coal.

8. The Company entered a long-term agreement to sell gypsum to BPB NC, Inc. ("BPB") in 2004. CertainTeed Gypsum NC, Inc. ("CTG") is the successor-in-interest to BPB.

9. Under the agreement, CTG was obligated to construct a wallboard manufacturing facility at Roxboro and committed to purchase substantial amounts of gypsum from the Roxboro and Mayo units.

10. The initial agreement was amended on a number of occasions—ultimately resulting in the Second Amended and Restated Supply Agreement—but the liquidated damages provision was an essential part of the agreement and remained substantially unchanged from the initial agreement through to the Second Amended and Restated Supply Agreement (referred to hereinafter as the "Gypsum Supply Agreement").

11. The liquidated damages provision was intended to provide CTG with certainty regarding the damages it would be entitled to recover in the event that DEP was unable to supply the full amount of gypsum required under the Gypsum Supply Agreement in light of its substantial capital investment in the wallboard manufacturing facility.

12. The amount of gypsum produced by Roxboro and Mayo substantially declined due to lower natural gas prices that decreased the amount of coal-fired generation.

13. The Company was therefore unable to meet the monthly minimum delivery obligations under the Gypsum Supply Agreement.

14. In light of the options available to the Company under the Gypsum Supply Agreement, the Company discontinued supply under the Gypsum Supply Agreement (though supply continued for a limited period of time and in limited amounts under a

replacement agreement) and paid the liquidated damages rather than delivering replacement gypsum.

15. When payments made by the Company under the Gypsum Supply Agreement for liquidated damages are netted against the revenues received by the Company for the sale of gypsum under the Gypsum Supply Agreement, the Company experienced a loss resulting from the sale of gypsum.

16. Because the Company experienced a net loss resulting from the sale of gypsum under the Gypsum Supply Agreement, it is proper to allow the Company to recover through fuel rates the liquidated damages paid in connection with the Gypsum Supply Agreement.

17. The Company's baseload plants were generally managed prudently and efficiently during the test period so as to minimize fuel and fuel-related costs.

18. The decision and actions of DEP in connection with the outage at the H.B. Robinson Nuclear Station Plant ("Robinson plant") in the fall of 2018 for refueling ("Robinson Refueling Outage") were prudent and reasonable. The outage extension resulted from causes beyond the control of the Company, including a shortage of qualified labor resources, which was exacerbated by extensive hurricane activity that occurred during the period of the outage.

19. No party to this proceeding recommended any adjustment to deny recovery for the costs of replacement power incurred by the Company during the Robinson Refueling Outage.

20. It is appropriate for DEP to recover the replacement power costs resulting from the Robinson Refueling Outage, including the extended period of the outage.

21. The Company's fuel and reagent procurement and power purchasing practices during the test period were reasonable and prudent. However, given DEP's increased reliance on natural gas and the resulting increased risk of under-recoveries if natural gas prices are not forecasted as accurately as possible, the Company should evaluate historic price fluctuations and whether its current method of forecasting and hedging programs should be adjusted to mitigate the risk of significant under-recovery of fuel costs. The Company shall report the results of this evaluation in the next fuel proceeding.

22. The test period per book system sales are 62,568,164 megawatt-hours ("MWh"). The test period per book system generation and purchased power is 70,945,428 MWh (net of auxiliary use) and is categorized as follows:

Net Generation Type	System MWh Generated
Coal	8,081,365
Natural Gas, Oil, and Biomass	23,239,469
Nuclear	27,748,149
Hydro – Conventional	848,406
Solar	227,472
Purchased Power – subject to economic dispatch or curtailment	5,601,750
Other Purchased Power	5,198,817
Total Net Generation (may not add to sum due to rounding)	70,945,428

23. The North Carolina retail test period sales, adjusted for customer growth and weather, for use in calculating the EMF are 37,693,746 MWh. The adjusted North Carolina retail customer class MWh sales are as follows:

N.C. Retail Customer Class	Adjusted NC Retail MWh Sales
Residential	16,022,203
Small General Service	1,941,728
Medium General Service	11,007,307
Large General Service	8,368,542
Lighting	353,965
Total (may not add to sum due to rounding)	37,693,746

24. The appropriate nuclear capacity factor for use in this proceeding is 94.62%.

25. The projected billing period system generation and purchased power for use in this proceeding in accordance with projected billing period system sales is 71,517,770 MWh and is categorized as follows:

Generation Type	Projected System MWh Generated
Coal	11,131,286
Gas Combined Cycle ("CC") and Combustion Turbine ("CT")	22,185,181
Nuclear	29,713,146
Hydro	648,112
Solar	279,675
Purchased Power	7,560,370
Total (may not add to sum due to rounding)	71,517,770

26. The projected billing period (December 2019 - November 2020) sales for use in this proceeding are 62,155,919 MWh on a system basis and 38,091,457 MWh on a North Carolina retail basis. The projected billing period North Carolina retail customer class MWh sales are as follows:

N.C. Retail Customer Class	Projected NC Retail MWh Sales
Residential	16,265,079
Small General Service	1,806,876
Medium General Service	10,414,506
Large General Service	9,223,825
Lighting	381,171
Total (may not add to sum due to rounding)	38,091,457

27. The appropriate fuel and fuel-related prices and expenses for use in this proceeding to determine projected system fuel expense are as follows:

A. The coal fuel price is $31.35/MWh.

B. The gas CC and CT fuel price is $26.68/MWh.

C. The appropriate expense for ammonia, lime, limestone, urea, dibasic acid, sorbents, and catalysts consumed in reducing or treating emissions (collectively, "Reagents") is $26,265,057.

D. The total nuclear fuel price is $6.17/MWh.

E. The total system purchased power cost (including the impact of Joint Dispatch Agreement ("JDA") Savings Shared and the impact of House Bill 589, N.C. Sess. L. 2017-192, is $442,407,406.

F. System fuel expense recovered through intersystem sales is $161,032,005.

28. The projected fuel and fuel-related costs for the North Carolina retail jurisdiction for use in this proceeding are $883,391,685.

29. The decrease in customer class fuel and fuel-related cost factors from the amounts approved in Docket No. E-2, Sub 1173 should be allocated among the rate classes on a uniform percentage basis, using the uniform bill adjustment methodology that was approved by the Commission in that docket.

30. The appropriate prospective fuel and fuel-related cost factors for this proceeding for each of DEP's rate classes, excluding the regulatory fee, are as follows: 2.344¢/kilowatt-hour ("kWh") for the Residential class; 2.527¢/kWh for the Small General Service class; 2.468¢/kWh for the Medium General Service class; 2.056¢/kWh for the Large General Service class; and 2.281¢/kWh for the Lighting class.

31. The appropriate EMF riders established in this proceeding, excluding the regulatory fee, are as follows: 0.394¢/kWh for the Residential class; 0.217¢/kWh for the Small

General Service class; 0.236¢/kWh for the Medium General Service class; 0.666¢/kWh for the Large General Service class; and 0.548¢/kWh for the Lighting class.

32. The coal inventory rider established in Ordering Paragraph 12 of the Commission's February 23, 2018 *Order Accepting Stipulation, Deciding Contested Issue and Granting Partial Rate Increase* in Docket No. E-2, Sub 1142 expired in October 2018 and was removed from billed rates on December 1, 2018. Additional amounts collected through January 2019 further reduced the under-collected balance and interest on the under-collected balance was calculated through November 30, 2019. The under-collected balance of $257,250 is included in the EMF.

33. The total net fuel and fuel-related cost factors for this proceeding for each of DEP's rate classes, excluding the regulatory fee, are as follows: 2.738¢/kWh for the Residential class, 2.744¢/kWh for the Small General Service class, 2.704¢/kWh for the Medium General Service class, 2.722¢/kWh for the Large General Service class, and 2.829¢/kWh for the Lighting class.

34. The base fuel and fuel-related costs as approved in Docket No. E-2, Sub 1142 of 1.993¢/kWh for the Residential class, 2.088¢/kWh for the Small General Service class, 2.431¢/kWh for the Medium General Service class, 2.253¢/kWh for the Large General Service class, and 0.0596¢/kWh for the Lighting class, will be adjusted by amounts equal to 0.351¢/kWh for the Residential class, 0.439¢/kWh for the Small General Service class, 0.037¢/kWh for the Medium General Service class, (0.197)¢/kWh for the Large General Service class, and 1.685¢/kWh for the Lighting class. The resulting approved fuel and fuel-related costs will be further adjusted by EMF increments to total 2.738¢/kWh for the Residential class, 2.744¢/kWh for the Small General Service class, 2.704¢/kWh for the

Medium General Service class, 2.722¢/kWh for the Large General Service class, and 2.829¢/kWh for the Lighting class, without regulatory fees.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

This finding of fact is essentially informational, procedural, and jurisdictional in nature and is uncontroverted.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2

N.C. Gen. Stat. § 62-133.2(c) sets out the verified, annualized information that each electric utility is required to furnish to the Commission in an annual fuel and fuel-related cost adjustment proceeding for a historical 12-month test period. Commission Rule R8-55(b) prescribes the 12 months ending March 31 as the test period for DEP. The Company's initial filing and direct testimony in this proceeding was based on the 12 months ended March 31, 2019.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 3

NCUC Rule R8-55(d)(3) allows the Company to update the fuel and fuel-related cost recovery balance up to thirty (30) days prior to the hearing. The Company elected this option and supplemented the direct testimony and exhibits to include the fuel and fuel-related cost recovery balance as of the 15 months ended June 30, 2019.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 4 - 16

The evidence for this finding of fact is contained in the Application, the direct testimony and supplemental direct testimony of Company witness Harrington, the direct testimony and exhibits of Public Staff witnesses Jay B. Lucas and Jenny X. Li. As is discussed herein, Public Staff recommended certain adjustments related to the Company's payment of liquidated damages.

In its application and testimony in this proceeding, DEP requested a total decrease of $89 million to its North Carolina retail revenue requirement associated with fuel and fuel-related costs, excluding the regulatory fee. The fuel and fuel-related cost factors requested by DEP included an Experience Modification Factor ("EMF") to take into account fuel and fuel-related cost under-recoveries experienced during the test period. On Harrington Exhibit 3, Pages 1-6, Company witness Harrington proposed fuel and fuel-related cost under-recoveries of $110 million experienced during the test period through the reporting date of March 31, 2019.

	Test Period through March 31, 2019
N.C. Retail Customer Class	Under - Recovery
Residential	$40,376,037
Small General Service	2,324,536
Medium General Service	18,739,830
Large General Service	46,571,176
Lighting	1,539,374
Total (may not add to sum due to rounding)	$109,550,954

In the direct supplemental testimony and exhibits of Company witness Harrington, DEP updated its North Carolina retail revenue requirement associated with fuel and fuel-related costs, excluding the regulatory fee, to a total decrease of $47 million through June 30, 2019. Revised Harrington Exhibit 3, Pages 1 - 6, reflect an updated EMF to $151 million as of June 30, 2019. The updated total adjusted system fuel and fuel-related expense, based in part on the use of these amounts, is utilized to calculate the prospective fuel and fuel-related cost factors recommended by the Company.

	Test Period updated through June 30, 2019
N.C. Retail Customer Class	Under - Recovery

Residential	$63,138,790
Small General Service	4,209,287
Medium General Service	26,020,608
Large General Service	55,725,485
Lighting	1,941,135
Total (may not add to sum due to rounding)	$151,035,306

In her testimony, Public Staff witness Li stated that, based on the testimony and recommendation of Public Staff witness Lucas, she recommended removing North Carolina's retail share of the cash payments made on the liquidated damages in the amount of $6.6 million and North Carolina's retail share of the judgment payment in the amount of $619,200 from the test period costs. Following these exclusions, Public Staff witness Li recommended the following under-recovery amounts by North Carolina retail customer class as follows:

	Test Period updated through June 30, 2019
N.C. Retail Customer Class	Under - Recovery
Residential	$59,835,706
Small General Service	3,842,749
Medium General Service	24,006,222
Large General Service	54,214,580
Lighting	1,875,903
Total (may not add to sum due to rounding)	$143,775,160

One of the disputed issues in this proceeding related to the Company's payment of liquidated damages under the Gypsum Supply Agreement (as defined above). The Commission's findings in this respect are supported by the application and the prefiled testimony of Company witness Harrington, the prefiled rebuttal of Company witnesses Coppola and Halm, the prefiled testimony of Public Staff witness Lucas and the entire record in this proceeding.

These findings of fact revolve around an agreement entered into in 2004 between DEP's predecessor, Progress Energy Carolinas, Inc. and BPB for the sale of synthetic gypsum from the Roxboro and Mayo plants to BPB for the manufacture of wallboard. (T. V. 2, p 61). Gypsum is a mineral that is the primary component of gypsum wallboard and can be mined in its natural state. However, synthetic gypsum is a suitable substitute and is a by-product of the flue gas desulfurization ("FGD") equipment installed at some coal-fired plants, such as Roxboro and Mayo coal-fired power plants. *Id.* at 60-61.

Witness Harrington testified that liquidated damages incurred in connection with the Gypsum Supply Agreement are properly recovered in fuel rates based on the Company's understanding of N.C. Gen. Stat. § 62-133.2(a1)(9). (T. V. 1, p 97). The statute specifies that "cost of fuel and fuel-related costs shall be adjusted for any net gains or losses resulting from any sales by the electric public utility of by-products produced in the generation process to the extent the costs of the inputs leading to that by-product are costs of fuel or fuel-related costs." The Company states that the liquidated damages in this case are properly included in the calculation of net gain/loss on the sale of by-products because the liquidated damages provision was an essential commercial term of a larger transaction that was reasonably and prudently entered into by the Company for the benefit of customers. Due to changes in coal consumption over time driven by lower natural gas prices, the Company was not able to meet the minimum gypsum supply obligations as originally contemplated by the parties to the Gypsum Supply Agreement. *Id.* Nevertheless, witness Harrington states the Company's decision to enter into the arrangement was reasonable and prudent and the transaction as a whole still provided a benefit to customers.

The Company proposes to recover the liquidated damages on a cash basis rather than an accrual basis. (T. V. 1, p 96). The NC retail share of these costs is reflected in the test period under-collection balance of $146.8 million but the Company believes that is more equitable to customers to recover these costs as the amounts are paid, rather than when the liability is accrued. *Id.*

Public Staff witness Lucas stated that in order to mitigate the cost of disposing of the gypsum produced in the FGD process, DEP executed a contract for the future sale of gypsum from the Roxboro and Mayo plants to BPB for the manufacture of gypsum board. (T. V. 2, p 61). Several events led to the reduced dispatch of the Roxboro and Mayo plants, and as a result, the amount of gypsum produced by the plants was below the minimum amounts required by the Gypsum Supply Agreement. First, the merger between DEC and DEP created the Joint Dispatch Agreement ("JDA") that facilitated the transfer of economic energy purchases between DEC and DEP resulting from the maximization of joint least cost dispatch of generation. The JDA allowed DEC to sell cheaper energy to DEP when not needed for DEC's own use; as a result, DEP's Roxboro and Mayo generating plants operated less often than before the merger. *Id.* at 63. Second, natural gas prices significantly declined after 2009 and have not approached the 2009 prices since. Public Staff witness Lucas further testified that this decline in natural gas prices resulted in utilities dispatching natural gas-fired combined cycle plants ("CCs") ahead of coal-fired plants. *Id.* The reduced dispatch resulted in less coal burned, resulting in the inability of DEP to provide the quantities of gypsum that CTG contracted for and anticipated when it built the wallboard manufacturing facility next to the Roxboro plant. *Id.*

Public Staff witness Lucas also stated that on June 30, 2017, CTG filed a lawsuit against DEP. *Id.* at 65. Mr. Lucas noted that the Court ordered DEP to 1) pay $1,084,216.75 to CertainTeed, which includes interest, representing the cost of the gypsum CertainTeed purchased at prices above the contract price provided in the 2012 Agreement between May 2017 and January 2018 (Judgment Payment), 2) deliver 119,768.03 tons of gypsum within 30 days at the agreed-to contract price and 3) provide a Replenishment Plan for the Roxboro Stockpile to CertainTeed within 90 days, consistent with the amount of gypsum required to be maintained in the Stockpile under the 2012 Agreement. *Id.* After the judgment was entered, DEP and CTG reached a settlement. *Id.*

As witness Lucas testified, the Public Staff recommends that the Commission deny DEP's request for the recovery of the costs because they are not appropriate for recovery in a fuel proceeding. The Public Staff's position is that the failure to deliver the required amount of gypsum and the resulting expenses arising from the legal action taken against DEP by CTG do not constitute a "sale" under the provisions of N.C. Gen. Stat. § 62-133.2(a1)(9). Mr. Lucas stated that, in his opinion, the more appropriate proceeding to consider these costs is in a general rate case. (T. V. 2, p 73).

On rebuttal, DEP witnesses Coppola and Halm stated that in assessing whether a loss occurred for purposes of determining the recoverability under N.C. Gen. Stat. § 62-133.2(a1)(9), it is necessary to look at the flow of revenue and costs under the Agreement. (T. V. 2, p 149). From that perspective, DEP experienced a "net loss" because the amount of costs incurred by the Company due to its obligations under the Gypsum Supply Agreement exceeded the amount of revenue received by DEP. *Id.* That is, DEP sold a substantial amount of gypsum to CTG for which DEP received revenue of approximately

$24.3 million and was also obligated to pay liquidated damages and other costs totaling approximately $90 million. Therefore, with respect to the Gypsum Supply Agreement and the sale of gypsum thereunder, DEP has experienced a net loss. *Id.* at 149-150.

DEP witnesses Coppola and Halm, like Public Staff Witness Lucas, discussed the numerous changes in circumstances over the approximately 15-year time period that resulted in the reduced dispatch of the Roxboro and Mayo plants. Witnesses Coppola and Halm testified that the Company considered all reasonable avenues, including further litigation, but ultimately determined that discontinuing supply under the Gypsum Supply Agreement and paying the liquidated damages was the most prudent and reasonable course for customers. In their view, each and every decision that the Company made was reasonable and prudent given what was known or reasonably should have been known at the time the decision was made. *Id.* at 153-156

In responding to the testimony of Public Staff Witness Lucas, DEP witnesses Coppola and Halm noted that Mr. Lucas made no attempt to identify any decision or action by the Company that may have been imprudent. *Id.* at 148. They further noted that the Company provided four sets of data responses with thousands of pages of documents to the Public Staff on this question, which should have been sufficient for the Public Staff to assess the reasonableness and prudence of the Company's actions. *Id.* at 149.

DEP witnesses Coppola and Halm also testified that liquidated damages are a common commercial term by which parties allocate risks under various types of contracts. The Public Staff's interpretation of N.C. Gen. Stat. § 62-133.2(a1)(9) would incent the Company to avoid liquidated damages provisions and instead allocate risk through more indirect means that may not be as optimal for the company or its customers. *Id.* at 151.

Witnesses Coppola and Halm also reviewed several previous dockets in which the Commission had permitted the recovery of liquidated damages through fuel rates. *Id.* at 152. They also noted that CTG was investing approximately $200 million to construct a wallboard production facility near the Roxboro plant and that it was therefore necessary for the contract to contain a minimum delivery obligation paired with a liquidated damages provision. *Id.* at 155. However, the liquidated damages provision also benefitted the Company and customers by limiting and defining liability in the event that the supply of gypsum was discontinued altogether. Although the Company could have chosen to continue the Gypsum Supply Agreement by obtaining gypsum from another source, such a decision would have resulted in higher costs to the Company and its customers. *Id*. at 154.

While prudence decisions are evaluated based on what was known or should have been known at the time the decision was made, nonetheless, witnesses Coppola and Halm noted that the Company had performed two hindsight analyses in order to put the results of the transaction in proper context. *Id.* at 157. The first showed that customers saved approximately $134 million in fuel costs between 2016 and 2018 alone by displacing Roxboro and Mayo coal-fired generation with natural gas-fired generation. *Id.* at 159. The second showed an overall benefit to customers of $55 million of estimated avoided disposal costs without even attempting to take into account the savings resulting from lower-cost natural gas generation. *Id.* at 160. Witnesses Coppola and Halm acknowledged that the Public Staff, without acknowledging that the analysis was based on hindsight, had taken issue with the reasonableness of the disposal cost and pile management assumptions included in the second hindsight analysis. While they noted that the result of any analysis

is dependent on what assumptions are made, there is evidence to suggest that the results of the analysis could have resulted in higher costs to customers because of the need for additional off-site landfills if all of the Roxboro and Mayo gypsum would have required disposal. *Id.* at 160-161.

The Commission is therefore faced with two questions: (1) whether the liquidated damages paid in connection with the Gypsum Supply Agreement constitute recoverable costs under the fuel adjustment clause and (2) if so, whether the decisions and actions of the Company that resulted in the obligation to pay liquidated damages were reasonable and prudent. With respect to the first question, the Commission is persuaded and thus concludes that the liquidated damages incurred under the Gypsum Supply Agreement constitute recoverable fuel costs under N.C. Gen. Stat. § 62-133.2(al)(9) because the Company has experienced a net loss resulting from a sale of by-products produced in the generation process. With respect to the second question, the Commission concludes that the preponderance of evidence in this proceeding demonstrates that the actions and decision of the Company that resulted in the obligation to pay liquidated damages were reasonable and prudent.

N.C. Gen. Stat § 62-133.2(al)(9) defines the following as a recoverable fuel cost "net gains or losses resulting from any sales by the electric public utility of by-products produced in the generation process to the extent the costs of the inputs leading to that by-product are costs of fuel or fuel-related costs." In addition, the Commission has stated the general prudence standard as follows:

> [w]hether management decisions were made in a reasonable manner and at an appropriate time on the basis of what was reasonably known or reasonably should have been known at that time (citation omitted)…The Commission notes that this standard is one of reasonableness that must be

> based on a contemporaneous view of the action or decision under question. Perfection is not required. Hindsight analysis – the judging of events based on subsequent developments – is not permitted.

78 North Carolina Utilities Commission Orders and Decisions 238 at 251-52 (August 5, 1988); reversed in part, and remanded (on other grounds), *Utilities Commission v. Thornburg*, 325 N.C. 484, 385 S.E.2d 463 (1989).

The Commission finds the Public Staff's reading of N.C. Gen. Stat. § 62-133.2(al)(9) is too narrow because it would artificially isolate the liquidated damages payment from the underlying Gypsum Supply Agreement, which was clearly an agreement for the sale of gypsum, a by-product produced by the generation process. The Company sold millions of tons of gypsum to CertainTeed under the Gypsum Supply Agreement and continues to sell gypsum to CTG. *Id.* at 150. Public Staff is misguided in its attempt to divorce or extract the liquidated damages payment obligation from the purchase and sale context in which it arose. The liquidated damages payment was a part of the Gypsum Supply Agreement, and it must be considered in that context.

Furthermore, N.C. Gen. Stat § 62-133.2(al)(9) contemplates the recovery of "net gains or losses **resulting from any sales**…" (emphasis added). Merriam-Webster defines "resulting" as "to proceed or arise as a consequence, effect, or conclusion." Therefore, the question for purposes of the statute is as follows: did the Company's obligation to pay liquidated damages to CTG "proceed or arise as a consequence, effect, or conclusion" from the sale of any by-products. And there is simply no dispute that in this case the answer is yes—the obligation to pay liquidated damages proceeded or arose as a consequence, effect or conclusion of the fact that DEP sold millions of tons of gypsum to CTG under the Gypsum Supply Agreement. The liquidated damages were the result of actual sales of gypsum. The Commission takes particular note of the fact that the liquidated damages

were negotiated as part of the original agreement for the sale of synthetic gypsum to CTG in 2004 and were included in all subsequent versions of the Agreement. *Id.* at 150.

The fact that, as a result of the litigation, the parties chose to memorialize the liquidated damage payment obligation in a settlement agreement that was separate from the Gypsum Supply Agreement does not change the fact that the obligation to pay liquidated damages in the first instance arose due to the Gypsum Supply Agreement. The Company sold millions of tons of gypsum, for which it received revenue and then was obligated to pay liquidated damages, resulting in a net loss (that is, the revenue received by the Company under the Gypsum Supply Agreement was exceed by the costs). Furthermore, the Commission notes that the N.C. Gen. Stat. § 62-l 33.2(a1)(9) does not contain any requirement that the any "net gains or losses" must occur simply with respect to a single agreement. Similarly, the fact that gypsum deliveries under the Gypsum Supply Agreement ceased on October 1, 2018 is not relevant to the Commission's determination. In any event, sales of gypsum to CTG continued even after the termination of the Gypsum Supply Agreement. To reach a different outcome simply because the parties found it most efficient to memorialize their agreement in a settlement and new supply agreement would place form over function.

Liquidated damage provisions are a common commercial term by which parties allocate risk under various types of contracts and provide benefit and certainty to all parties by defining and limiting remedies in the event of non-performance. Liquidated damages are but one of numerous mechanisms by which parties allocate risk in any agreement and the Commission sees no basis under N.C. Gen. Stat. § 62-133.2(al)(9) to make the distinction that Public Staff advocates. Furthermore, the Public Staff's interpretation of

N.C. Gen. Stat. § 62-l 33.2(a1)(9) could incentivize the Company to avoid liquidated damages provisions and instead allocate risk through more indirect means that may not be as optimal for the Company or its customers.

The Company's testimony cited three prior instances in which the Company has recovered liquidated damages through the fuel clause. In all three instances, the liquidated damages were owed due to the failure of the Company to meet a minimum contractual obligation and in all three instances it was technically the case that nothing was being "received" for the payment (*e.g.*, the Company was paying liquidated damages under a transportation agreement and not receiving transportation in return). Furthermore, in at least two of the three cases, the obligation to pay liquidated damages was caused by the same factors at play in this case—namely, the reduction in coal burn caused by lower natural gas prices. The Commission finds that these examples support the Company's view that the liquidated damages in this case are recoverable fuel costs.

The Commission recognizes that in the two cases of liquidated damages paid due to a tonnage shortfall under a transportation, subsection (2) of N.C. Gen. Stat. 62-133.2(a1) would apply and not subsection (9), as is the case with respect to the liquidated damages in this proceeding. However, if anything, subsection (9) appears to provide even more latitude to include liquidated damages given the inclusion of the phrase "net gains and losses." In other words, if liquidated damages are properly recoverable as a "cost of fuel transportation" under subsection (2), then surely liquidated damages should be considered as part of the "net gains or losses" resulting from the sale of byproducts. The mere fact that the General Assembly specifically contemplated that a utility should be able to recover

"net losses" suggests that the General Assembly understood that even when attempting to dispose of byproducts that have value, costs may be incurred that result in a net loss.

There is also an asymmetry to Public Staff's position. The price for gypsum in the Agreement reflected the allocation of risk by the parties, including the liquidated damages provisions. Customers have been receiving the benefit of the revenues under the Agreement through reduced fuel rates and it would be asymmetrical for them to receive the benefits but not an actual cost that arose from the same transaction.

Having concluded that the liquidated damages in this case constitute recoverable fuel costs, the Commission also concludes that the preponderance of evidence demonstrates that the Company's actions in connection with the CTG transaction were reasonable. Once again, no party has offered any expert testimony alleging that the actions and decisions of the Company in connection with the overall CTG transaction—including the decision to discontinue supply rather than supply replacement gypsum—were imprudent. In contrast, the Company has provided extensive and largely un-rebutted evidence that its decisions and actions were prudent given what was known at the time. The evidence clearly indicates that the initial decision to enter into the transaction was prudent and reasonable given what was known at the time, as it provided a long-term buyer for a substantial portion of the gypsum from the Roxboro and Mayo units.

From the very beginning of the transaction, the parties included a minimum delivery obligation paired with a contractually-defined remedy for non-performance. Such minimum delivery obligation was an essential part of the transaction given that CTG was investing $200+ million in a manufacturing facility and therefore naturally required an assurance of supply of gypsum sufficient to justify construction of the facility. No rational

investor would have been willing to make such a substantial investment without having an assurance of cost-effective supply of gypsum that would be necessary to sustain operations at necessary levels. And the minimum delivery obligation needed to be paired with contractual remedies to incent performance and protect CTG in the event of non-performance, which is the purpose of liquidated damages.

At the same time, from the Company's perspective, there needed to be provisions limiting the financial risk to the Company in the event it was not able to consistently supply the contractually-required amounts over the longer term. In this case, the Company reasonably limited its risk by providing that, if the Company failed to supply the required amount of gypsum for certain periods specified in the Agreement, or if it discontinued the supply of gypsum altogether, its obligation would be limited to the payment of liquidated damages. In other words, the liquidated damages provision reduced the Company's and its customers' exposure in the event of a long-term disruption in its ability to deliver gypsum and, therefore, was an essential component of the transaction as a whole. Finally, the Company introduced uncontroverted evidence that inclusion of firm delivery obligations coupled with a contractual remedy for non-performance was common in the industry at the time the transaction was first put in place. The fact that natural gas prices would drop so significantly, reducing coal generation and therefore gypsum production, was not foreseeable at the time of the initial transaction or at the time of execution of the Gypsum Supply Agreement.

The fact that DEP took the position in the CTG litigation that a particular section was intended to establish an as-available, variable supply obligation is not relevant to the Commission's determination. The ultimate conclusion of the court was that the Gypsum

Supply Agreement established a monthly minimum obligation. Finally, the Commission notes that per ton price (which includes substantial transportation costs) identified in by the Company as the potential cost of obtaining replacement gypsum does not indicate that the per ton price specified in the Interim Supply Agreement was imprudent. Importantly, the per ton price in the Interim Supply Agreement was part of the overall balance of risks and obligations agreed to by the Company and CTG in the Settlement Agreement. The Commission also notes that the judgment payment was not a payment for a breach but instead was a true-up of previously recognized revenues.

Finally, the Commission reiterates its clear precedent that "[h]indsight analysis – the judging of events based on subsequent developments – is not permitted." [Cite]. The Commission recognizes that the Company introduced hindsight analysis in response to Public Staff's testimony but does not rely on such hindsight analysis at all in reaching its conclusions hereunder.

In summary, the Commission concludes that the liquidated damage paid in connection with the Gypsum Supply Agreement constitute a recoverable fuel cost under N.C. Gen. Stat. § 62-133.2(a1)(9) and the Company's decisions and actions that led to the payment of liquidated damages were reasonable and prudent. The Commission also approves the Company's proposal to recover the liquidated damages on a cash basis rather than an accrual basis as it will be more equitable to customers to recover these costs as the amounts are paid, rather than when the liability is accrued.

Based upon the evidence in the record as to the appropriate fuel and fuel-related prices and expenses and the conclusion above regarding the CTG liquidated damages payment, the Commission concludes that the fuel and fuel-related under-recoveries

recommended by Company witness Harrington utilized to calculate the prospective fuel and fuel-related cost factors are reasonable and appropriate for use in this proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 17 - 20

Commission Rule R8-55(d)(1) provides that capacity factors for nuclear production facilities will be normalized based generally on the national average for nuclear production facilities as reflected in the most recent North American Electric Reliability Corporation ("NERC") Generating Availability Report ("GAR"), adjusted to reflect the unique, inherent characteristics of the utility facilities and any unusual events. Company witness Henderson testified that DEP's nuclear fleet consists of three generating stations and a total of four units. He testified that the Company's four nuclear units operated at an actual system average capacity factor of 89.21% during the test period, which reflects the significant impact of Hurricane Florence on three of the four DEP nuclear units. This annual average capacity factor came in below the five-year industry average of 91.80% for the period 2013-2017 for average comparable units on a capacity-rated basis, as reported by NERC in its latest Generating Unit Statistical Brochure, but the Company's 2-year average capacity factor of 92.44% and the Company's 5-year average capacity factor of 93.29%, exceeded the five-year industry average capacity factor.

Company witness Repko testified concerning the performance of DEP's fossil/hydro assets. He stated that the Company's generating units operated efficiently and reliably during the test period. He explained that several key measures are used to evaluate operational performance, depending on the generator type: (1) equivalent availability factor ("EAF"), which refers to the percentage of a given time period a facility was available to operate at full power, if needed (EAF is not affected by the manner in which the unit is

dispatched or by the system demands; it is impacted, however, by planned and unplanned (*i.e.*, forced) outage time); (2) net capacity factor ("NCF"), which measures the generation that a facility actually produces against the amount of generation that theoretically could be produced in a given time period, based upon its maximum dependable capacity (NCF *is* affected by the dispatch of the unit to serve customer needs); (3) equivalent forced outage rate ("EFOR"), which represents the percentage of unit failure (unplanned outage hours and equivalent unplanned derated hours); a low EFOR represents fewer unplanned outage and derated hours, which equates to a higher reliability measure; and (4) starting reliability, which represents the percentage of successful starts.

Witness Repko presented the following chart, which shows operational results, categorized by generator type, as well as results from the most recently published NERC Generating Unit Statistical Brochure for the period 2013 through 2017:

Generator Type	Measure	Review Period	2013-2017	Nbr of Units
		DEP Operational Results	NERC Average	
Coal-Fired Test Period	EAF	71.4%	81.6%	418
	NCF	25.9%	57.8%	
	EFOR	6.1%	8.1%	
Coal-Fired Summer Peak	EAF	93.1%	n/a	n/a
Total CC Average	EAF	80.3%	85.0%	338
	NCF	72.5%	52.7%	
	EFOR	4.77%	5.3%	
Total CT Average	EAF	80.2%	87.8%	776
	SR	98.7%	98.1%	
Hydro	EAF	79.7%	80.4%	1,113

Company witness Repko also testified that the Company, like other utilities across the United States, has experienced a change in the dispatch order for each type of

generating facility due to continued favorable economics resulting from the lower pricing of natural gas. Gas-fired facilities provided 59% of the DEP fossil/hydro generation during the test period.

In his direct testimony, witness Henderson testified that the Robinson Refueling Outage was originally scheduled to begin on September 15, 2018, just one day after Hurricane Florence made landfall along North Carolina's southeast coast. (T. V. 1, p. 46). The outage start was delayed by one week, and on September 22, 2018, Robinson entered the fall refueling outage, which began one week after the hurricane's landfall and was impacted by resource constraints directly attributable to the hurricane and its aftermath. *Id.* In addition to refueling activities, significant safety, regulatory, and reliability enhancements were completed. Regulatory and safety enhancements included the transmission upgrade project ("Robinson TUP") and modifications required to transition to the National Fire Protection Association standard ("NFPA 805"). *Id.* Significant activities associated with the Robinson TUP included replacement of the 115KV startup transformer, addition of a second transformer, and upgrades to the 4KV bus and transmission lines. The Robinson TUP provides the Robinson plant with a second off-site power path, aligning the station with the current industry standard for U.S. nuclear plants. Reliability enhancements included the replacement of both low-pressure turbines, which addressed blade design issues that have impacted generation since 2012. *Id.* After refueling, maintenance, projects and inspection activities were completed, the Robinson plant returned to service on November 26, 2018. The 65-day outage extended beyond the originally scheduled allocation of 37 days, with the overrun primarily attributable to direct

impacts on resource availability related to Hurricane Florence and Michael and challenges with the complex Robinson TUP.

Public Staff Witness Metz described the Public Staff's investigation and review of the Company's test period and projected fuel and fuel related costs. Witness Metz utilized an updated NERC GAR capacity factor that was released after the Company's filing but prior to the filing of Public Staff testimony. Based on this updated value, Witness Metz initially observed that the Company did not meet either of the two benchmarks under Commission Rule R8-55(k). However, witness Metz also acknowledged, consistent with the testimony of DEP witness Henderson, that the test year weather-related events that caused Brunswick Units 1 and 2 to be offline were beyond the Company's control. When the effect of the hurricane was removed, the Company's performance satisfied the Commission Rule R8-55(k) standard and therefore, witness Metz concluded that the rebuttal presumption of imprudence was avoided. Witness Metz also noted that he did not completely agree with the Company's inputs to its calculation of its capacity factors but noted that such disagreement was immaterial to the end result in this proceeding.

With respect to the Robinson Refueling Outage, in addition to reviewing extensive discovery documents provided by the Company, the Public Staff engaged in multiple discussions and meetings with Company personnel regarding the subject matters of this docket and conducted a site visit to the Robinson plant. In his testimony, witness Metz acknowledged that the 67-day outage, which included a scheduled 39-day refueling and transmission project outage, was impacted, at least in part, to weather events beyond the control of the Company. (T. V. 2, p. 116). The Public Staff recognizes that the Robinson TUP was expansive and required a significant level of engineering and oversight. Based

on his review, witness Metz was unable to conclude that the additional 28 outage days of replacement power costs incurred during the outage were imprudently incurred. Although witness Metz expressed significant doubt as to whether the Company's management of the project should have resulted in the outage being shifted from the Spring 2017 refueling outage to the Fall 2018 refueling outage, he did not recommend a disallowance for any portion of the replacement costs for which the Company seeks recovery in this docket. *Id.* at 118.

Witness Metz testified that he was unable to reach a conclusion because the Company's lack of document access or retention restricted the Public Staff's ability to review and evaluate the prudency of project management regarding the Robinson TUP. *Id* at 119. Witness Metz stated the Robinson TUP started before the merger of Duke Energy Corporation and Progress Energy, Inc. in 2012. During the project life cycle, the merger led to the introduction of new policies and procedures regarding project management. The Company was able to produce applicable guidelines and procedures that should have been followed, but, in the opinion of witness Metz, the documentation to ensure that these items were, in fact, appropriately implemented and completed could not be produced consistently. *Id* at 120. Witness Metz testified the Company worked in good faith to respond to Public Staff discovery requests, made technical experts and senior management available for discussion, and had open dialogue as the Public Staff and DEP worked through the discovery process. *Id.* at 120-121. Nonetheless, he has concerns about the Company's apparent lack of records retention in this case and that this concern has broader implications that could impact future investigations and proceedings regarding the capital costs of the Robinson TUP in the context of a future general rate case.

On rebuttal, witness Henderson testified that the Company made a prudent and reasonable decision in implementing the Robinson TUP, including managing an engineering firm that was ultimately unable to deliver on its contractual obligations. (Henderson Rebuttal p. 2). Witness Henderson stated that, having effectively mitigated such issue and taken substantial steps to ensure design completion and other detailed preparatory actions, the Company was fully prepared to implement the Robinson TUP at the start of the Robinson Refueling Outage. *Id.* The Company was aware of the labor issues and undertook substantial efforts to address the shortage. The Company conferred weekly with a major supplemental labor provider to the nuclear industry and independently contacted fifteen additional sub-tier vendors in an effort to secure additional electrical workers. Unfortunately, the shortage of qualified, electrical workers was exacerbated by the impact of two hurricanes. *Id.* The refueling outage was originally scheduled to begin on September 15, 2018, just one day after Hurricane Florence made landfall. Ultimately, the Company was able to obtain only approximately 50% of the needed electricians for this project. *Id.* at 6.

In further efforts to solve the resource gap, the Company reviewed non-critical electric projects underway or scheduled to determine if those projects could be delayed, thereby freeing additional resources to assist on the Robinson TUP. *Id*. at 7. Witness Henderson also noted that the unit had reached the period where refueling was required, and any additional delays would have required the unit to operate at increasingly reduced power, and would have impacted other scheduled unit outages and the ability of the Company to efficiently meet load demands. *Id.* Putting aside the fact that there was no practical way to further delay the outage, the Company could not have anticipated the wide-

spread regional flooding that would result from the hurricanes. Due to the flooding, some of the already limited available resources had to leave work to respond to emergency situations and tend to homes damaged by the flooding. Other qualified contractors were prevented from traveling to the Robinson plant because of the flooding. *Id.* at 8.

Witness Henderson also addresses the concerns expressed by witness Metz regarding the shift of the Robinson TUP project from Spring 2017 to Fall 2018. In witness Henderson's view, witness Metz seems to suggest that the shift might be a potential cause of the extended outage, but witness Metz provides no explanation to establish a causal connection between the shift and the extended outage. Witness Henderson stated that the delay of the Robinson TUP project to Fall 2018 had no direct impact on the extension of the Robinson Refueling Outage and, moreover, the delay was a prudent decision, which avoided potential challenges that might have arisen due to the project not being in a ready state for implementation. *Id.* at 9.

While witness Metz provided general, non-specific concerns about the availability of information, witness Henderson noted that in addition to multiple meetings and an on-site visit to Robinson, the Company responded to 31 detailed data requests and provided thousands of pages of responsive documents. *Id.* at 10. The documents included detailed project timelines, business analysis documents and details about the RFP process used to select the contractor. The responses also included the underlying contract and all amendments, annual estimated and actual project spend, project oversight guidelines, and records of monthly hours charged by employees. In the view of witness Henderson, the information provided to the Public Staff provides a very clear and detailed picture of the Company's oversight of the Robinson TUP.

In regard to witness Metz's concerns that the Company did not comply fully with Commission Rule R8-28, witness Henderson noted that witness Metz did not identify any ways in which the Company's document retention policies do not comply with the specific document retention policy of the NARUC policies referenced in Commission Rule R8-28. *Id.* at 12. Rather, witness Metz appears to reference general guidelines of the NARUC policies, which provide that a utility shall retain appropriate records to support the costs and adjustments that it plans to propose in a current or future rate case. Witness Henderson testified that the vast majority of the issues explored in discovery by the Public Staff related to the Robinson TUP more directly address the prudence of capital costs, which are not related to this proceeding. *Id.* at 13-14. Witness Henderson stated that the Company had provided sufficient information to demonstrate the reasonableness and prudence of the fuel related costs at issue in this proceeding and understands that additional information may be required in the context of the next base rate case in which capital issues are considered. *Id.* at 14.

Noting that the Public Staff did not identify any alleged imprudence that caused the outage extension, in response to witness Metz's concerns about the Company's management of the Robinson TUP and the fact that this issue has base rate case implications, witness Henderson testified that questions regarding the Company's management of the Robinson TUP are not relevant in light of the clear evidence that labor shortages were the cause of the extended outage. *Id.* at 3. Further, he noted that the Company has, in response to extensive data requests from the Public Staff, produced a significant amount of information in this case, but to the extent the Company can produce additional information that will address base rate impacts of the Robinson TUP, the

Company will continue to do so. In the final analysis, witness Henderson noted that witness Metz stated that he could not conclude that it is appropriate to disallow recovery of replacement power costs for an outage that was impacted by severe weather events.

Finally, witness Henderson also responded to the testimony of witness Metz regarding the Company's input to its calculation of its capacity factors. Witness Metz described that Company's timing of official maximum dependable capacity adjustments at the beginning of a calendar year complies with industry norms and is driven to some extent by regulatory reporting requirements. Based both on regulatory reporting requirements, and the business need for the Company to establish and maintain valid MDC ratings, the Company follows procedural guidelines in establishing and reporting MDC values.

Pursuant to N.C. Gen. Stat. § 62-133.2(d) and Commission Rule R8-55, the burden of proof, as to the correctness and reasonableness of any charge and as to whether the test year fuel costs were reasonable and prudently incurred, is on the utility. For purposes of determining the EMF rider, a utility must achieve either (a) an actual system-wide nuclear capacity factor in the test year that is at least equal to the national average capacity factor for nuclear production facilities based on the most recent five year period available as reflected in the most recent NERC Generating Availability Report, appropriately weighted for size and type of plant, the NERC average, or (b) an average system-wide nuclear capacity factor, based upon a two-year simple average of the system-wide capacity factors actually experienced in the test year and the preceding year, that is at least equal to the NERC average in order to avoid a presumption that the utility imprudently incurred the increased fuel costs and that disallowance of those costs is appropriate.

In accordance with Commission Rule R8-55, the Company utilized the NERC GAR capacity that was "most recent" at the time of the filing of the Company's application. Public Staff witness Metz recommend using an updated NERC GAR capacity factor that was not available at the time of the Company's filing but was released earlier than normal and just prior to the filing of Public Staff's testimony. The Commission has concerns with the procedural inequities that could arise in the unique circumstances where such an update in the NERC GAR capacity factors late in a proceeding could cause a shift in presumption at a late-stage in the proceeding. However, in this proceeding, the issue is immaterial, as witness Metz acknowledged, after adjusting for weather impacts, that the rebuttal presumption of imprudence was avoided.

Therefore, the Commission concludes that the Company's nuclear fleet achieved a capacity factor above the NERC average, rendering the rebuttable presumption of imprudence under Commission Rule R8-55(k) inapplicable. Thus, based upon the provisions of the fuel adjustment statute, the question before the Commission is whether the Company has met its burden of proving that the replacement power costs resulting from the Robinson Refueling Outage were reasonable and were prudently incurred under efficient management and economic operations.

The Commission's general prudency standard was recited above and based on such standard and the preponderance of evidence, the Commission concludes that it there is no basis for a disallowance of the replacement fuel costs for the outage at the Robinson plant. More specifically, the preponderance of evidence indicates that the Company's actions in connection with the Robinson Refueling Outage were reasonable and prudent and no party has introduced evidence indicating imprudent conduct or decisions. The Commission

places great weight on the fact that after numerous meetings with Company representatives, a site visit to the Robinson plant and review of extensive responses to discovery requests, the Public Staff stated that it could not conclude that replacement power costs should be disallowed because of the impact of factors outside of the Company's control.

The Commission also agrees with the Company that whether different management decisions could have resulted in an opportunity to implement the Robinson TUP in an earlier refueling outage is an irrelevant exercise in speculation. Rather, the question for this proceeding is whether the Company's decision to implement the Robinson TUP during the 2018 fall outage was reasonable and prudent and whether the Company's actions during the outage were reasonable and prudent. No party to this proceeding has challenged the Company's position that it was reasonable to implement the Robinson TUP during the fall 2018 outage and was, in fact, fully prepared to do so. The evidence demonstrates that it was circumstances outside of the Company's control and not any imprudent action or decision that caused the extended outage. Specifically, the cause of the 28-day outage extension was a shortage of qualified technical contractors, a situation regarding which the Company was aware of prior to the outage but which was exacerbated by the impact of Hurricanes Florence and Michael. Furthermore, delaying the refueling of the plant was not a viable option. The Commission therefore concludes that the replacement power costs associated with Robinson Refueling Outage were reasonably and prudently incurred under efficient management and economic operations.

The Commission reminds that Company of the need to maintain reasonable document retention policies, including the NARUC guidelines identified in Commission Rule R8-28. However, under the facts of this case, the Commission cannot conclude that

Company is not in compliance with the Commission Rule. To the extent that document retention policies become an issue in future general rate cases, the Commission will address those issues as they arise.

In summary, the Commission concludes that DEP generally managed its baseload plants prudently and efficiently to minimize fuel and fuel-related costs.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 21

Commission Rule R8-52(b) requires each electric utility to file a Fuel Procurement Practices Report at least once every 10 years and each time the utility's fuel procurement practices change. The Company's revised fuel procurement practices were filed with the Commission in Docket No. E-100, Sub 47A in 2015, and were in effect throughout the 12 months ending March 31, 2019. In addition, the Company files monthly reports of its fuel and fuel-related costs pursuant to Commission Rule R8-52(a). Further evidence for this finding of fact is contained in the testimony of Company witnesses Harrington, Phipps, Henderson, and Church.

Company witness Harrington testified that DEP's fuel procurement strategies that mitigate volatility in supply costs are a key factor in DEP's ability to maintain lower fuel and fuel-related rates. Other key factors include DEP's and Duke Energy Carolina's ("DEC's") respective expertise in transporting, managing and blending fuels, procuring reagents, and utilizing purchasing synergies of the combined Company, as well as the joint dispatch of DEP's and DEC's generation resources.

Company witness Phipps described DEP's fossil fuel procurement practices, set forth in Phipps Exhibit 1. Those practices include computing near and long-term consumption forecasts, developing inventory targets, inviting proposals from all qualified

suppliers, awarding contracts based on the lowest evaluated offer, monitoring delivered coal volume and quality against contract commitments, and conducting short-term and spot purchases to supplement term supply.

According to witness Phipps, the Company's average delivered coal cost per ton increased approximately 5%, from $80.82 per ton in the prior test period to $84.81 per ton in the test period. The Company's transportation costs increased approximately 11%, from $29.42 per ton in the prior test period to $32.72 per ton in the test period.

Witness Phipps stated that DEP's current coal burn projection for the billing period is 4.4 million tons compared to 3.6 million tons consumed during the test period. DEP's billing period projections for coal generation may be impacted due to changes from, but not limited to, the following factors: delivered natural gas prices versus the average delivered cost of coal, volatile power prices, and electric demand. Combining coal and transportation costs, DEP projects average delivered coal costs of approximately $65.43 per ton for the billing period compared to $84.81 per ton in the test period due, in part to newly negotiated rail transportation contracts that went into effect March 1, 2019.

According to witness Phipps, DEP continues to maintain a comprehensive coal and natural gas procurement strategy that has proven successful over the years in limiting average annual fuel price changes while actively managing the dynamic demands of its fossil fuel generation fleet in a reliable and cost-effective manner.

Witness Phipps further testified that DEP's current natural gas burn projection for the billing period is approximately 158.5 million MMBtu, which is a decrease from the 182.4 million MMBtu consumed during the test period. The current average forward Henry Hub price for the billing period is $2.76 per MMBtu, compared to $3.12 per MMBtu

in the test period. Witness Phipps also testified that the Company's average price of gas purchased for the test period was $4.05 per MMBtu, compared to $4.68 per MMBtu in the prior test period, representing a decrease of approximately 13%.

N.C. Gen. Stat. § 62-133.2(a1)(3) permits DEP to recover the cost of "ammonia, lime, limestone, urea, dibasic acid, sorbents, and catalysts consumed in reducing or treating emissions." Company witness Repko testified that the Company's fossil/hydro/solar generation portfolio consists of 9,204 MWs of generating capacity, 3,544 MWs of which is coal-fired generation across three generating stations and a total of seven units. These units are equipped with emission control equipment, including selective catalytic reduction ("SCR") equipment for removing nitrogen oxides ("NOx"), flue gas desulfurization ("FGD" or "scrubber") equipment for removing sulfur dioxide ("SO_2"), and low NOx burners. This inventory of coal-fired assets with emission control equipment enhances DEP's ability to maintain current environmental compliance and concurrently utilize coal with increased sulfur content, thereby providing flexibility for DEP to procure the most cost-effective options for fuel supply.

Company witness Repko further testified that overall, the type and quantity of chemicals used to reduce emissions at the plants vary depending on the generation output of the unit, the chemical constituents in the fuel burned, and/or the level of emissions reduction required.

Company witness Church testified that DEP's nuclear fuel procurement practices involve computing near and long-term consumption forecasts, establishing nuclear system inventory levels, projecting required annual fuel purchases, requesting proposals from qualified suppliers, negotiating a portfolio of long-term contracts from diverse sources of

supply, and monitoring deliveries against contract commitments. Witness Church explained that for uranium concentrates, conversion and enrichment services, long-term contracts are used extensively in the industry to cover forward requirements and ensure security of supply. He also stated that, throughout the industry, the initial delivery under new long-term contracts commonly occurs several years after contract execution. For this reason, DEP relies extensively on long-term contracts to cover the largest portion of its forward requirements. By staggering long-term contracts over time for these components of the nuclear fuel cycle, DEP's purchases within a given year consist of a blend of contract prices negotiated at many different periods in the markets, which has the effect of smoothing out the Company's exposure to price volatility. He further stated that diversifying fuel suppliers reduces DEP's exposure to possible disruptions from any single source of supply. Due to the technical complexities of changing fabrication services suppliers, DEP generally sources these services to a single domestic supplier on a plant-by-plant basis using multi-year contracts.

N.C. Gen. Stat. §§ 62-133.2(a1)(4), (5), (6), and (7) permit the recovery of the cost of non-capacity power purchases subject to economic dispatch or economic curtailment; capacity costs of power purchases associated with qualifying facilities subject to economic dispatch; certain costs associated with power purchases from renewable energy facilities; and the fuel costs of other power purchases. Company witness Phipps testified that DEP and DEC utilize the same process to ensure that the assets of the Companies are reliably and economically available to serve their respective customers. To that end, both companies consider numerous factors such as the latest forecasted fuel prices, transportation rates, planned maintenance and refueling outages at the generating units,

generating unit performance parameters, and expected market conditions associated with power purchases and off-system sales opportunities in order to determine the most economic and reliable means of serving their customers.

No party presented testimony contesting the Company's fuel and reagent procurement and power purchasing practices. Based upon the fuel procurement practices report, the evidence in the record, and the absence of any testimony to the contrary, the Commission concludes that these practices were reasonable and prudent during the test period.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 22

The evidence supporting this finding of fact is contained in the testimony and exhibits of Company witness Harrington.

According to the exhibits filed by Company witness Harrington, the test period per book system sales were 62,568,164 MWh, and test period per book system generation and purchased power amounted to 70,945,428 MWh (net of auxiliary use). The test period per book system generation and purchased power are categorized as follows (Harrington Exhibit 6):

Net Generation Type	System MWh Generated
Coal	8,081,365
Natural Gas, Oil, and Biomass	23,239,469
Nuclear	27,748,149
Hydro – Conventional	848,406
Solar	227,472
Purchased Power – subject to economic dispatch or curtailment	5,601,750
Other Purchased Power	5,198,817
Total Net Generation (may not add to sum due to rounding)	70,945,428

The evidence presented regarding the operation and performance of the Company's generation facilities is discussed in the Evidence and Conclusions for Finding of Fact No. 5.

No party contested witness Harrington's exhibits setting forth per books system sales, generation by fuel type, and purchased power. Therefore, based on the evidence presented and noting the absence of evidence presented to the contrary, the Commission concludes that the per books levels of test period system sales of 62,568,164 MWh and system generation and purchased power of 70,945,428 MWh are reasonable and appropriate for use in this proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NO. 23

The evidence supporting these findings of fact is contained in the testimony and exhibits of Company witness Harrington and supported in the testimony of Public Staff witness Li.

On her Exhibit 4, Company witness Harrington set forth the test year per books North Carolina retail sales, adjusted for weather and customer growth, of 37,693,746 MWh, comprised of Residential class sales of 16,022,203 MWh, Small General Service sales of 1,941,728 MWh, Medium General Service sales of 11,007,307 MWh, Large General Service sales 8,368,542 MWh, and Lighting class sales of 353,965 MWh.

Based on the evidence presented by the Company, the Public Staff's acceptance of the amounts presented by the Company, and the absence of evidence presented to the contrary, the Commission concludes that the projected North Carolina retail levels of sales set forth in the Company's exhibits (normalized for customer growth and weather) are reasonable and appropriate for use in this proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 24

The evidence supporting this finding of fact is contained in the testimony and exhibits of Company witness Henderson and the testimony of Public Staff witness Metz.

Commission Rule R8-55(d)(1) provides that capacity factors for nuclear production facilities will be normalized based generally on the national average for nuclear production facilities as reflected in the most recent NERC Generating Availability Report, adjusted to reflect the unique, inherent characteristics of the utility's facilities and any unusual events. The Company proposed using a 94.62% capacity factor in this proceeding based on the operational history of the Company's nuclear units, and the number of planned outage days scheduled during the 2019-2020 billing period. This proposed capacity factor exceeds the five-year industry weighted average capacity factor of 91.80% for the period 2013-2017 for average comparable units on a capacity-rated basis, as reported by NERC in its latest Generating Availability Report. Public Staff witness Metz did not dispute the Company's proposed use of a 94.62% capacity factor.

Based upon the requirements of Commission Rule R8-55(d)(1), the historical and reasonably expected performance of the DEP system, and the fact that the Public Staff did not dispute the Company's proposed capacity factor, the Commission concludes that the 94.62% nuclear capacity factor, and its associated generation of 29,713,146 MWh, are reasonable and appropriate for determining the appropriate fuel and fuel-related costs in this proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 25-26

The evidence supporting these findings of fact is contained in the testimony and exhibits of Company witness Harrington.

Company witness Harrington used projected billing period system sales, generation, and purchased power to calculate the proposed prospective component of the fuel and fuel-related cost rate. The projected system sales level used, as set forth on Harrington Exhibit 2, Schedule 1, is 62,155,919 MWh. The projected level of generation and purchased power used was 71,517,770 MWh (calculated using the 94.62% capacity factor found reasonable and appropriate above), and was broken down by witness Harrington as follows, as set forth on that same schedule:

Generation Type	Projected System MWh Generated
Coal	11,131,286
Gas Combustion Turbine and Combined Cycle	22,185,181
Nuclear	29,713,146
Hydro	648,112
Solar	279,675
Purchased Power	7,560,370
Total (may not add to sum due to rounding)	71,517,770

As part of her Workpaper 8, Company witness Harrington also presented an estimate of the projected billing period North Carolina retail Residential, Small General Service, Medium General Service, Large General Service, and Lighting MWh sales. The Company estimates billing period North Carolina retail MWh sales to be as follows:

N.C. Retail Customer Class	Projected NC Retail MWh Sales
Residential	16,265,079
Small General Service	1,806,876
Medium General Service	10,414,506
Large General Service	9,223,825
Lighting	381,171
Total (may not add to sum due to rounding)	38,091,457

These class totals were used in Harrington Exhibit 2, Schedule 1, Page 2 of 3 and Revised Harrington Exhibit 2, Schedule 1, Page 3 of 3, in calculating the total fuel and fuel-related cost factors by customer class.

Based on the evidence presented by the Company and the absence of evidence presented to the contrary, the Commission concludes that the projected levels of generation and purchased power set forth in the Company's exhibits, are reasonable and appropriate for use in this proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 27 - 28

The evidence supporting this finding of fact is contained in the testimony and exhibits of Company witness Harrington and the testimony of Public Staff witnesses Lucas, Metz and Li.

Company witness Harrington recommended fuel and fuel-related prices and expenses, for purposes of determining projected system fuel expense, as follows:

A. The coal fuel price is $31.35/MWh.

B. The gas CC and CT fuel price is $26.68/MWh.

C. The appropriate expense for ammonia, lime, limestone, urea, dibasic acid, sorbents, and catalysts consumed in reducing or treating emissions (collectively, "Reagents") is $26,265,057.

D. The total nuclear fuel price is $6.17/MWh.

E. The total system purchased power cost (including the impact of Joint Dispatch Agreement ("JDA") Savings Shared and the impact of House Bill 589, N.C. Sess. L. 2017-192, is $442,407,406.

F. System fuel expense recovered through intersystem sales is $161,032,005.

These amounts are set forth on or derived from Revised Harrington Exhibit 2, Schedule 1. The total adjusted system fuel and fuel-related expense, based in part on the

use of these amounts, is utilized to calculate the prospective fuel and fuel-related cost factors recommended by the Company. According to Revised Harrington Exhibit 2, Schedule 1, the projected fuel and fuel-related costs for the North Carolina retail jurisdiction for use in this proceeding are $883,391,685.

Public Staff witness Metz concludes that the projected fuel and reagent costs are reasonable and were calculated appropriately with the exception of CTG-related costs. Similarly, Public Staff witness Li stated that, based on the testimony and recommendation of Public Staff witness Lucas, she recommended removing North Carolina's retail share of the projected cash payments to be made on the liquidated damages from the projected billing period costs.

Aside from the Company and the Public Staff, no other party presented testimony contesting the Company's projected fuel and fuel-related costs for the North Carolina retail jurisdiction. Based upon the evidence in the record and the Commission's conclusions with respect to the CTG liquidated damages, the Commission concludes that the Company's projected total fuel and fuel-related cost for the North Carolina retail jurisdiction of $883,391,685 is reasonable.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 29

The evidence supporting these findings of fact is contained in the testimony and exhibits of Company witness Harrington.

Company witness Harrington calculated the Company's proposed fuel and fuel-related cost factors for which there is no specific guidance in N.C. Gen. Stat. § 62-133.2(a2) using a uniform bill adjustment method. She stated that DEP proposes to use the same uniform percentage average bill adjustment methodology to adjust its fuel rates to reflect a

proposed decrease in fuel and fuel-related costs as it did in the prior year fuel and fuel-related cost recovery proceeding in Docket No. E-2, Sub 1173. No party opposed the use of this allocation method.

Based on the evidence presented by the Company and the absence of evidence presented to the contrary, the Commission concludes it appropriate to allocate fuel and fuel-related costs, with the exception of capacity-related purchased power costs, among customer classes using the uniform percentage average bill adjustment methodology as adopted in DEP's 2018 fuel and fuel-related cost recovery proceeding under Docket No. E-2, Sub 1173.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 30

The evidence supporting this finding of fact is contained in the supplemental direct testimony and exhibits of Company witness Harrington and the testimony of Public Staff witness Metz.

Based on NC's retail share of projected billing period costs as presented by the Company in the Evidence and Conclusions for Finding of Fact No. 13, and NC's projected retail sales for the billing period as presented by the Company discussed in the Evidence and Conclusions for Finding of Fact No. 11, the Company proposed the following increment/(decrement) fuel and fuel-related factors by customer class, excluding regulatory fees:

N.C. Retail Customer Class	Increment/(Decrement) in ¢/kWh
Residential	2.344
Small General Service	2.527
Medium General Service	2.468
Large General Service	2.056
Lighting	2.281

In his testimony, Public Staff witness Dustin R. Metz stated that, based on his investigation, the projected fuel and reagent costs are reasonable and were calculated appropriately with the exception of CertainTeed lawsuit-related costs. Therefore, witness Metz proposed the following increment/(decrement) fuel and fuel-related factors by customer class, excluding regulatory fees:

N.C. Retail Customer Class	Increment/(Decrement) in ¢/kWh
Residential	2.326
Small General Service	2.499
Medium General Service	2.456
Large General Service	2.054
Lighting	2.217

The Commission concludes that the proposed increment/(decrement) fuel and fuel-related cost factors set forth by Company witness Harrington are reasonable.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 31

The evidence supporting this finding of fact is contained in the supplemental direct testimony and exhibits of Company witness Harrington and Public Staff witness Lucas and the testimony of Public Staff witness Li and Metz.

Based on the Company's EMF updated through the period ending June 30, 2019 as presented by the Company in the Evidence and Conclusions for Finding of Fact No. 4, and projected North Carolina retail levels of sales (normalized for customer growth and weather) as discussed in the Evidence and Conclusions for Finding of Fact No. 8, the Company proposed the following EMF increment/(decrement) riders by customer class, excluding regulatory fees:

N.C. Retail Customer Class	EMF Increment/(Decrement) in ¢/kWh

Residential	0.394
Small General Service	0.217
Medium General Service	0.236
Large General Service	0.666
Lighting	0.548

In her testimony, Public Staff witness Jenny X. Li stated that, based on the testimony and recommendation of Public Staff witness Lucas, she recommended removing North Carolina's retail share of the cash payments made on the liquidated damages from test period costs. Therefore, witnesses Li and Metz proposed the following EMF increment/(decrement) riders by customer class, excluding regulatory fees:

N.C. Retail Customer Class	Increment/(Decrement) in ¢/kWh
Residential	0.373
Small General Service	0.198
Medium General Service	0.218
Large General Service	0.648
Lighting	0.530

The Commission concludes that the proposed EMF increment/(decrement) riders set forth by Company witness Harrington are reasonable.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 32

The evidence supporting this finding of fact is contained in the direct testimony and exhibits of Company witness Harrington.

Company witness Harrington testified that the coal inventory rider established in Ordering Paragraph 12 of the Commission's February 23, 2018 *Order Accepting Stipulation, Deciding Contested Issue and Granting Partial Rate Increase* in Docket No. E-2, Sub 1142 expired in October 2018 and was removed from billed rates on December 1, 2018, and that amounts collected through January 2019 further reduced the under-

collected balance. Witness Harrington further testified that interest has been calculated on the under-collected balance through November 30, 2019 yielding the total under-collection as of $257,250, which will be recovered over a 12-month period expiring on and after November 30, 2020. This amount is included in EMF balances previously addressed and quantified.

Based on the evidence presented by DEP, and noting the absence of evidence presented to the contrary by any other party, the Commission finds and concludes that including the coal inventory rider under-collected balance in the Company's fuel EMF rider rates is reasonable.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 33 - 34

Accordingly, the overall fuel and fuel-related cost calculation, incorporating the conclusions reached herein, results in net fuel and fuel-related cost factors of 2.738¢/kWh for the Residential class, 2.744¢/kWh for the Small General Service class, 2.704¢/kWh for the Medium General Service class, 2.722¢/kWh for the Large General Service class, and 2.829¢/kWh for the Lighting class, consisting of the prospective fuel and fuel-related cost increments/(decrements) of 2.344¢/kWh, 2.527¢/kWh, 2.468¢/kWh, 2.056¢/kWh, and 2.281¢/kWh, for the classes respectively, and EMF riders of 0.394¢, 0.217¢, 0.236¢, 0.666¢, and 0.548¢/kWh, for the classes respectively, all excluding the regulatory fee. The billing factors, both excluding and including the regulatory fee, are shown in Appendix A to this order.

IT IS, THEREFORE, ORDERED:

1. That, effective for service rendered on and after December 1, 2019, DEP shall adjust the base fuel and fuel-related cost factors in its North Carolina retail rates, as

approved in Docket No. E-2, Sub 1142, amounting to 1.993¢/kWh for the Residential class, 2.088¢/kWh for the Small General Service class, 2.431¢/kWh for the Medium General Service class, 2.253¢/kWh for the Large General Service class, and 0.596¢/kWh for the Lighting class (all excluding the regulatory fee), by amounts equal to 0.351¢/kWh, 0.439¢/kWh, 0.037¢/kWh, (0.197)¢/kWh, and 1.685¢/kWh, respectively, and further, that DEP shall adjust the resulting approved prospective fuel and fuel-related cost factors by EMF increments/(decrements) of 0.394¢/kWh for the Residential class, 0.217¢/kWh for the Small General Service class, 0.236¢/kWh for the Medium General Service class, 0.666¢/kWh for the Large General Service class, and 0.548¢/kWh for the Lighting class (all excluding the regulatory fee). The EMF increments/(decrements) are to remain in effect for service rendered through November 30, 2019.

2. That DEP shall file appropriate rate schedules and riders with the Commission in order to implement these approved rate adjustments no later than 10 days from the date of this Order.

3. That DEP shall notify its North Carolina retail customers of these rate adjustments by including the "Notice to Customers of Change in Rates" attached as Appendix B as a bill insert with bills rendered during the Company's next normal billing cycle.

4. That DEP shall evaluate historic price fluctuations and whether its current method of forecasting and hedging programs should be adjusted to mitigate the risk of significant under-recovery of fuel costs and report the results of that evaluation in the Company's next fuel proceeding.

ISSUED BY ORDER OF THE COMMISSION.

This the ___ day of _____, 2019.

NORTH CAROLINA UTILITIES COMMISSION

_____

Chief Clerk

Appendix A

Rates in ¢/kWh excluding regulatory fee:						
	A	B	C	D	E	F
Class	Base Fuel Rate	Increment / (Decrement) to Base Fuel Rate	Prospective Rate: Columns A+B	EMF Increment / (Decrement)	EMF Interest (Decrement)	Billed Rate: Columns C+D+E
Residential	1.993	0.351	2.344	0.394	-	2.738
Small General Service	2.088	0.439	2.527	0.217	-	2.744
Medium General Service	2.431	0.037	2.468	0.236	-	2.704
Large General Service	2.253	(0.197)	2.056	0.666	-	2.722
Lighting	0.596	1.685	2.281	0.548	-	2.829

Rates in ¢/kWh including regulatory fee:						
	A	B	C	D	E	F
Class	Base Fuel Rate	Increment / (Decrement) to Base Fuel Rate	Prospective Rate: Columns A+B	EMF Increment / (Decrement)	EMF Interest (Decrement)	Billed Rate: Columns C+D+E
Residential	1.996	0.351	2.347	0.395	-	2.742
Small General Service	2.091	0.440	2.531	0.217	-	2.748
Medium General Service	2.434	0.037	2.471	0.236	-	2.707
Large General Service	2.256	(0.197)	2.059	0.667	-	2.726
Lighting	0.597	1.687	2.284	0.549	-	2.833

Appendix B

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1204

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	)	
Application of Duke Energy Progress, LLC	)	
Pursuant to G.S. 62-133.2 and Commission	)	NOTICE TO CUSTOMERS
Rule R8-55 Relating to Fuel and Fuel	)	OF CHANGE IN RATES
Related Cost Adjustments for Electric Utilities	)	

NOTICE IS GIVEN that the North Carolina Utilities Commission entered an Order in Docket No. E-2, Sub 1204, on _____ __, 2019, after public hearing, approving net fuel and fuel-related rate decreases of 0.148, 0.175, 0.116, 0.073, and 0.307 ¢/kWh (excluding regulatory fee[1]) for the Residential, Small General Service, Medium General Service, Large General Service, and Lighting classes, respectively, or an approximate

[1] Based on a NCRF multiplier of 1.001402

decrease of $47 million on an annual basis, in the fuel and fuel-related rates and charges paid by the retail customers of Duke Energy Progress in North Carolina, effective for service rendered on and after December 1, 2019. The net rate decrease was ordered by the Commission after review of Duke Energy Progress' fuel and fuel-related expenses during the 12-month period ended March 31, 2019, and represents actual changes experienced by the Company with respect to its reasonable cost of fuel and fuel-related costs during the 15-month period ended June 30, 2019. The total fuel and fuel-related cost factors for the Residential, Small General Service, Medium General Service, Large General Service, and Lighting, and Industrial customer classes are 2.738¢/kWh, 2.744¢/kWh, 2.704¢/kWh, 2.722¢/kWh, and 2.829¢/kWh respectively (excluding regulatory fee).

Overall the changes in the approved fuel and fuel-related rates described above will result in monthly net rate decreases of approximately $1.48 for each 1,000 kWh of residential usage (including regulatory fee).

ISSUED BY ORDER OF THE COMMISSION.

This the ___ day of _____, 2019.

NORTH CAROLINA UTILITIES COMMISSION

_____

Chief Clerk

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-2, SUB 1204

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

NOW COMES Duke Energy Progress, LLC ("DEP" 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. This Post-Hearing Brief ("Brief") is filed in support of the Company's Proposed Order. The Company requests that the Commission adopt the Proposed Order in its entirety as reasonable resolution to this proceeding that is supported by the preponderance of evidence presented in this case.

There are only two substantive issues in dispute in this case: (1) the Company's recovery through fuel rates of certain liquidated damages incurred by the Company under a gypsum supply agreement between CertainTeed Gypsum NC, Inc. ("CTG") and DEP ("Gypsum Supply Agreement") and (2) replacement power costs arising from a refueling outage at the Robinson Nuclear Plant ("Robinson Refueling Outage"). Both issues are addressed in substantial detail in the Company's Proposed Order[1] and this Brief focuses largely on certain related legal and procedural issues.

[1] Regarding the CTG liquidated damages, see Findings of Fact Nos. 7-16 and corresponding Evidence and Conclusions. Regarding the Robinson Refueling Outage, see Findings of Fact Nos. 17-20 and corresponding Evidence and Conclusions.

As described below, the liquidated damages incurred under the Gypsum Supply Agreement are recoverable fuel costs under N.C. Gen. Stat. § 62-l 33.2(a1)(9) because the liquidated damages are part of the "net loss" experienced by the Company that resulted from the sale of by-products. Furthermore, because the costs are properly recoverable through fuel rates, the issue is ripe for decision, and the Company has presented substantial, largely unchallenged evidence regarding the reasonableness and prudence of the Company's actions that resulted in the liquidated damages being incurred. No party has introduced any testimony alleging imprudent actions. Therefore, the Commission should find that the liquidated damages incurred under the Gypsum Supply Agreement were reasonably and prudently incurred under efficient management and economic operations.

Similarly, the Company has presented substantial evidence concerning the prudence and reasonableness of its actions in connection with the Robinson Refueling Outage. No party has alleged imprudence on the part of the Company's management. However, Public Staff has asserted that it was unable to reach a prudence determination due to an alleged insufficiency of Company's document retention. To the contrary, the preponderance of evidence in this proceeding demonstrates that the decisions and actions of Company management in connection with the Robinson Refueling Outage were reasonable and prudent and the vague document retention concerns raised by Public Staff are an insufficient basis to defer a decision.

I. PROCEDURAL OVERVIEW

On June 11, 2019, DEP 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, along with the testimony and exhibits of Dana M. Harrington, Brett Phipps, Regis

Repko, Kenneth D. Church, and Kelvin Henderson.[2] On August 19, 2019, the Public Staff filed the testimony of Jay B. Lucas, Jenny X. Li, and Dustin R. Metz. On August 28, 2019, the Company filed the rebuttal testimony of Kelvin Henderson and the panel of Barbara Coppola and John Halm.

II. ARGUMENT

1. THE LIQUIDATED DAMAGES INCURRED BY THE COMPANY UNDER THE GYPSUM SUPPLY AGREEMENT CONSTITUTE RECOVERABLE FUEL COSTS UNDER N.C. GEN. STAT. § 62-133.2(A1)(9).

The Company is entitled to recover the liquidated damages in question under N.C. Gen. Stat § 62-133.2(al)(9), which defines the following as a recoverable fuel cost: "net gains or losses resulting from any sales by the electric public utility of by-products produced in the generation process to the extent the costs of the inputs leading to that by-product are costs of fuel or fuel-related costs."

Public Staff witness Lucas asserts that "…DEP's failure to deliver the required amount of artificial gypsum and the resulting expenses arising from the legal action taken against DEP by [CTG] do not constitute a 'sale' under the express and limited provision of N.C. Gen. Stat. § 62-133.2(a1)(9). There was no 'sale' in which DEP sold gypsum to CertainTeed in exchange for payment." Public Staff's position has no basis in established commercial practice, is misguided as a matter of policy and, most importantly, is not supported by the plain language of the statue.

[2] A more complete description of the procedural history of this case is set forth in the Company's Proposed Order.

A. Liquidated damages are a very common commercial term and are but one of the many mechanisms by which parties can choose to allocate risk and liabilities in a contract.

All contracts, but particularly substantial commercial transactions such as the Gypsum Supply Agreement in question, involve a complex allocation of risk and liabilities between counterparties that is a product of extensive negotiation and compromise. (T. V. 2, p 151) Such transactions must be viewed in their entirety and attempts to view particular provisions in isolation can be misleading when they fail to take into account the interrelated nature of all of the provisions.

At the most basic contract negotiation level, when one party requests a particular provision to be included, the other party will often request that another provision be included. In other cases, if a party desires a particular provision to be included, then it may impact other aspects of the agreement. For instance, if a buyer inserts very onerous insurance requirements on the seller, then the seller will often only agree to such insurance requirements if the buyer will agree to a higher price.

Liquidated damages are a common commercial term, particularly in complex and longer-term transactions. *Id.* In fact, DEP witnesses Coppola and Halm testified that liquidated damage provisions were a common commercial term in the context of other gypsum supply arrangements at the time of the Gypsum Supply Agreement. *Id.* at 156.

However, liquidated damage provisions must be understood as being but one of the many ways that parties may allocate risk and obligations. Similar to the basic negotiation process described above, if a seller rejects a buyer's request to include liquidated damages in a contract in the event of seller's non-performance, the buyer may then offer a lower price or seek a shorter term in light of the buyer's lack of certainty of remedy in the event

of non-performance by the seller. Conversely, if a buyer rejects a seller's request to include liquidated damages in the event of buyer's non-performance, the seller may insist on a higher price to compensate for the risk that buyer does not purchase sufficient quantity.

Every transaction is unique and whether parties choose to include a liquidated damage provision and for what purpose will vary depending on the circumstance. But the point is that liquidated damage provisions are but one among many interrelated contractual provisions by which parties choose to allocate risk and obligations.

B. Liquidated damages provide benefit to DEP and its customers in numerous other contracts.

Importantly, liquidated damage provisions provide substantial benefit and protections to the Company and its customers in other contexts, including in the context of numerous fuel-related transactions. Reciprocal liquidated damage provisions (*i.e.*, buyer pays in the event of failure to receive and seller pays in the event of failure to supply) are a fairly standard contract term in many of the Company's commodity agreements. In such agreements, liquidated damage provisions protect customers from damages in the event of non-performance by the Company's counterparty. Moreover, as was discussed by DEP witnesses Coppola and Halm, the liquidated damages provision in the Gypsum Supply Agreement actually provided protection to the Company in the event of the Company's non-performance by limiting potential damages. *Id.* at 155. With respect to the Gypsum Supply Agreement, the liquidated damages provision pre-defined a remedy that was far more beneficial to the Company and its customers than other potential measures of damages (such as supplying replacement gypsum at substantially higher costs). In summary, liquidated damage provisions provide benefit to the Company and its customers

in many commercial contexts, including the Gypsum Supply Agreement and many other commercial transactions involving fuel costs.

C. Public Staff's position is not supported by a plain reading of the statute.

As noted, N.C. Gen. Stat § 62-133.2(al)(9) establishes that recoverable fuel costs include the "net gains or losses resulting from any sales by the electric public utility of by-products produced in the generation process to the extent the costs of the inputs leading to that by-product are costs of fuel or fuel-related costs."

Public Staff's position appears to be that if one completely segregates the liquidated damages payment from the commercial context in which it occurred (which, as discussed above, can only be done by ignoring the interrelated nature of the provisions), then there was no "sale" of by-product that occurred in connection with the payment of liquidated damages to CTG. This reading is not supported by the statute nor does it align with commercial common sense.

First, N.C. Gen. Stat § 62-133.2(al)(9) contemplates the recovery of "net gains or losses **resulting from any sales**…" (emphasis added). Merriam-Webster defines "resulting" as "to proceed or arise as a consequence, effect, or conclusion." Therefore, the question for purposes of the statute is as follows: did the Company's obligation to pay liquidated damages to CTG "proceed or arise as a consequence, effect, or conclusion" from the sale of any by-products. The answer in this case is clearly yes—the obligation to pay liquidated damages proceeded or arose as a consequence, effect or conclusion of the fact that DEP sold millions of tons of gypsum to CTG under the Gypsum Supply Agreement.

Second, Public Staff's position simply does not align with commercial reality, since the payment of liquidated damages never occurs in a vacuum. Such provisions are always integrally tied to the overall transaction under which counterparties engage in a precise allocation of risks and obligations. Therefore, Public Staff's position that there was no "sale" in connection with the payment of liquidated damages is divorced from the commercial reality of this transaction.

Furthermore, the Commission has allowed the recovery of liquidated damages through fuel rates in the past. In the three instances discussed in more detail below, the costs would have technically been recovered under different subsections of N.C. Gen. Stat § 62-133.2(al). For instance, where the Company was permitted to recover liquidated damages under a railroad transportation contract, those costs would have been recoverable under subsection (2), which allows for the recovery of "[t]he cost of fuel transportation." However, subsection (9) appears to provide even more latitude to include liquidated damages given the inclusion of the phrase "net gains and losses." In other words, because liquidated damages are properly recoverable as a "cost of fuel transportation" under subsection (2), then surely liquidated damages should be considered as part of the "net gains or losses" resulting from the sale of by-products. The mere fact that the General Assembly specifically contemplated that a utility should be able to recover "net losses" suggests that the General Assembly understood that even when attempting to sell by-products that have value, costs may be incurred that should be properly netted against the revenues received. In fact, it is not even clear how Public Staff's rigid reading that each and every isolated transaction must include a specific, identifiable sale can be squared with the statute, which contemplates the netting of costs.

D. Public Staff's interpretation of N.C. Gen. Stat § 62-133.2(al)(9) is not supported by the Commission's recent decision in Docket No. E-2, Sub 1142

In the Commission's recent February 23, 2018 *Order Accepting Stipulation, Deciding Contested Issues and Granting Partial Rate Increase* in Docket No. E-2, Sub 1142 ("*DEP Rate Case Order*"), the Commission considered DEP's request to "recover certain CCR costs related to the excavation and movement of CCRs. . .through the fuel adjustment clause on the grounds that the beneficial reuse of CCRs constitutes a sale of a by-product produced in the generation process." *DEP Rate Case Order* at 214.

The Commission's conclusion in that proceeding was that the "preponderance of the evidence…all support the conclusion that the arrangement was one for Charah to provide CCR excavation, transportation, and disposal services to DEP, not for a sale of DEP's CCRs to Charah under G.S. 62-133.2(a1)(9)." *Id.* at 219. In contrast to that finding in the *DEP Rate Case Order*, the preponderance of evidence in this case clearly establishes that the arrangement with CTG (*i.e.*, the Gypsum Supply Agreement) was intended to and did, in fact, facilitate the sale of byproducts by DEP to CTG.

In reaching its determination on the issue in Docket No. E-2, Sub 1142, the Commission relied, in part, on the fact that "nothing in the Master Contract or its associated documents included pricing or discounts to account for a sale of the CCRs." *Id.* at 215. In contrast, the Gypsum Supply Agreement included a specified price for the sale of gypsum. In the *DEP Rate Case Order*, the Commission further noted that "nothing in the bid documents, contracts, purchase orders, or change orders relating to the Master Contract assign any value to the CCRs to 'net' against the cost of the services provided." *Id.* In this

case, there was a clear value assigned to the gypsum (*i.e.*, the per ton purchase price) and therefore it is appropriate to 'net' the cost of the liquidated damages against such revenues.

E. Public Staff's position incents non-standard contracting practices.

As discussed above, liquidated damages are a common commercial provision by which parties allocate risk and obligations. But as also discussed above, parties can allocate risk and obligations through various other means, and if liquidated damage provisions are not utilized for regulatory or policy reasons, then the parties will allocate risk by other contractual means such as lower prices in the context of a sale. *Id.* at 151. This highlights how artificial is the recommendation of Public Staff to divorce or separate the payment of liquidated damages from the transaction as a whole.

F. Public Staff's position is asymmetrical in two ways.

First, it is asymmetrical in that Public Staff would permit customers to receive the benefit of the revenues flowing from the Gypsum Supply Agreement but not the cost of the liquidated damages, which were a crucial component of the overall agreement that resulted in revenues in the first instance. *Id.* at 151-52. Without a liquidated damages provision, the transaction might not have gone forward or the Company would have received a lower price and therefore, less revenue.

Second, in the event that Duke ever received the payment of liquidated damages from a supplier (*e.g.*, payment of a liquidated damages required from a coal supplier that failed to provide an agreed upon amount of coal), Duke would certainly flow such liquidated damages through fuel rates and Public Staff would most certainly insist that such liquidated damages be credited to customers through fuel rates.

G. The Commission and Public Staff have previously recognized liquidated damages as being appropriately recovered under North Carolina law through fuel rates.

DEP witnesses Coppola and Halm described numerous instances in which the Company has previously recovered liquidated damages through fuel rates. *Id.* at 152 - 53. Those examples are as follows:

i. 2013 DEP Fuel Case – Docket No E-2, Sub 1031.

As described by DEP witnesses Coppola and Halm, in 2013 the Company incurred and recovered through fuel rates $10.6 million due to a tonnage shortfall under a railroad transportation contract in connection with the retirement of the Robinson and Sutton coal-fired generating units. The liquidated damages—referred to as "dead weight" charges—were incurred because DEP was not able to meet certain minimum contractual obligations under a CSX transportation contract. The amount of liquidated damages was based on the specific tonnage shortfall multiplied by the liquidated damages. In this instance, the Company's recovery of liquidated damages was specifically identified in the Commission's order (*see* November 25, 2013 *Order Approving Fuel Charge Adjustment* in Docket No. E-2, Sub 1031, at 28).

ii. 2014 DEP Fuel Case – Docket E-2, Sub 1045.

DEP Witnesses Coppola and Halm also described that in 2014, the Company incurred and recovered through fuel rates $10.5 million in liquidated damage due to a tonnage shortfall under another railroad contract in connection with the retirement of the Sutton coal-fired generating facility.[3] The Company specifically noted in a discovery

[3] Docket No. E-2, Sub 1045. See the Company's response PSDR 2-8.

response that "it was cheaper for the Company's customers for the Company to incur the liquidated damages on its [railroad] contract and generate the lowest cost generation after accounting for the [] liquidated damages." This was in essence the identical outcome that occurred in the 2013 DEP fuel case as approved by the Commission.

iii. <u>2019 DEC Fuel Case – Docket No. E-7, Sub 1190</u>

DEP witnesses Coppola and Halm also describe that in 2019, Duke Energy Carolinas, LLC ("DEC") incurred $786,615 in liquidated damages due to a limestone tonnage shortfall and the Commission approved a fuel charge adjustment for DEC to begin recovering these LDs through fuel rates effective for service on or after September 1, 2019.[4] DEC specifically noted in a discovery response that "DEC was unable to meet its contractually defined minimum tonnage obligations due to decreases in natural gas prices that resulted in declining coal burns, which in turn reduced limestone consumption."

H. The Company's proposed accounting treatment is reasonable and limits the impact on fuel rates.

As described in the testimony of DEP witness Dana Harrington, the Company has proposed to recover the liquidated damages on a cash basis rather than an accrual basis. (T. V. 1, p 96) In simple terms, this means that the liquidated damages will be reflected in rates as they are paid rather than all at once. The Company's proposed approach spreads out the impact of the liquidated damages in an equitable manner, thereby reducing the impact on customers' fuel rate. This is a reasonable approach and should be adopted by the Commission.

[4] Docket No. E-7, Sub 1190. See the Company's response to PSDR 2-5.

2. THE PREPONDERANCE OF EVIDENCE IN THIS PROCEEDING DEMONSTRATES THAT THE ACTIONS AND DECISION OF THE COMPANY IN CONNECTION WITH GYPSUM SUPPLY AGREEMENT WERE PRUDENT AND REASONABLE AND THE ISSUE IS RIPE FOR DECISION.

DEP has presented extensive expert testimony in this proceeding demonstrating the prudence of the Company's actions in connection with the Gypsum Supply Agreement. In addition, the Company responded to multiples sets of data requests and produced thousands of pages of responsive documents. The Company's Proposed Order identifies the applicable legal standard governing the Commission's prudence determinations and more specifically describes the evidence demonstrating the prudence of the Company's actions.[5]

No party to this proceeding submitted any testimony challenging the prudence of the Company's actions and decisions. [6] Public Staff witness Lucas stated that Public Staff was not "making a recommendation on the reasonableness and prudence of [the liquidated damages]" but did note that "Public Staff has concerns regarding the reasonableness and prudence of the costs." Merely articulating generalized concerns is an insufficient basis to support a Commission finding of imprudence and, moreover, cannot overcome the extensive and largely undisputed evidence put forward by the Company.

[5] See Findings of Fact Nos. 7-16 and corresponding Evidence and Conclusions.

[6] On cross examination, Public Staff sought to introduce as evidence of imprudence the affidavit of Gisele L. Rankin from the litigation related to the Gypsum Supply Agreement that occurred in North Carolina Superior Court. The Commission should not place any weight on such affidavit as it would be wholly inappropriate and inequitable to base a Commission finding on the hearsay statement of an individual who had no role in this proceeding and therefore was not made available for cross examination and furthermore was not offering the affidavit for the purposes of this proceeding. Even if the Commission was inclined to consider the affidavit at all, the affidavit did not provide any meaningful or substantive analysis regarding the basis for Mrs. Rankin's conclusion that the Gypsum Supply Agreement was a "bad bargain" nor does Mrs. Rankin make any attempt in the affidavit to assess the prudency of the Company's actions under the Commission's well-established prudency standard.

Therefore, assuming that the Commission concludes that the liquidated damages are recoverable fuel costs under N.C. Gen. Stat § 62-133.2(al)(9), the question of prudence is ripe for Commission determination and the preponderance evidence demonstrates the prudence of the Company's actions. There is no basis in the governing statute or rules for deferring such decision at this time nor would it be efficient from a regulatory perspective to do so.

3. THE PREPONDERANCE OF EVIDENCE IN THIS PROCEEDING DEMONSTRATES THAT THE ACTIONS AND DECISIONS OF THE COMPANY'S ACTIONS IN CONNECTION WITH THE ROBINSON REFUELING OUTAGE WERE PRUDENT AND REASONABLE AND THE ISSUE IS RIPE FOR DECISION.

Similar to the liquidated damages discussed in Sections 1 and 2, DEP presented extensive expert testimony in this proceeding demonstrating the prudence of the Company's actions in connection with the Robinson Refueling Outage. In addition, the Company responded to multiples sets of data requests and produced thousands of pages of responsive documents. The Company's Proposed Order identifies the applicable legal standard governing the Commission's prudence determinations and more specifically describes the evidence demonstrating the prudence of the Company's actions.[7]

No party to this proceeding submitted any testimony challenging the prudence of the Company's actions and decisions. Public Staff witness Metz states "[a]t this time I cannot recommend disallowance of any portion of the replacement power costs because the Fall 2018 outage was impacted, at least in part, by events outside of the Company's control (weather)." Witness Metz largely focuses on "whether the Company's

[7] *See* Findings of Fact Nos. 17-20 and corresponding Evidence and Conclusions.

management of the project should have resulted in it being shifted from the Spring 2017 refueling outage to the Fall 2018 refueling outage." Witness Metz then goes on to state:

> I cannot conclude with a reasonable certainty that the TUP was prudently managed up to the events that caused the outage to shift from 2017 to 2018. I will provide more detail on the factors that contributed to this decision later. At the same time, I cannot conclude that it is reasonable to disallow recovery of the replacement power costs for an outage that was impacted by severe weather events.

The basis given by Mr. Metz for his inability to draw a definitive conclusion largely centered on his view of DEP's "lack of document access or retention."

Once again, merely articulating generalized concerns is an insufficient basis to support a Commission finding of imprudence and moreover, cannot overcome the extensive and largely undisputed evidence put forward by the Company demonstrating the reasonableness of the Company's actions. Importantly, in the case of the Robinson Refueling Outage, the Company introduced testimony challenging witness Metz's apparently alleged causal connection between the Company's prudent deferral of the Robinson Transmission Upgrade Project ("TUP") to the 2018 refueling outage and the fact of the outage extension. Mr. Metz never clearly articulates any alleged causal connection, but appears to imply that it is somehow possible to assume or speculate that had the TUP been implemented in 2017, no outage extension would have occurred. Putting aside the fact that the Company absolutely stands behind the prudence of decision to delay the TUP from 2017 to 2018 (as explained by DEP witness Henderson), there is simply no basis to conclude that labor shortages would not have similarly impacted the work in 2017 or that there would not have been other challenges. While we know now with hindsight that the 2017 outage would not have also been impacted by extreme weather events, that is a classic case of hindsight analysis that is simply not relevant to a prudency review.

Furthermore, Public Staff had not identified any specific shortcoming in the Company's document retention policies. Instead, they have apparently simply concluded that the thousands of documents produced by the Company did not meet their subjective interpretation of what is meant by the NARUC Document Retention Policy requirement that a utility should "retain appropriate records to support the costs and adjustments proposed" in a rate proceeding**.** Public Staff's subjective judgment regarding such a broad document retention requirement is not a sufficient basis to defer a decision in this case. The Company believes that the documents produced—which included an immense amount of detail regarding TUP implementation including reports provided to management on a monthly basis containing budget projections and variances, status of key milestones and deliverables, project risk and contingency analysis and safety performance details—was sufficient to make a prudence determination.

As indicated in the testimony of DEP witness Henderson, the Company will certainly work with the Public Staff in the context of the pending base rate case to ensure that Public Staff has sufficient information to assess the base rate impacts of the TUP. And the Company will also continue to maintain vigilance regarding its document retention policies to ensure compliance with the myriad of applicable laws and regulations. However, in the context of this case, there is no basis in the governing statute or rules for deferring a prudency decision at this time nor would it be efficient from a regulatory perspective to do so.

Respectfully submitted, this the 4th day of November, 2019.

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