

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. E-7, SUB 1146
DOCKET NO. E-7, SUB 819
DOCKET NO. E-7, SUB 1152
DOCKET NO. E-7, SUB 1110

DOCKET NO. E-7, SUB 1146)
)
In the Matter of)
Application of Duke Energy Carolinas, LLC)
for Adjustment of Rates and Charges)
Applicable to Electric Utility Service in North)
Carolina)
)
)
DOCKET NO. E-7, SUB 819)
)
In the Matter of)
Amended Application by Duke Energy)
Carolinas, LLC, for Approval of Decision to)
Incur Nuclear Generation Project)
Development Costs)
)
)
DOCKET NO. E-7, SUB 1152)
)
In the Matter of)
Petition of Duke Energy Carolinas, LLC, for an)
Order Approving a Job Retention Rider)
)
)
DOCKET NO. E-7, SUB 1110)
)
In the Matter of)
Joint Application by Duke Energy Progress,)
LLC, and Duke Energy Carolinas, LLC, for)
Accounting Order to Defer Environmental)
Compliance Costs)
)

NORTH CAROLINA
ATTORNEY GENERAL'S
NOTICE OF APPEAL

The North Carolina Attorney General pursuant to N.C. Gen. Stat. § 7A-29(b), § 62-90 *et al.*, and Rule 18 of the North Carolina Rules of Appellate Procedure, gives Notice of Appeal to the North Carolina Supreme Court from the 22 June 2018 Order Accepting Stipulation, Deciding Contested Issues and Requiring Revenue Reduction, as clarified by the Commission's 2 July 2018 Order on Motion for Clarification (together, the Order), issued by the North Carolina Utilities Commission (the Commission) in these proceedings. The focus of this appeal is the Commission's decision that allows the recovery in future rates of Duke's expenditures made from January 1, 2015 through December 31, 2017, for the disposal of coal ash, a waste byproduct of electric power production, and for the closure of the coal ash basins or other waste sites where the coal ash has accumulated for 70 years at the coal-fired steam stations of Duke Energy Carolinas, LLC (Duke or the Company) in North and South Carolina (referred to hereafter as the coal ash expenditures or coal ash costs),¹ plus a rate of return.

Pursuant to N.C. Gen. Stat. § 62-90(a), the Attorney General identifies the exceptions and the grounds on which he considers the decision to be unlawful, unjust, unreasonable, or unwarranted because it is in excess of the Commission's statutory authority; affected by errors of law; unsupported by competent, material and substantial evidence in view of the entire record as submitted; and arbitrary or capricious.

¹ Coal ash is also referred to as CCR, which stands for Coal Combustion Residuals.

EXCEPTION NO. 1

The Commission's findings and conclusions that the coal ash expenditures were reasonable and prudent are affected by errors of law; unsupported by competent, material and substantial evidence in view of the entire record as submitted; in excess of statutory authority; and arbitrary or capricious in view of the following:

- The inappropriate legal standard for reasonableness and prudence applied by the Commission which misapplied the burden of proof in N.C. Gen. Stat. § 62-133(b); § 62-134.
- Duke's failure to meet its burden of proof because the evidence it introduced during the hearing was insufficient to allow the parties or the Commission to effectively evaluate the reasonableness and prudence of its coal ash expenses or the proper ratemaking treatment for those expenses.
- The inconsistency between the Commission's finding and conclusion that Duke's coal ash expenditures were reasonable and prudent and its findings and conclusions recited in support of the decision to impose a cost of service penalty in which the Commission found, among other things, that it was "unable to conclude that [Duke's] mismanagement to which it admitted in the federal criminal court proceeding was not at least a contributing factor" to provisions of the Coal Ash Management Act (CAMA) that directly address remediation of Duke's CCR repositories and impose accelerated deadlines with respect to them. (Order at 319)

- The finding and conclusion that Duke’s coal ash costs were reasonable and prudent, giving no or inadequate consideration to the General Assembly’s declaration that the policy of the State of North Carolina is to “foster the continued service of public utilities on a well-planned and coordinated basis that is consistent with the level of energy needed for the protection of public health and safety and for the promotion of the general welfare as expressed in the State energy policy” and to “encourage and promote harmony between public utilities, their users and the environment.” N.C. Gen. Stat. § 62-2(a)(5) & (6).
- The Commission’s failure to make its own determination of whether evidence showed that Duke has failed to comply with applicable environmental regulations.
- The Commission’s conclusion deeming the costs reasonable if they are prompted by a change in environmental regulation and statutory requirements irrespective of Duke’s historical mismanagement, which included violations of previously existing regulations and laws.
- The Commission’s failure to consider that Duke’s violations of environmental laws constituted negligence *per se* and thus imprudence *per se*.
- Duke’s guilty plea to multiple counts of criminal negligence and its in-court admissions of mismanagement of its facilities.
- Duke’s breach of its legal duty to exercise due care in its coal ash activities.

- The greater weight of evidence which demonstrated that Duke knew of the risks of storing coal ash in unlined surface impoundments and failed to take timely and appropriate action to address those risks.
- The Commission's failure to consider factors affecting reasonableness other than prudence, including intergenerational fairness and matching principles.
- The Commission's failure to consider "material facts of record that [would have] enabled it to determine what are reasonable and just rates," as required by N.C. Gen. Stat. § 62-133(d), including the undisputed credible evidence that Duke itself had determined that its coal ash management practices were creating unacceptable risks and needed to be addressed, but that it nevertheless did not move forward with its own recommended changes.
- The greater weight of the evidence on the record as a whole demonstrating, when assessed under the correct principles of law, that Duke's coal ash costs were not reasonable and prudent.

(Finding of Fact Nos. 65-72, Evidence and Conclusions in support thereof and Ordering Paragraph No. 41)

EXCEPTION NO. 2

The Commission's Order is affected by errors of law; unsupported by competent, material and substantial evidence in view of the entire record as submitted; in excess of statutory authority; and arbitrary or capricious, because the Commission applied a legal standard for approval of cost recovery that is not

consistent with North Carolina statutory requirements or basic ratemaking principles. The Commission held:

The utility must show that the costs it seeks to recover are (1) “known and measurable”; (2) “reasonable and prudent”; and (3) where included in rate base “used and useful” in the provision of service to customers. Lesser & Giacchino, at 41-43. ... [O]nce it has shown that these metrics are met, the utility should have the opportunity to recover the costs so incurred. This is what North Carolina’s ratemaking statute requires (see N.C. Gen. Stat. § 62-133(b)(5)), and to do otherwise would amount to an unconstitutional taking.

(Order at 258) The Commission also stated that:

In the recently-decided DEP rate case (Docket No. E-2, Sub 1142, the 2018 DEP Rate Case, or 2018 DEP Case), the Commission’s decision summarized cost recovery based upon these principles, and found that for cost recovery the utility must prove that the costs it seeks to recover are “(1) ‘known and measurable’; (2) ‘reasonable and prudent’; and (3) ‘used and useful’ in the provision of service to customers.” 2018 DEP Rate Order, p. 143. The same standard applies in this case.

(Order at 209) This standard is inconsistent with North Carolina law, including N.C. Gen. Stat. §§ 62-132, 62-133, and 62-134, and is not required by the Constitution.

Moreover, the finding and conclusion that the full expenditures “at least to the extent they are capital in nature” (Order at 23, 268) are for used and useful property does not support cost recovery in this case. The undisputed evidence is that the costs are for closure of ash basins and disposal of waste; that most of the expenditures relate to Duke’s retired coal stations; that much of the cost is for “dewatering” or transportation activities; and that Duke has separately accounted for capital assets for ongoing operations such as its conversion of operating plants for dry ash handling and those costs are not in dispute. In addition, the

Commission does not make any findings to what extent the costs are capital in nature.

(Finding of Fact Nos. 65-72 and Evidence and Conclusions in support thereof and Ordering Paragraph No. 41)

EXCEPTION NO. 3

The Commission's findings and conclusions that a return on the Company's coal ash costs incurred between January 1, 2015 through December 31, 2017 was warranted are affected by errors of law; unsupported by competent, material and substantial evidence in view of the entire record as submitted; in excess of statutory authority; and arbitrary or capricious in view of the following:

- The Commission erred in finding and concluding that it has discretion to grant a rate of return on coal ash disposal costs under N.C. Gen. Stat. § 62-133(d). The Commission's Order states that "[t]he Commission determines it unnecessary to determine whether the costs must receive a return on the unamortized balance. In its discretion, as expressly authorized by N.C. Gen. Stat. § 62-133(d), with the exception addressed below [the management penalty], it approves a return." (Order at 275 (emphasis added)) This is an error of law, because N.C. Gen. Stat. § 62-133(d) requires the Commission to consider material facts of record that will enable it to determine what are reasonable and just rates; it does not grant the Commission discretion to create new ratemaking procedures unauthorized by the General Assembly.

- Even if the Commission did have such discretion, it abused its discretion to give Duke a rate of return on coal ash disposal costs in light of the competent, material, and substantial evidence of record, including—without limitation—Duke’s admitted criminal conduct; its history of mismanagement of coal ash; its failure to appropriately reflect the coal ash disposal costs in depreciation; the fact that so many of the coal ash disposal costs relate to retired plants; and its unwarranted delay in applying for an adjustment of rates to capture its coal ash disposal costs.

In its Order, the Commission stated that it was addressing the parties’ contentions with respect to a rate of return on coal ash, but that “by and large the arguments are not particularly germane or dispositive to the Commission’s decisions.” (Order at 276) To the extent that the Commission’s *dicta* regarding such contentions informed its discretion, the Commission’s reasoning was affected by errors of law; unsupported by competent, material and substantial evidence in view of the entire record as submitted; in excess of statutory authority; and arbitrary or capricious for the following reasons:

- The Commission erroneously considered Duke’s coal ash disposal costs to be “used and useful” despite the undisputed facts that the waste was produced in past years as a byproduct of coal-fired power production and many of the expenditures were for coal ash disposal at plants that are retired and have not been in service for several years and/or are related to electrical service rendered to past customers.

- The Commission failed to examine the particular costs in order to determine whether they are “ratebase” or “operating expense” items.
- The Commission relied on Duke’s decision to record the costs in the working capital section of ratebase to support its conclusion that the costs are capital in nature and thus appropriate for earning a rate of return, without consideration of what “working capital” refers to under accounting norms.
- The Commission erroneously concluded that a rate of return was warranted on the coal ash disposal costs because the coal ash disposal costs were recorded to an Asset Retirement Account (ARO) for proper presentation under generally accepted accounting principles (GAAP) and because, under GAAP guidance and guidance from the Federal Energy Regulatory Commission, ARO costs are capitalized.
- The Commission erroneously concluded that, “Had [Duke] not sought establishment of an ARO and deferral, it is incorrect that [capital item expenses, such as landfill construction,] would not have been added to plant in service and depreciated over their useful lives,” where most of the costs in the ARO are identified by Duke with retired plants that are no longer in service. (Order at 279)

(Finding of Fact Nos. 65-72, Evidence and Conclusions in support thereof and Ordering Paragraph No. 41)

EXCEPTION NO. 4

The Commission's final order and decision fails to provide findings and conclusions and the reasons or bases therefor upon all material issues of fact, law, or discretion presented in the record relating to coal ash cost recovery as required in N.C. Gen. Stat. § 62-79. The Commission's reasoning and conclusions lack sufficient clarity for the parties and the appellate court to discern the bases for the decision. Instead, the Order relies primarily or wholly on the circular reasoning that the Commission exercised discretion in the particular decisions reached in the case because the Commission can do so in its discretion. For instance, as noted in Exception 3, in connection with its decision to grant Duke a rate of return on coal ash disposal costs, the Commission stated that it would address the parties' arguments, but that it did not find them germane or dispositive to its decisions. (Order at 276)

(Finding of Fact Nos. 659-72, Evidence and Conclusions in support thereof and Ordering Paragraph No. 41)

EXCEPTION NO. 5

The Commission's findings and conclusions that it is just and reasonable to approve Duke's request for an order authorizing the deferral in a regulatory asset account of the coal ash expenditures from 2015, 2016 and 2017 for future rate recovery are affected by errors of law; unsupported by competent, material and substantial evidence in view of the entire record as submitted; arbitrary or capricious; and in excess of statutory authority in view of the following:

- the prohibitions against retroactive ratemaking and single-issue ratemaking, see *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 451, 468-69, 232 S.E.2d 184, 194-95 (1977);
- the requirements in the Commission’s Order Granting Motion for Reconsideration and Allowing Deferral of Costs issued August 8, 2003 in Docket No. E-7 Sub 723 *In the Matter of Duke Power’s Petition for Authority to Place Certain Asset Retirement Obligation Costs in a Deferred Account* at 10-13 (“August 8, 2003 Order”);
- the other ratemaking statutes, policies, and principles relating to the review of the request for deferral as applied in the case.

(Finding of Fact Nos. 65-72, Evidence and Conclusions in support thereof and Ordering Paragraph No. 41)

EXCEPTION NO. 6

The Commission’s findings and conclusions that Duke’s creation of an ARO for financial accounting purposes provided authorization for Duke to defer coal ash costs from its revenues for regulatory and ratemaking purposes without prior Commission approval (not just to preserve the accounting approved for regulatory accounting purposes) are affected by errors of law; unsupported by competent, material and substantial evidence in view of the entire record as submitted; and arbitrary or capricious in light of the requirements in the August 8, 2003 Order and regulatory accounting rules. (Finding of Fact Nos. 65-72, Evidence and Conclusions in support thereof and Ordering Paragraph No. 41)

EXCEPTION NO. 7

The Commission's findings and conclusions that there is no dispute that the coal ash expenditures are known and measureable costs are affected by errors of law; unsupported by competent, material and substantial evidence in view of the entire record as submitted; and arbitrary or capricious in view of evidence that the Company's plans for basin closure at some locations may be rejected due to improper design. (Finding of Fact Nos. 65-72, Evidence and Conclusions in support thereof and Ordering Paragraph No. 41)

EXCEPTION NO. 8

The Commission's findings and conclusions that an exceedance may be mismanagement under the Clean Water Act but not under North Carolina's 2L Groundwater Rules (15A N.C.A.C. .02L *et seq.*) are affected by errors of law; unsupported by competent, material and substantial evidence in view of the entire record as submitted; and arbitrary or capricious. (Finding of Fact Nos. 65-72, Evidence and Conclusions in support thereof and Ordering Paragraph No. 41)

EXCEPTION NO. 9

The Commission's findings and conclusions that Duke Energy Carolinas was not required to engage in additional accelerated groundwater extraction and treatment activities in order to comply with the 2L Groundwater Rules beyond the obligations imposed upon it by the Coal Ash Management Act and/or the federal Coal Combustion Residuals Rule are affected by errors of law; unsupported by competent, material and substantial evidence in view of the entire record as

submitted; and arbitrary or capricious. (Finding of Fact Nos. 65-72, Evidence and Conclusions in support thereof and Ordering Paragraph No. 41)

EXCEPTION NO. 10

The Commission's findings and conclusions failing to consider or disallow, as required by N.C. Gen. Stat. § 62-133.13, costs resulting from Duke's unlawful discharges to the surface waters of the State from coal combustion residuals surface impoundments, including acknowledged unlawful discharges located at the Dan River and Riverbend plants, are affected by errors of law; unsupported by competent, material and substantial evidence in view of the entire record as submitted; and arbitrary or capricious. (Finding of Fact Nos. 65-72, Evidence and Conclusions in support thereof and Ordering Paragraph No. 41)

EXCEPTION NO. 11

The Commission's findings and conclusions allowing the deferral of future coal ash costs for consideration in future rate cases, with a return at the Company's overall cost of capital and delay in amortization during the deferral period, are affected by errors of law; unsupported by competent, material and substantial evidence in view of the entire record as submitted; and arbitrary or capricious. (Finding of Fact Nos. 65-72, Evidence and Conclusions in support thereof and Ordering Paragraph Nos. 41-42)

EXCEPTION NO. 12

The Commission's findings and conclusions that its Order will provide just and reasonable rates are affected by errors of law; unsupported by competent, material and substantial evidence in view of the entire record as submitted; in

excess of statutory authority; and arbitrary or capricious. (Finding of Fact Nos. 34-35, 65-72, and Evidence and Conclusions in support thereof) As grounds for this exception, the Attorney General incorporates by reference all forgoing Exceptions and the grounds thereto.

EXCEPTION NO. 13

The Commission's findings and conclusions to the effect that the "base non-fuel and base fuel revenues approved herein are just and reasonable to the customers of [Duke], to [Duke], and to all parties to this proceeding, and serve the public interest" are affected by errors of law; unsupported by competent, material and substantial evidence in view of the entire record as submitted; in excess of statutory authority; and arbitrary or capricious. (Finding of Fact Nos. 65-72, 83, Evidence and Conclusions in support thereof, and Ordering Paragraph Nos. 1, 4, 41-42) As grounds for this exception, the Attorney General incorporates by reference all forgoing Exceptions and the grounds thereto.

CONCLUSION

For the reasons stated above, the Commission's Order is in excess of the Commission's statutory authority; affected by errors of law; unsupported by competent, material and substantial evidence in view of the entire record as submitted; and arbitrary or capricious.

Respectfully submitted, this 20th day of July, 2018.

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CERTIFICATE OF SERVICE

The undersigned certifies that she has served a copy of the foregoing NORTH CAROLINA ATTORNEY GENERAL'S NOTICE OF APPEAL upon the parties of record in this proceeding and their attorneys by depositing a copy of the same in the United States Mail, postage prepaid, this 20th day of July, 2018.

/s/

Margaret A. Force
Assistant Attorney General