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July 24, 2023

VIA ELECTRONIC FILING

Ms. A. Shonta Dunston
Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4300

Re: Duke Energy Carolinas, LLC's Post-Hearing Brief
Docket No. E-7, Sub 1281

Dear Ms. Dunston:

Enclosed for filing in the above-referenced proceeding on behalf of Duke Energy Carolinas, LLC is its *Post-Hearing Brief*.

Please feel free to contact me if you have any questions. Thank you for your assistance in this matter.

Sincerely,

Ladawn S. Toon

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-7, SUB 1281

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Duke Energy Carolinas, LLC, Pursuant to N.C.G.S. § 62-110.8 and Commission Rule R8-71 for Approval of CPRE Cost Recovery Rider and Compliance Report	))))))	DUKE ENERGY CAROLINAS, LLC'S POST-HEARING BRIEF

NOW COMES Duke Energy Carolinas, LLC ("DEC" 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.

INTRODUCTION

In this proceeding, DEC seeks Commission approval of its annual Rider CPRE to recover the costs incurred to implement the Competitive Procurement of Renewable Energy ("CPRE") Program pursuant to N.C.G.S. § 62-110.8 and Commission Rule R8-71(j). DEC's request is set forth in detail in its Application for Approval of CPRE Cost Recovery Rider and 2022 CPRE Compliance Report filed in the above-captioned docket on February 28, 2022 ("Application"). The Public Staff – North Carolina Utilities Commission ("Public Staff") investigated DEC's Application and agreed with the relief sought therein in all but one respect.[1] Specifically, the Public Staff recommends the Commission direct DEC to reduce the costs it recovers by crediting to customers 50% of

[1] Tr. 17-18.

the default liquidated damages ("LDs") value that the Public Staff asserts DEC should have obtained from Tranche 2 counter-party Wilkes Solar, LLC ("Wilkes Solar") as a result of Wilkes Solar's breach and subsequent termination of Wilkes Solar's Power Purchase Agreement ("PPA") with DEC (the Public Staff's recommendation will hereafter be referred to as the "Recommended Adjustment").[2]

The Commission held a hearing on DEC's Application on May 30, 2023. As explained in greater detail below, the evidence presented at the hearing illustrated that DEC was unable to recover the LDs primarily because: 1) Wilkes Solar allowed its parent guaranty to expire during the term of the PPA—an Event of Default under the PPA; and 2) DEC was unaware of such expiration because an employee in its credit risk department made a human error entering the guaranty's expiration date in DEC's internal credit information management ("CIM") tracking system. After the hearing, the Commission requested the parties brief whether there are any legal or procedural issues pertaining to the Commission's consideration of the termination of Wilkes Solar's PPA and the Public Staff's "recommended monetary penalty to DEC."[3]

Imposition of the Recommended Adjustment is inappropriate because it will disallow recovery of reasonable and prudently incurred CPRE Program costs that the Public Staff has not challenged. The Recommended Adjustment is tied to the LDs Wilkes Solar owes DEC. The LDs are not, however, a "cost" that DEC is seeking to recover from

[2] *See id.* at 28.

[3] The Commission further stated that examples of these types of issues include, but are not limited to: 1) whether there is any precedent demonstrating that the Commission has (or does not have) the authority to impose a penalty on DEC without first determining fault for the Wilkes Solar PPA termination; and 2) whether there are legal or procedural impediments to the Commission making a determination as to fault for the termination in the current CPRE Rider proceeding.

customers in this proceeding.[4] Accordingly, the only possible source of the "credit" at the heart of the Recommended Adjustment is to deny recovery of other reasonable and prudently incurred costs. It is for this reason that the Company considers the Recommended Adjustment to be an "imputed disallowance" despite the fact that the Public Staff did not categorize the Recommended Adjustment as a recommendation that recovery of costs be disallowed.[5] The Commission has—in its questions to the parties for post-hearing briefing—described the Recommended Adjustment as a "penalty." Regardless of whether it takes the form of an imputed disallowance or a penalty, the effect of imposing the Recommended Adjustment will be to inappropriately disallow recovery of DEC's reasonable and prudently incurred costs.

The Public Utilities Act and applicable Commission precedent are clear that it would be inappropriate for the Commission to impose the Recommended Adjustment and thereby disallow recovery of reasonable and prudently incurred costs for two reasons. First, the evidentiary record falls far short of what is required to support a disallowance under the Commission's prudence framework. As will be discussed in greater detail below, to successfully challenge costs as unreasonable or imprudently incurred, the Public Staff must (among other things) identify specific and discrete instances of imprudence. The Public

[4] In fact, although DEC has chosen to credit recovered LDs to customers, it is not clear under N.C.G.S. § 62-110.8 whether LD revenues are, in fact, "costs" to be "recover[ed]" through Rider CPRE. Under the statute, DEC could have credited revenues received from recovered LDs to customers as part of its base rates. However, DEC determined that because the revenues received are directly related to implementation of the CPRE Program, it would credit them to customers through Rider CPRE. DEC's decision to credit the LDs to customers through Rider CPRE gives customers the benefit of a more direct credit that arrives more quickly than the credit customers would have received through a base rate credit. Consistent with DEC's efforts to credit customers with revenues from LDs in the most effective way, DEC has also chosen to voluntarily accelerate $13,710,000 of LDs collected in early 2023 that otherwise would be credited to customers through DEC's next annual Rider CPRE filed in 2024.

[5] Tr. 137, 140-41, 158.

Staff has failed to make the requisite showing. To the contrary, under direct questioning from presiding Commissioner Duffley during the hearing, Public Staff witness McLawhorn declined to take the position that the Company acted imprudently.[6]

Second, the Commission has never imposed a penalty that would disallow recovery of reasonable and prudently incurred costs. Instead, when the Commission has elected to impose a penalty on a utility, it has only done so in general rate cases and its penalties have reduced or disallowed a return *on* reasonable and prudently incurred costs. Those instances are fundamentally distinct from the current CPRE rider proceeding in which DEC is seeking recovery *of* its reasonable and prudently incurred costs. Even if the Public Staff were to have adequately supported the Recommended Adjustment (which it has not), imposition of a penalty in this proceeding would require the Commission to disallow the recovery *of* reasonable and prudently incurred costs because that is all DEC is seeking. The Commission has never applied its authority under the Public Utilities Act to impose a penalty that prevented a utility from recovery *of* reasonable and prudently incurred costs. Indeed, the Companies have not identified any precedent to support the Public Staff's implied position that the Commission has the legal authority to impose a penalty in a rider proceeding to disallow reasonable and prudently incurred costs; however, the Commission need not reach this question as the facts in the evidentiary record in this proceeding are clearly distinguishable from the exceptional circumstances in past general rate case proceedings that have justified the Commission's imposition of a penalty. Accordingly, regardless of how the Recommended Adjustment operates, it is not supported by

[6] *Id.* at 57-58; *infra* Section I.

competent, material, and substantial evidence and it would be legally inappropriate for the Commission to impose it in this proceeding.

BACKGROUND

Wilkes Solar was a 75 MW solar facility being developed in Wilkes County, North Carolina, that was selected as a non-late stage winning bid in the Tranche 2 CPRE Program Request for Proposals ("RFP").[7] DEC and Wilkes Solar entered into a 20-year term PPA on October 15, 2020.[8, 9] Section 5.1 of the PPA required Wilkes Solar to provide to DEC Pre-Commercial Operation Date ("COD") Performance Assurance no later than five business days after execution of the PPA.[10] Section 5.2 of the PPA required Wilkes Solar as Seller to maintain adequate Performance Assurance through the 20-year term of the PPA.[11]

Failing to maintain adequate Performance Assurance was an Event of Default by Seller under the PPA. Specifically, Section 19.18 of the PPA stated that it would be an Event of Default for Wilkes Solar to fail to "provide, replenish, renew, or replace" the Performance Assurance required by Section 5.[12] Section 19.9 also stated that it would be an Event of Default for Wilkes to fail to achieve its COD,[13] and section 20.5 of the PPA established that Wilkes Solar would be liable to DEC for LDs if its project failed to achieve

[7] Tr. 147-48.

[8] Capitalized terms not otherwise defined in this brief are intended to have the meaning ascribed to them in the CPRE PPA between DEC and Wilkes Solar.

[9] Rebuttal Testimony of Angela Tabor and Matthew Holstein Rebuttal Panel Exhibit 1, 45.

[10] *Id.* at 13.

[11] *Id.*

[12] *Id*. at 34.

[13] *Id.* at 33.

COD deadlines.[14] The COD Milestone established in Exhibit 3 to the PPA required the Facility to achieve commercial operation and begin delivering power to DEC 90 days after the date upon which DEC delivered Interconnection Facilities and System Upgrades enabling the Facility to interconnect.[15]

Pre-COD Performance Assurance was timely provided by DESRI Portfolios, LLC ("DESRI") on behalf of Wilkes Solar in the form of a parent guaranty in the amount required by the PPA.[16] The DESRI guaranty had an expiration date of December 31, 2021.[17] December 31, 2021 preceded any possible COD date for Wilkes Solar. Witness Holstein testified, however, that this term of guaranty was not problematic or unreasonable *per se* from the perspective of Duke Energy's credit risk department.[18] As explained by witness Holstein, many guarantors have policies against executing guaranties with expiration dates that extend beyond the end of the guarantor's next fiscal year.[19] As a result, it is routine to accept guaranties with an expiration date of around 14 months, even where the underlying instrument being guaranteed involves obligations that extended beyond the 14-month guaranty period.[20] Witness Holstein testified acceptance of such guaranties is standard business practice in the utility industry.[21]

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[14] *Id.* at 35-36.

[15] Tr. 144; Rebuttal Testimony of Angela Tabor and Matthew Holstein Rebuttal Panel Exhibit 1, 48.

[16] *See* tr. 175 (during the hearing, Commissioner McKissick raised questions about the timing of delivery of Performance Assurance. Witness Holstein explained that Pre-COD Performance Assurance was provided by DESRI on the fourth business day after execution of the PPA, which was timely).

[17] *Id.* at 151.

[18] *Id.* at 176-77, 206-07.

[19] *Id.* at 176.

[20] *See id.* at 176-77, 206-07.

[21] *Id.* at 206.

In fact, and as shown by DEC's Late-Filed Exhibit 2, around half of the guaranties managed by the credit risk department have guaranties that either: 1) have an expiration date that precedes the termination of the underlying agreement; or 2) support an underlying agreement that is temporally unlimited. The expectation was that the DESRI guaranty would be extended, or that Wilkes Solar would have to, consistent with the terms of the PPA, provide some other acceptable Performance Assurance before the DESRI guaranty expired.

Despite the fact that maintenance of active Performance Assurance was the Seller's Responsibility under the PPA, Duke Energy has processes and procedures for tracking Performance Assurance with a defined expiration date.[22] The credit risk department maintains digital and physical copies of the provided security instrument and details related to the Performance Assurance, including any expiration date, are manually entered by an employee of the credit risk department into CIM.[23] Each day CIM produces a "90 Day Report" for security instruments that are within 90 days of their expiration date.[24] The credit department has an employee dedicated to reviewing the 90 Day Reports on a monthly basis and ensuring renewals occur in a timely manner.[25] This procedure for managing security instruments has historically worked well and witness Holstein testified that, based on his 10 years of experience in the industry, Duke Energy has a high level of operational performance managing security instruments.[26]

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[22] Tr. 145-46.

[23] *Id.*

[24] *Id.* at 146.

[25] *Id.*

[26] *Id.*

DEC proceeded to process Wilkes Solar's interconnection request and the Facilities Study results were completed and delivered to Wilkes Solar on January 13, 2022.[27] Per the North Carolina Interconnection Procedures, a construction planning meeting was held on February 11, 2022 to discuss the cost of System Upgrades and a construction schedule for the upgrades.[28] Company personnel met with Wilkes Solar and offered an Interconnection Agreement consistent with the CPRE Program.[29] Wilkes Solar declined to execute the Interconnection Agreement by the required due date of April 18, 2022, and failed to cure by April 25, 2022, after receiving notice from DEC.[30]

Company representatives met with Wilkes Solar on May 11, 2022, and Wilkes Solar explained it wished to terminate the PPA.[31] DEC representatives sent Wilkes Solar a draft Termination Agreement on May 13, 2022.[32] On June 2, 2022, Wilkes Solar edited the draft Termination Agreement to make clear that it would not agree to pay the LDs required under the PPA.[33] DEC employees engaged Wilkes Solar about not paying the LDs.[34] On June 10, 2022, Wilkes Solar stated in an email that the System Impact Study was delayed 6-7 months and that the Facilities Study was delayed 5-6 months.[35] Wilkes Solar argued these delays made it impossible to build the facility because its intended equipment was no

[27] *Id.* at 148.

[28] Tr. 148.

[29] *Id.*

[30] *Id.* at 149.

[31] *Id.*

[32] *Id.*; DEC Late-Filed Exhibit 3, 6-9.

[33] Tr. 149.

[34] *Id*; *see also* DEC Late-Filed Exhibit 3, 4-5.

[35] Tr. 149; DEC Late-Filed Exhibit 3, 3-4.

longer available, and its ITC qualification strategy was affected.[36] Wilkes Solar also argued that the revised interconnection cost estimate was higher than previously contemplated in connection with Wilkes Solar's CPRE bid.[37] Wilkes Solar did not identify any section of the PPA that supported its position that it did not owe the LDs due to the reasons cited.[38]

After DEC's good-faith efforts to negotiate mutual termination of the PPA failed, DEC provided Wilkes Solar written notice of termination of the PPA on August 23, 2022.[39] The August 23, 2022 letter indicated that if Wilkes Solar failed to pay the LDs, DEC may seek to recover the LDs from DESRI Portfolios, LLC through the DESRI guaranty.[40] On August 30, 2022, Wilkes Solar responded with a letter reiterating its position articulated on June 10, 2022.[41] Again, Wilkes Solar did not identify any section of the PPA that supported its position that it did not owe the LDs. Wilkes Solar also noted—for the first time—that the DESRI guaranty expired on December 31, 2021.[42]

Duke Energy's credit risk department reviewed the situation and determined that the DESRI guaranty had in fact expired on December 31, 2021.[43] The credit risk department determined that the Company did not flag the need for Wilkes Solar to replace the DESRI guaranty before its expiration due to a data entry error in CIM.[44] Specifically, the employee responsible for entering the details of the DESRI guaranty into CIM entered

[36] Tr. 149; DEC Late-Filed Exhibit 3, 3-4.

[37] DEC Late-Filed Exhibit 3, 3-4.

[38] *See id.*

[39] Tr. 150; DEC Late-Filed Exhibit 3, 10-11.

[40] DEC Late-Filed Exhibit 3, 10-11.

[41] DEC Late-Filed Exhibit 3, 12-13.

[42] *See id.*

[43] Tr. 151.

[44] *Id.*

the guaranty into CIM as though it had no expiration date.[45] As a result, the DESRI guaranty did not appear on the 90 Day Report and the employee monitoring the reports was not notified that the DESRI guaranty was expiring.[46] Had the DESRI guaranty appeared on the 90 Day Report, the employee monitoring the reports would have proactively reached out to Wilkes Solar for renewal or replacement, despite that being the responsibility of Wilkes Solar under the PPA.[47]

Witness Holstein testified that the credit risk department's oversight was a 1 in 1,000 occurrence during his tenure at Duke Energy[48] and that the Company has robust business practices and ongoing training of credit risk department employees responsible for managing Performance Assurance and other security instruments.[49] He additionally testified that the department maintains a library of training and procedures documents that set forth procedures for managing security in CIM.[50] Had these procedures been followed, the data entry error would not have occurred. Witness Holstein testified that credit risk department employees complete annual training on DEC's business processes and must annually review and certify the continuing accuracy and completeness of its Credit Policy and Credit Risk Management Procedures.[51]

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[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 139, 154.

[49] *See* Tr. 145-146 (describing the credit risk department's process for managing security instruments); 147 (describing training for credit risk department employees); 154-55 (describing the Company's successful management of security instruments).

[50] Tr. 147.

[51] *Id.*

The Company reasonably evaluated its options for recovering the LDs. Although the Company is confident that it could obtain a judgment against Wilkes Solar for the LDs, the Company is not confident it would be able to execute on the judgment.[52] In the Company's experience, special purpose entities formed for the purpose of building greenfield solar projects rarely hold significant assets.[53] Due to the expiration of the DESRI guaranty, the Company is not confident it could enforce the guaranty against DESRI.[54] As a result, as of the hearing, the Company had not initiated any formal process against Wilkes Solar or DESRI in an attempt to collect the LDs.[55] The Public Staff agreed with DEC's analysis and did not recommend that DEC take further action to pursue LDs due to the risk that litigation costs might exceed any recovery.[56]

ARGUMENT

Analysis of the legal and procedural issues pertaining to the Recommended Adjustment is complicated by the fact that the Public Staff has not opined on the source of the Commission's authority to impose it. The Public Staff has also not identified the source of funding the "credit" it proposes. As described above, DEC categorizes the Recommended Adjustment as an "imputed disallowance" that should be analyzed in the same manner as a typical disallowance. Section I of this Brief will therefore analyze the Recommended Adjustment as if it constitutes a disallowance. This section will explain that in order to disallow the recovery of DEC's costs incurred in implementing its CPRE

[52] *Id.* at 152.

[53] *Id.*

[54] *Id.* at 152-53.

[55] *Id.* at 26.

[56] Tr. 28.

Program, the Commission would need to find that those costs incurred were not reasonable or that DEC was imprudent. Section I will then show that the Public Staff has failed to meet its burden in demonstrating unreasonableness or imprudence.

Because the Commission described the Recommended Adjustment as a "penalty" in its post-hearing questions to the parties, Section II of this Brief will analyze the Recommended Adjustment as if it constitutes a penalty. This section will explain that the Commission has never penalized a utility by disallowing the recovery of reasonable and prudently incurred costs. In fact, the Commission has rejected several recommendations from the Public Staff and intervenors to do just that. Section II will demonstrate that imposing a penalty on DEC in this proceeding that will deny it the ability to recover its reasonable and prudently incurred costs would be unprecedented and inappropriate.

In response to the Commission's questions about determining fault, Section III of this Brief will argue that "fault" is, at most, tangentially related to the issue before the Commission: the reasonableness and prudence of costs incurred by DEC to implement its CPRE Program and proposed for recovery. Section III will also explain that Wilkes Solar clearly bears full and sole responsibility for termination of its PPA with DEC.

I. DEC Is Entitled to Recover the Full Amount of Costs Incurred Implementing its CPRE Program Because it Acted Reasonably and Prudently With Respect to its PPA With Wilkes Solar at all Times.

The Public Utilities Act establishes that utilities shall have a right to charge just and reasonable rates that are fair to the utility and the consumer for furnishing adequate, efficient, and reasonable service.[57] Well established ratemaking principles entitle a utility

[57] *See* N.C.G.S. §§ 62-130-133.

to recover its reasonable and prudently incurred operating expenses.[58] More specifically, N.C.G.S. § 62-110.8 governs the CPRE Program and subsection (g) states:

> an electric public utility shall be authorized to recover the costs of all purchases of energy, capacity, and environmental and renewable attributes from third-party renewable energy facilities and to recover the authorized revenue of any utility-owned assets that are procured pursuant to this section through an annual rider approved by the Commission and reviewed annually.

Commission Rule R8-71 "implement[s] the provisions of G.S. 62-110.8 and [] provide[s] for Commission oversight of the CPRE Program(s) designed by" DEC and Duke Energy Progress, LLC ("DEP").[59] Rule R8-71(j)(2) states that "the Commission shall permit each electric public utility to charge an increment or decrement as a rider to its rates to recover in a timely manner the reasonable and prudent costs incurred and anticipated to be incurred to implement its CPRE Program and to comply with G.S. 62-110.8." The only manner set forth in N.C.G.S. § 62-110.8 and Rule R8-71 through which the Commission may appropriately adjust costs recovered from customers through Rider CPRE is to find that a cost the utility proposes to recover is not reasonable and prudently incurred. This framework aligns with the well-established principles of general ratemaking codified in the Public Utilities Act.[60]

As set forth in the Rebuttal Testimony of Company witnesses Tabor and Holstein, the Company considers the Recommended Adjustment to be a recommendation for an

[58] *See e.g., State ex rel. Utils. Comm'n v. Stein*, 375 N.C. 870, 893-94 (2020) (noting that "[t]he Commission held that, once a utility has demonstrated 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, the utility should have the opportunity to recover the costs so incurred in order to avoid an unconstitutional taking.") (citations and quotations omitted).

[59] Commission Rule R8-71(a).

[60] *See e.g., Stein,* 375 N.C. at 893-94; N.C.G.S. §§ 62-130-133.

imputed disallowance because it will have the effect of disallowing recovery of other reasonable and prudently incurred CPRE Program costs.[61] Accordingly, despite the fact that the Company is not proposing to recover any costs—and is not projecting incurring any costs—associated with Wilkes Solar's breach of its PPA from customers in this proceeding,[62] it is appropriate to analyze the Company's reasonableness and prudence related to its inability to recover LDs from Wilkes Solar. This is because an imputed disallowance should be held to the same legal standard as any other proposed disallowance. It is therefore not appropriate for the Commission to impose an (imputed) disallowance unless it finds DEC acted unreasonably or imprudently.

The Public Staff's position on the Company's reasonableness and prudence is both notable and correct. Under direct questioning from presiding Commissioner Duffley, Public Staff witness McLawhorn declined to identify the applicable legal standard or to affirmatively take the position that DEC had acted imprudently. The relevant line of questioning from presiding Commissioner Duffley was:

> Q. Okay. And are you saying or asserting that DEC has acted imprudently? I'm just trying to gain knowledge or information *about what the standard is* that Public Staff was using.
>
> A. Well, I think that we believe, I believe, that by allowing this, such a short – clearly, Duke said they made an error by not entering the expiration date in their tracking system, in which case they would have been notified that it was about to expire, but I have concerns that they ever allowed such a short date to be put in place to begin with. To me, that should have been a red flag for the Company.
>
> Q. And again, but are you stating this error is – rises to the level of imprudent behavior?

[61] Tr. 137, 140-41, and 158.

[62] Tr. 161.

A. I believe that the Company should have been more diligent in their efforts when they were signing this PPA and the Guaranty.[63]

In analyzing DEC's reasonableness and prudence, it is significant that the Public Staff—the party recommending the Commission impose the Recommended Adjustment and which performed a thorough investigation into DEC's Application—refused to testify that DEC was imprudent. It is also significant that at no point did witness McLawhorn identify any costs that the Company unreasonably incurred. The Public Staff's position in its pre-filed testimony and at the hearing supports a finding that DEC was reasonable and prudent with respect to the Wilkes Solar PPA termination.

A. The Commission's Framework for Analyzing Reasonableness and Prudence.

The Commission has stated that:

> … the standard for determining the prudence of the Company's actions should be whether 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 . . . 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.[64]

The Commission has also described the general guidelines for evaluating whether utility action or inaction was imprudent as: 1) whether the utility's actions were reasonable based on the information known to it, or that should have been known to it, at the time; and 2) whether there were repeated errors that the utility failed to discover due to inaccurate record keeping or other deficiencies, or errors that the utility failed to correct in a reasonable time or manner.[65] For the

[63] Tr. 57-58 (emphasis added).

[64] *Order Approving Fuel Charge Adjustment*; E-7, Sub 1163 at 24 (Aug. 20, 2018) (citations omitted) ("Nuclear Cost Recovery Order").

[65] *See id.* at 24-25*; see also Stein*, 375 N.C. 870 at 908.

Public Staff to successfully challenge costs as imprudently incurred, it is required to: 1) identify specific and discrete instances of imprudence; 2) demonstrate the existence of prudent alternatives; and 3) quantify the effects of the imprudence on ratepayers.[66] The Commission has strictly held challengers to satisfaction of their burden when challenging costs as imprudently incurred.[67]

DEC has the burden of proof to show that its proposed CPRE Rider is just and reasonable under N.C.G.S. § 62-134(c).[68] Despite this fact, "the reasonableness and prudence of those costs is presumed unless the Commission or an intervenor adduces sufficient evidence to cast doubt upon their reasonableness or prudence, at which point the burden to make an affirmative showing of the reasonableness of the costs in question shifts to the utility."[69] In

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[66] *See e.g., Order Granting Partial Increase in Rates and Charges* at 15*,* Docket Nos. E-2, Sub 537 and 333 (Aug. 5, 1988) (*aff'd State ex rel. Utils. Com. v. Thornburg,* 326 N.C. 484 at 489 (1989) (finding "no error" in the prudence framework section of the Commission's Order); *Order Accepting Stipulation, Deciding Contested Issues and Granting Partial Rate Increase* at 196*,* Docket Nos. E-2, Sub 1131, 1142, 1103, and 1153 (Feb. 23, 2018) (*rev'd in part on other grounds and remanded,* 375 N.C. 870) ("DEP Coal Ash Rate Case Order"); *Order Accepting Stipulation, Deciding Contested Issues, and Requiring Revenue Reduction* at 258-59, Docket Nos. E-7, Sub 1146, 819, 1152, and 1110 (June 22, 2018) (*rev'd in part on other grounds and remanded,* 375 N.C. 870) ("DEC Coal Ash Rate Case Order").

[67] DEP Coal Ash Rate Case Order at 196 ("The disallowance methodologies proposed by [intervenors and the Public Staff] … fail because they fail to comply with the Commission's prudence framework … They avoid the detailed analysis that an appropriate framework requires … The Commission's prudence framework requires a detailed and cost-specific analysis to the extent the Commission resolves the [dispute] on the basis of discrete prudence assessments alone. The Company's costs are presumed reasonable and prudent unless challenged, and the challenges presented must (1) identify specific and discrete instances of imprudence; (2) demonstrate the existence of prudent alternatives; and (3) quantify the effects by calculating imprudently incurred costs. The methodologies proposed do not do that, and the Commission determines not to accept them.") (citations omitted); DEC Coal Ash Rate Case Order at 271 (rejecting intervenors' arguments that the Company should be disallowed from recovering reasonable and prudently incurred costs because the arguments put forth failed to (1) identify specific and discrete instances of imprudence; (2) demonstrate the existence of prudent alternatives; and (3) "most importantly, it fails to quantify the effects by calculating imprudently incurred costs."); *Order Allowing Recovery of Liquidated Damages and Transportation Costs* at 26*,* Docket No. E-2, Sub 1204 (July 28, 2020) ("Gypsum Supply Order") (ruling that challenged costs were not subject to disallowance on grounds of imprudence even if the Commission were to identify specific and discrete instances of utility imprudence because the Public Staff failed to demonstrate the existence of prudent alternatives or quantify the costs of the alleged imprudence on customers).

[68] "At any hearing involving a rate changed or sought to be changed by the public utility, the burden of proof shall be upon the public utility to show that the changed rate is just and reasonable."

[69] *Stein*, 375 N.C. 870 at 908.

order to satisfy the burden of production, the Public Staff or an intervenor must offer "affirmative evidence tending to show that the expenses that the utility seeks to recover are exorbitant, unnecessary, wasteful, extravagant, or incurred in abuse of discretion or in bad faith…"[70]

B. DEC Acted Reasonably and Prudently with Respect to the Wilkes Solar PPA at all Relevant Times.

i. It was Not Unreasonable or Imprudent for DEC to Accept a Guaranty with an Expiration Date Prior to Possible COD.

Company witness Holstein testified that it was not unreasonable and reflected routine business practice to accept guaranties that were scheduled to expire prior to the term of the underlying agreement or to accept a guaranty with an expiration date that supported an underlying agreement without a defined termination date.[71] Witness Holstein explained that many potential guarantors had policies against providing guaranties with expiration dates beyond the end of their next fiscal year.[72] Accordingly, many guarantors provide guaranties that expire at the conclusion of their next fiscal year, which was frequently before the expiration of the underlying agreement.[73] These "short" guaranties were not a concern for the credit risk department in the context of CPRE performance assurance because the PPA required Seller to maintain active performance assurance throughout the term of the PPA or be in default under the PPA.[74] The PPA therefore incentivized the counter-party Seller to ensure that performance

[70] *Id.*

[71] Tr. 163, 176; *see also* DEC Late-Filed Exhibit 2, 1.

[72] Tr. 176.

[73] Tr. 176; *see also* DEC Late-Filed Exhibit 2 (showing that roughly half of the guaranties currently managed in CIM either: 1) have an expiration date prior to the end of the term of the underlying agreement; or 2) support an agreement that does not have a defined date of termination).

[74] Rebuttal Testimony of Angela Tabor and Matthew Holstein Rebuttal Panel Exhibit 1, 34 (defining it as an Event of Default if "Seller fails to provide, replenish, renew, or replace the Performance Assurance and/or otherwise fails to fully comply with the credit related requirements of this Agreement, including without limitation, Section 5, and any such failure is not cured within five (5) Business Days.").

assurance (i.e., a guaranty) did not lapse or expire. Witness Holstein also testified based upon his expertise and experience that Duke Energy's credit risk management practice, including acceptance of guarantees of varying terms, is consistent with standard business practice in the industry.[75]

Acceptance of the DESRI guaranty—despite the fact that it was initially scheduled to expire prior to Wilkes Solar's planned COD date—was consistent with the credit risk department's reasonable business practices. The evidence is uncontroverted that it was commonplace and reasonable to accept such a guarantee. The fact that this type of lapse in maintaining performance assurance has not happened in witness Holstein's five years with Duke Energy despite half of the guaranties managed by the credit risk department having "short" expiration dates supports the conclusion that it is not inappropriate to accept guaranties with such expiration dates on the assumption that they will be renewed before expiration. At the very least, the evidence presented by the Public Staff is insufficient to demonstrate that it was unreasonable or imprudent to accept the DESRI guaranty due to its expiration date.

Further, to insist on guaranties that extended to or beyond the date of performance in the underlying agreement (COD in terms of the PPA with Wilkes Solar) would preclude those entities with policies against executing guaranties that extended beyond their next fiscal year from guaranteeing agreements. This would reduce the pool of potential guarantors and would frustrate the Commission's approval of the *pro forma* guaranty as an acceptable form of performance assurance.[76]

[75] Tr. 206.

[76] *See generally Order Approving Pro Forma PPA,* Docket Nos. E-2, Sub 1159, E-7 Sub 1156 (Jan. 24, 2020).

ii. The Data Entry Error Does Not Justify a Finding of Imprudence or Unreasonableness.

Human errors do not necessarily equate to imprudent utility action. When previously considering whether costs incurred by DEC due to a technical mistake made by a Relay Technician in the switchyard of a nuclear power plant, the Commission stated: "In essence, DEC's employee made a mistake. Employees sometimes fail to follow proper procedures that have been communicated to them in a reasonable manner, and, consequently, they make mistakes. However, every employee mistake … does not necessarily signify imprudence on the part of the utility."[77] In that case, the utility employee "negligently" performed a test in the switchyard of a nuclear power plant that caused the plant to shut down for 30 hours and caused DEC to incur replacement power costs.[78] DEC attempted to recover those costs in a subsequent fuel case.[79] The Public Staff recommended the replacement power costs be disallowed as not reasonable or prudently incurred but the Commission found that the costs were reasonably and prudently incurred.[80]

The Commission stated that some of the factors to consider when determining whether employee mistakes rose to the level of imprudence were: the gravity of the conduct, the level and sufficiency of management supervision and procedures, and the qualifications of employees.[81] The Commission also considered whether the mistake could have been prevented

[77] Nuclear Cost Recovery Order at 27.

[78] *Id.* at 25.

[79] *See id.*

[80] *Id.* at 28-29.

[81] *Id.* at 26.

had the employee's training been followed.[82] Finally, the Commission gave weight to the fact that DEC's nuclear fleet performed above the NERC average capacity performance metrics.[83]

Reviewing the expiration of the DESRI guaranty under the factors set forth by the Commission in the Nuclear Cost Recovery Order reveal that the data entry error did not rise to the level of imprudence. The employees employed in Duke Energy's credit risk department have been in their roles for 4 to 11 years and are, therefore, experienced employees.[84] Mr. Holstein has been with Duke Energy since 2018 and is unaware of Duke Energy previously experiencing any difficulty collecting damages owed due to a similar premature performance assurance expiration or security management oversight.[85] The lack of any evidence of previous security performance management issues speaks to the competence and quality of the current credit risk department employees and the sufficiency of management supervision and procedures. Further, Duke Energy's credit risk department employees undergo annual training on the Company's business processes and must annually review and certify the continuing accuracy and completeness of the Company's Credit Policy and Credit Risk Management Procedures documents.[86]

Accordingly, Commission precedent indicates that the data entry error, although a mistake, does not amount to imprudence. To find otherwise would be to, through the impermissible application of hindsight analysis, impermissibly impose a standard of perfection on DEC. The uncontroverted evidence suggests that this data entry error was a "1 in 1,000"

[82] *See id.* at 28.

[83] Nuclear Cost Recovery Order at 28.

[84] Tr. 147.

[85] *Id.* at 146.

[86] *Id.*

occurrence and not a part of a larger pattern of similar issues.[87] There was also no event that preceded the data entry error that should have evoked some kind of corrective action from DEC that may have prevented the data entry error. Commission precedent is clear that neither hindsight analysis nor a standard of perfection are permissible in an evaluation of the reasonableness and prudence of utility action. Accordingly, the weight of the evidence clearly shows that the data entry error was not a mistake that amounted to unreasonableness or imprudence.

More generally, if it was appropriate to allow recovery of the costs at issue in the Nuclear Cost Recovery Order, then it is appropriate to allow DEC to recover its reasonable and prudently incurred costs at issue in this proceeding. In the Nuclear Cost Recovery Order, the Commission allowed DEC to recover discrete increased costs from customers that were proximately caused by an employee mistake. The same dynamic is not present in this case. Here, there is no discrete increased cost to customers proximately caused by the data entry error.[88] Further, Witness McLawhorn conceded that there is no guarantee that but for the error DEC would have recovered the LDs for the benefit of customers.[89] The same cannot be said about the facts in the Nuclear Cost Recovery Order as the replacement power costs represented a discrete increased cost to customers and certainly would not have been incurred but for DEC's mistake. Accordingly, if a disallowance of replacement power costs was inappropriate in the Nuclear Cost Recovery Order, then a vague, speculative, and logically questionable disallowance of potentially recoverable LDs is certainly inappropriate in this proceeding.

[87] *Id.* at 154.

[88] Although DEC would have credited the LDs to customers had it received them, as noted in footnote 4, DEC could have elected to credit the LDs revenue to customers through other slower and less direct means.

[89] Tr. 59.

iii. It is Uncontroverted that DEC has Proceeded Reasonably and Prudently Since Discovering the Data Entry Error.

DEC reasonably and prudently evaluated its options following Wilkes Solar's breach and its discovery of the data entry error. Although DEC is confident in its ability to prevail against Wilkes Solar, DEC's experience with special purpose entities formed for the purpose of building greenfield solar project is that they do not hold material assets.[90] Accordingly, prevailing against Wilkes Solar is likely to yield nothing more than an unenforceable judgment. As reflected in Rebuttal Exhibits 3-4 and DEC's Late-Filed Exhibit 3, DEC took reasonable steps available to it to attempt to collect the LDs from Wilkes Solar. However, pursuing dispute resolution and/or litigation that is unlikely to be successful but will certainly be expensive is not a judicious use of resources. It is notable when considering the reasonableness and prudence of DEC's relevant actions that the Public Staff has not taken issue with (much less alleged imprudent or unreasonable action or inaction related to) DEC's course of conduct after Wilkes Solar's breach and identification of the data entry error. Nevertheless, DEC could still seek recovery from Wilkes Solar and/or DESRI if directed to do so by the Commission.[91]

C. The Public Staff Has Not Made the Requisite Showing by Producing Competent and Material Evidence that DEC Acted Unreasonably or Imprudently.

To successfully challenge costs as not reasonable and prudently incurred, the Public Staff must produce competent and material evidence that the costs challenged were, in fact, not reasonable and prudently incurred. The Public Staff must also: 1) identify specific and discrete instances of imprudence; 2) demonstrate the existence of prudent alternatives; and 3) quantify

[90] Tr. 152.

[91] DEC notes that there is a three-year statute of limitations for bringing claims for breach of contract in North Carolina. N.C.G.S. § 1-52(1). As Wilkes Solar breached its PPA in 2022, the Statute of Limitations has not yet run.

the effects of the imprudence on ratepayers.[92] The Public Staff has satisfied none of these requirements. Further, in challenging DEC's actions related to the Wilkes Solar PPA as not reasonable or prudently incurred, the Public Staff has the burden of production.[93] To satisfy its burden, the Public Staff must offer evidence that the expenses the utility seeks to recover are "exorbitant, unnecessary, wasteful, extravagant, or incurred in abuse of discretion or in bad faith…"[94] The Public Staff has offered no such evidence.

The Public Staff has produced no evidence—much less competent and material evidence—that DEC was unreasonable or imprudent in some relevant way. To the contrary, the Public Staff refused to take the position that the Company was imprudent.[95] Accordingly, the Public Staff has not "identif[ied] specific and discrete instances of imprudence" because it has alleged no imprudence at all. Putting aside the fatal deficiency that the Public Staff has not affirmatively asserted that DEC was even generally imprudent, the Public Staff has not identified specific and discrete actions with which it takes issue. In witness McLawhorn's pre-filed direct testimony, the Public Staff seemed to imply that the data entry error itself was the problematic action.[96] During the hearing, witness McLawhorn stated that accepting a guaranty that had an expiration date prior to when Wilkes Solar's obligations would be satisfied was "the issue in this case, as [he] sees it."[97] Ultimately, it is not for the Commission nor for DEC

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[92] *See e.g., Order Granting Partial Increase in Rates and Charges* at 15*,* Docket Nos. E-2, Sub 537 and 333 (Aug. 5, 1988) (*aff'd State ex rel. Utils. Com. v. Thornburg,* 326 N.C. 484 at 489 (1989) (finding "no error" in the prudence framework section of the Commission's Order)); DEP Coal Ash Rate Case Order at 196; DEC Coal Ash Rate Case Order at 258-59.

[93] *Stein*, 375 N.C. 870 at 908.

[94] *Id.*

[95] Tr. 57-58.

[96] *Id.* at 28 ("[T]he lack of an expiration date in the tracking system would have made recovering liquidated damages from Wilkes Solar more difficult, if not impossible … the Public Staff does not believe that DEC ratepayers should bear the full cost of DEC's error.").

[97] *Id.* at 38.

to guess at the Public Staff's position on this point. Commission precedent is clear that it is the Public Staff's burden to identify specific and discrete instances of imprudence and the Public Staff has not met that burden.

The Public Staff has also not satisfied the second or third requirement under the Commission's articulated standard for demonstrating imprudence. The Public Staff has not demonstrated the existence of a more reasonable path that would have led to DEC recovering LDs or that would have prevented Wilkes Solar from terminating its PPA. Neither has it quantified the effects of DEC's actions that purportedly caused it to be unable to recover the LDs it is entitled to under the terms of the PPA with Wilkes Solar. In fact, Witness McLawhorn recognized that there is no guarantee that DEC would have recovered the LDs owed by Wilkes Solar even if the data entry error had not happened.[98] Accordingly, the Public Staff has not met its burden to produce competent and material evidence of DEC's imprudence.

II. It Would be Inappropriate and Unprecedented for the Commission to Impose a Penalty on DEC in a Rider Proceeding That Would Disallow Recovery of Reasonable and Prudently Incurred Costs.

N.C.G.S. § 62-110.8(g) authorizes a mechanism for recovery of CPRE Program costs and does not recognize any Commission authority to penalize electric public utilities in connection with recovering the costs of implementing their CPRE Program(s). Commission Rule R8-71(j)(2) states that "the Commission shall permit each electric public utility to charge an increment or decrement as a rider to its rates to recover in a timely manner the reasonable and prudent costs incurred and anticipated to be incurred to implement its CPRE Program and to comply with G.S. 62-110.8." Thus, the CPRE rule

[98] *Id.* at 57 (at the hearing, witness McLawhorn testified: "[T]here is no way to know for certain that Duke would have been able to collect the liquidated damages … So because we couldn't know with 100 percent certainty that Duke would, in fact, have been able to, we thought some lesser amount than the full amount was appropriate.").

effectuates the plain language and legislative intent of the CPRE statute by providing a mechanism for recovery of all reasonable and prudent CPRE costs and, on its face, does not contemplate the Commission imposing a penalty in connection with a utility's implementation of its CPRE Program.

The Commission has general authority to penalize a public utility under N.C.G.S. § 62-310 but such authority is inapplicable here.[99] North Carolina precedent also supports the notion that the Commission has authority to penalize a utility in the limited and discrete circumstances of a general rate case by reducing or denying a return on costs incurred.[100] Specifically, the North Carolina Supreme Court has affirmed the Commission's decision in a general rate case to penalize a utility for inadequate service due to poor management by denying it the right to earn what would otherwise be a "fair return" upon the value of its properties if the utility's service were adequate.[101] The Court has also approved of the Commission's imposition of a "management penalty" based upon a factual showing of the utility's "criminal negligence" and "management misfeasance."[102] Most recently, the North Carolina Supreme Court affirmed the Commission's decision to prevent a utility from earning a return on the unamortized balance of costs that were prudently incurred but for which the Commission noted: "[a] number of material facts in evidence call into

[99] N.C.G.S. § 62-310 (authorizing the Commission to penalize a public utility that violates any provision of Chapter 62 of the North Carolina General Statutes or that refuses to confirm to or obey any rule, order, or regulation of the Commission).

[100] *See State ex rel. Utils. Comm'n v. Gen. Tel. Co.,* 285 N.C. 671, 679-80, 208 S.E.2d 681, 686 (1974); DEP Coal Ash Rate Case Order at 205; DEC Coal Ash Rate Case Order at 321-22.

[101] *See State ex rel. Utils. Comm'n v. Gen. Tel. Co.,* 285 N.C. 671, 679-80, (1974); *see also State ex rel. Utils. Com. v. Pub. Staff, N.C. Utils. Com.,* 317 N.C. 26, 35 (1986) (ruling that the Commission has the authority to penalize a utility for inadequate service due to poor management by setting its rate of return in a way that prevents it from earning a profit).

[102] *Stein*, 375 N.C. 870 at 932 (tacitly approving of the imposition of the Commission's "management penalty" in the DEC and DEP Coal Ash Rate Case Orders by remanding those orders on other grounds and noting that, on remand, the Commission could adjust its ruling on the management penalties if appropriate).

question the prudence of [the utility's] actions and inaction and the risks accepted by [the utility's] management."[103] The Commission's penalties in the DEC, DEP, and DENC Coal Ash Rate Case Orders were also predicated on decades-long series of actions and inaction that the Commission found presented mismanagement of risk in the context of significant allegations of noncompliance with environmental regulations—facts that are not present in this case.[104]

In the general rate case context, the Commission has historically refused to disallow recovery of reasonable and prudently incurred costs despite repeated recommendations from the Public Staff and intervenors to do so.[105] In the DEC, DEP, and DENC Coal Ash Rate Case Orders, the Commission rejected the Public Staff's "equitable sharing" proposals that would have disallowed the utilities from recovering reasonable and prudently incurred costs. In the DEC and DEP Coal Ash Rate Case Orders, the Commission found that the Public Staff's recommendation lacked a "determining principle" and—if imposed by the Commission—would likely constitute arbitrary and capricious decision-

[103] *State ex rel. Utils. Comm'n v. Va. Elec. & Power Co.,* 381 N.C. 499, 530 (2022) (affirming the Commission's ruling in its *Order Accepting Public Staff Stipulation in Part, Accepting CIGFUR Stipulation, Deciding Contested Issues, and Granting Partial Rate Increase* at 131-32, 136*,* Docket Nos. E-22, Sub 562 and 566 (Feb. 24, 2020) ("DENC Coal Ash Rate Case Order") in which the Commission declined to disallow recovery of costs at issue because the record lacked an evidentiary basis on which to find that any of the costs at issue were imprudently incurred but where the Commission explained that the material facts that called into question the prudence of the utility's management partly justified denying the Company the ability to earn a return on the unamortized balance of the costs in question).

[104] DEC Coal Ash Rate Case Order at 207-323; DEP Coal Ash Rate Case Order at 142-206; DENC Coal Ash Rate Case Order at 85-137.

[105] DEP Coal Ash Rate Case Order at 162-64 (explaining the Public Staff's "equitable sharing" proposal included a recommended disallowance of a portion of reasonable and prudently incurred costs), 188-96 (rejecting the Public Staff's equitable sharing proposal); DEC Coal Ash Rate Case Order at 234 (explaining the Public Staff's "equitable sharing" proposal included a recommended disallowance of a portion of reasonable and prudently incurred costs), 272-83 (rejecting the Public Staff's equitable sharing proposal); DENC Coal Ash Rate Case Order at 94-95 (summarizing the Public Staff's testimony that its "equitable sharing" recommendation would have disallowed recovery of costs the Public Staff acknowledged it could not show were unreasonable and imprudently incurred), 136 (ruling that DENC would be permitted to recover the costs at issue because there was no basis on which to find the costs were incurred imprudently).

making by the Commission and subject it to reversal.[106] In the DENC Coal Ash Rate Case Order, the Commission explained that it rejected the proposal to disallow recovery of reasonable and prudently incurred costs because "the record in [that] proceeding lack[ed] an evidentiary basis on which to find that any of the [costs at issue] were imprudent."[107]

The Commission has been clear that the penalties it did impose were *not* intended to prevent recovery of the utilities' reasonable and prudently incurred costs. In the DEC and DEP Coal Ash Rate Case Orders, the Commission explained that "[t]he penalties imposed by this Commission take the form of denial of recovery of a return on … costs…"[108] In the DENC Coal Ash Rate Case Order, the Commission explained that it "declined to follow the Public Staff's equitable sharing recommendation, and has instead … reached its decision based on the evidence in the record and adherence to the ratemaking framework prescribed by N.C.G.S. § 62-133, which requires an analysis of the reasonableness and prudence of the expenditures in question."[109] Thus, after thorough review, DEC is unaware of any precedent in which the Commission directly disallowed recovery of a utility's reasonable and prudently incurred costs.

Considering that the Commission has only imposed penalties that reduced or eliminated returns *on* costs, it would be unprecedented for the Commission to impose the Recommended Adjustment in the form of a penalty in an annual rider proceeding. DEC is not seeking to adjust its general rates and cost of service under N.C.G.S. § 62-133 nor seeking a return on the prudently incurred costs that it seeks to recover in this proceeding.

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[106] DEP Coal Ash Rate Case Order at 189; DEC Coal Ash Rate Case Order at 273.

[107] DENC Coal Ash Rate Case Order at 136.

[108] DEP Coal Ash Rate Case Order at 204; DEC Coal Ash Rate Case Order at 321.

[109] DENC Coal Ash Rate Case Order at 136.

Imposition of the Recommended Adjustment as a penalty would therefore require the Commission to exercise its general authority to impose penalties in an unprecedented way (*i.e.,* in a rider proceeding). Imposition of the Recommended Adjustment would also have an unprecedented impact to DEC by directly disallowing recovery of reasonable and prudently incurred costs. In the absence of any precedent further elucidating the Commission's authority under the Public Utilities Act, DEC questions whether the Commission has legal authority to impose a penalty and disallow reasonable and prudently incurred costs in this rider proceeding. However, the Commission need not resolve this question as—even assuming *arguendo* the Commission does have such authority—the facts presented in this CPRE rider proceeding are clearly distinguishable from the exceptional circumstances in past general rate case proceedings that justified the Commission's imposition of a penalty.

Specifically, in setting base rates, the Commission has utilized its authority to impose a penalty by reducing the return on costs only in cases of insufficient service, criminal negligence that the utility admitted to, management misfeasance, or prolonged series of actions and inaction inappropriately managing risk resulting in material costs or reduced quality of service to customers. The events that have justified Commission denial of return on costs were often temporally prolonged over decades and involved significant allegations of noncompliance with environmental safety regulations.[110]

In contrast, the uncontroverted evidence in the record in this proceeding suggests the Company's credit management department's data entry error was a unique "1 in 1,000

[110] DEC Coal Ash Rate Case Order at 207-323; DEP Coal Ash Rate Case Order at 142-206; DENC Coal Ash Rate Case Order at 85-137.

occurrence"[111] and that the department has a high level of operational performance managing Performance Assurance.[112] Unlike in the previously cited cases, there are no allegations of decades-long patterns of behavior that led to the circumstances that made recovery of LDs difficult. Instead, the evidence in this proceeding suggests that the data entry error was an isolated incident that was not proximately caused by any imprudence, unreasonableness, or managerial misfeasance by DEC. Accordingly, the facts presented in this proceeding are clearly distinguishable from past general rate cases where the Commission exercised its authority to penalize a utility. Thus, if the Commission prefers, it need not reach the legal question of whether the Public Utilities Act provides the Commission authority to impose a penalty on an electric public utility in a rider proceeding that would prevent it from fully recovering its reasonable and prudently incurred costs. The Commission may instead determine the evidentiary record in this proceeding does not justify imposition of a penalty that would disallow the recovery of reasonable and prudently incurred costs.

III. Wilkes Solar Bears Full Responsibility for Termination of the PPA, a Fact Which Provides Some Support for a Finding that DEC Acted Reasonably and Prudently with Respect to Terminating the PPA under the CPRE Program.

When the Commission considers the reasonableness and prudence of a utility incurring costs related to a breach of a contract, determining fault for the breach is not determinative in the inquiry. The Commission has previously explained that circumstances of a breach or termination of a contract are "only tangentially related to the Commission's main inquiry," which was whether the utility acted reasonably and prudently entering into the contract at

[111] Tr. 154.

[112] *Id.*

issue.[113] This approach is consistent with the Commission's framework for evaluating reasonableness and prudence as it avoids imposing a standard of perfection on utilities (*i.e.*, this approach recognizes that breaching a contract with a counter-party does not necessarily imply imprudent or unreasonable utility behavior).

In the DEP Gypsum Supply Order, the Commission explained that DEP entered into a supply contract to provide gypsum to a counter-party.[114] DEP ultimately defaulted on its obligations under the contract and failed to supply the requisite amount of Gypsum.[115] The counter-party filed suit against DEP and prevailed.[116] The Court Ordered DEP to find a way to provide the requisite amount of Gypsum.[117] Instead, DEP elected to pay LDs set forth in the contract.[118] DEP then sought to recover the LDs it paid from customers.[119] The Commission allowed DEP to recover those LDs from customers because it found that the Public Staff failed to meet its burden of demonstrating that DEP had not acted reasonably and prudently.[120] The Commission explained that analyzing "fault" for the breach was only "tangentially related to the Commission's main inquiry – whether DEP acted in a reasonable and prudent manner in entering into the [gypsum supply contract]…"[121]

Although the question of whether DEC or Wilkes Solar bears responsibility for the breach of the PPA is not determinative of whether the Recommended Adjustment should be imposed, Wilkes Solar is clearly the defaulting party and bears sole "fault" for termination of

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[113] Gypsum Supply Order at 7.

[114] *Id.* at 3.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] Gypsum Supply Order at 2.

[119] *See id.* at 2.

[120] *See id.* at 4.

[121] *Id.* at 7.

the PPA. Wilkes Solar breached the PPA by not maintaining adequate security performance as required under Section 5.7.[122] It was also an Event of Default to not achieve its COD under Section 20.5 of the PPA.[123]

DEC, on the other hand, did not breach the PPA and Wilkes Solar did not expressly allege that it did.[124] Instead, Wilkes Solar alleged that the system impact study was delayed by 6-7 months and the subsequent facilities study was delayed by another 5-6 months, which, in turn, delayed the anticipated COD date by at least two years.[125] Wilkes Solar did not identify the section of the PPA that DEC allegedly breached through the purported delays in processing Wilkes Solar's interconnection request because there is no such section. There is no such section because study delays were a pervasive, well-known, and unavoidable characteristic of the interconnection process at that time. As explained by witness Tabor, it was the responsibility of Wilkes Solar during the RFP process to evaluate the assumptions on which it would be able to finance and develop the project.[126] Those assumptions included the well-known possibility of delays in the interconnection process. It is also notable that the delays experienced by Wilkes Solar were experienced by all other projects in Tranche 2 of the CPRE and the delays experienced by Wilkes Solar were not in excess of those other projects.[127] In fact, because Wilkes Solar elected to be studied under the transitional serial process, it was

[122] Tabor and Holsten Rebuttal Exhibit 1, 15, 34 (Section 5.7 of the PPA states that "Seller shall ensure that the Performance Assurance in the required amount remains in full force, and effect, and outstanding for the duration required by this Agreement." Section 19.18 explicitly stated that it would be an Event of Default for Wilkes Solar to fail to "provide, replenish, renew, or replace" the Performance Assurance required by Section 5.).

[123] *Id.* at 35-36.

[124] *See generally* DEC Late-Filed Exhibit 3.

[125] *Id.* at 3-4.

[126] Tr. 208

[127] Tr. 182, 184.

studied in advance of any other project in the transitional cluster or the cluster process.[128] DEC's reasonable efforts to administer the interconnection process and even-handed treatment of Wilkes Solar were not Events of Default or otherwise bases for termination of the PPA.

Wilkes also argued that the interconnection cost estimate was higher than previously contemplated in connection with the CPRE bid process. Again, Wilkes Solar did not identify the Section of the PPA that DEC allegedly breached by presenting a higher-than-expected interconnection cost estimate because no such section exists. Under the CPRE Program, Sellers are not responsible for payment of their upgrade costs, which were to be funded by DEC.[129]

The evidence in the record is uncontroverted that Wilkes Solar defaulted on its obligations set forth in the PPA and that DEC did not. The Public Staff has indicated that it "is not making any judgment as to whom was at fault for the PPA termination." It has offered no evidence relevant to the issue of who bears responsibility for termination of the PPA and certainly has not demonstrated that DEC, in any way, defaulted under the PPA. The fact that Wilkes Solar was the party responsible for termination of the PPA tangentially supports the conclusion that DEC was reasonable and prudent with respect to the termination of the Wilkes Solar PPA.

CONCLUSION

It would be extraordinary for the Commission to impose the Recommended Adjustment by making a finding of imprudence or unreasonableness in this proceeding considering the Public Staff's refusal to opine that the Company was unreasonable or

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[128] Tr. 185.

[129] *Order Approving Interim Modifications to North Carolina Interconnection Procedures for Tranche 1 of CPRE RFP* at 12, Docket Nos. E-100, Sub 101; E-2, Sub 1159; E-7, Sub 1156 (Oct. 5, 2018) ("The current CPRE construct, as interpreted by Duke and as set forth in the RFP for Tranche 1, allows Duke to impute grid upgrades costs to bidding projects, but the successful bidder (Interconnection Customer) does not actually incur these costs. Rather, Duke incurs the grid upgrade costs and has the ability to seek recovery of these costs in a future rate case.").

imprudent. Such a finding would also be inconsistent with the Commission's framework for evaluating the reasonableness and prudence of utility action. It would be unprecedented for the Commission to impose the Recommended Adjustment in the form of a penalty that directly disallowed recovery of reasonable and prudently incurred costs. Accordingly, the Companies respectfully request the Commission allow DEC to fully recover its reasonable and prudently incurred CPRE Program costs pursuant to N.C.G.S. § 62-110.8(g) and Commission Rule R8-71(j).

Respectfully submitted this 24th day of July, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing *Post-Hearing Brief*, as filed in Docket No. E-7, Sub 1281, was served electronically or via U.S. mail, first-class, postage prepaid, upon all parties of record.

This, the 24th day of July, 2023.

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