

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. E-7, SUB 989

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of)
Application of Duke Energy Carolinas, LLC)
for an Increase in and Revisions to its Rates)
and Charges Applicable to Electric Utility)
Service in North Carolina)

**ATTORNEY GENERAL'S
NOTICE OF APPEAL
AND EXCEPTIONS**

NOW COMES the North Carolina Attorney General (the "Attorney General"), pursuant to N.C. Gen. Stat. § 62-90 and Rule 18 of the North Carolina Rules of Appellate Procedure, and gives Notice of Appeal to the North Carolina Court of Appeals from the January 27, 2012 Order Granting General Rate Increase (the "Order") issued by the Commission in the above-captioned proceeding. Pursuant to N.C. Gen. Stat. § 62-90(a), the Attorney General sets forth below the exceptions and the grounds on which he considers the Order to be erroneous, unlawful, unjust, unreasonable, unwarranted and prejudicial. As set forth below, the focus of this appeal is not on whether Duke Energy should be allowed to recover its prudently invested capital, but instead whether there was sufficient evidence in the record for the Commission to determine that Duke's shareholders should receive a 10.5% profit (or return on equity on that invested capital) in a challenging economic climate for the State, and whether Duke met its burden of proof on that item.

EXCEPTION NO. 1:

There is insufficient evidence in the record to support the Commission's finding of fact and conclusion of law that a 10.5% return on equity ("ROE") is just and reasonable, thus rendering the findings of fact and conclusions of law arbitrary and capricious and erroneous as a

matter of law. (Finding of Facts Nos. 9 and 10 and Conclusions of Law 9, 10 and 11). The North Carolina General Statutes require the Commission to

Fix such rate of return on the cost of the property ascertained pursuant to subdivision (1) of this subsection as will enable the public utility by sound management to produce a fair return for its shareholders, **considering changing economic conditions and other factors**, including, but not limited to, the inclusion of construction work in progress in the utility's property under subdivision b. of subdivision (1) of this subsection, as they then exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise, and to compete in the market for capital funds on terms that are reasonable and that are fair to its customers and to its existing investors.

N.C. Gen. Stat. § 62-133(b)(4) (emphasis added).

In order to comply with the statutory framework and requirements, the testimony regarding rate of return must (1) evaluate economic conditions relevant to Duke's paying customers; and (2) incorporate those considerations into rate of return analysis and recommendations. The rate of return testimony should balance the rate of return investors expect against the economic conditions and returns that Duke's customers are experiencing. The Commission's findings and conclusions regarding rate of return fail to comply with this standard.

An examination of the record in this proceeding reveals a lack of evidence regarding the impact of "changing economic conditions" on consumers. None of the three cost of capital witnesses presented by Duke testified with respect to the changing economic conditions on consumers. Carolina Utility Customer Association ("CUCA") witness Kevin O'Donnell's testimony contains no discussion of economic conditions and Duke's customers. Similarly, Public Staff witness Dr. Benjamin Johnson also failed to analyze the impact of economic conditions and the prospective ROE on Duke's customers. None of the cost of capital witnesses incorporated consumer economic data into their analysis, such as the impact on Duke's fixed

income customers, the impact of reductions in household income in the homes of many consumers through loss of jobs or unemployment, the impact of reduced revenue on the budgets of business consumers, the impact on State agencies and ratepayers in challenging budget times and the resulting impact on taxpayers, the impact on cities, counties, and schools, or the impact on job creation. Absent any evidence from the cost of capital expert witnesses on the subject of consumer impact, the Commission cannot adequately make findings of fact regarding the appropriate ROE in this case and it cannot apply the statutory standard established in N.C. Gen. Stat. § 62-133(b)(4).

In its discussion and conclusions, the Commission appears to rely on the lay testimony of public witnesses with respect to the impact of current economic conditions on Duke's customers. However, the Commission's order does not point to any specific lay testimony that supported the rate increase set forth in the stipulation or the 10.5% ROE set forth in the stipulation. Indeed, the overwhelming majority of the public testimony opposed a rate increase, including the rate increase set forth in the stipulation, and spoke of the burden and hardship that any rate increase would impose during these economic times. The Commission's order and ROE determination lacks specific support in the record, based on public witness testimony or otherwise, which is contrary to law. Duke Power v. Public Staff, 322 N.C. 689, 701 (1988).

Additionally, the testimony of the expert witnesses failed to support the stipulated return on equity of 10.5%. The stipulated ROE of 10.5% falls outside the recommended ranges of Public Staff witness Johnson, CUCA witness O'Donnell and Duke witness Hevert. The fact that these witnesses did not oppose the stipulation, along with its 10.5% percent ROE recommendation, does not automatically establish that the ROE complies with the statutory standard. The Commission essentially backed into its finding that sufficient testimony exists to

support the stipulation by noting that the stipulated ROE falls between the parties' negotiating positions and further noting that none of the ROE witnesses objected to the stipulated figure. The statutory framework requires affirmative evidence to establish an appropriate ROE rather than a rebuttable presumption.

There is insufficient evidence in the record to support the Commission's findings of fact regarding cost of capital, thus the findings of fact cannot support the Commission's conclusions of law regarding cost of capital. Accordingly, the Commission's order is arbitrary and capricious, is affected by errors of law, is unsupported by competent, material, and substantial evidence in light of the entire record and is beyond the Commission's statutory power and jurisdiction.

CONCLUSION

For the reasons set forth above, the Order is arbitrary and capricious, is affected by errors of law, is unsupported by competent, material, and substantial evidence in light of the entire record, and is beyond the Commission's statutory power and jurisdiction.

Respectfully submitted, this the 28th day of March, 2012.

NORTH CAROLINA ATTORNEY
GENERAL

BY: Margaret A. Force

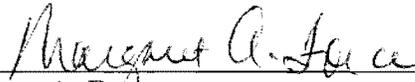
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ATTORNEY FOR NORTH CAROLINA
ATTORNEY GENERAL'S OFFICE

CERTIFICATE OF SERVICE

The undersigned certifies that she has served a copy of the foregoing Attorney General's Notice of Appeal and Exceptions upon the parties of record in this proceeding by electronic mail and hand delivery or depositing a copy of the same in the United States Mail, postage prepaid this the 28th day of March, 2012.



Margaret A. Forte
Assistant Attorney General