STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH
DOCKET NO. E-7, SUB 1276
DOCKET NO. E-7, SUB 1134

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-7, SUB 1276	)	
	)	
Application of Duke Energy Carolinas, LLC For Adjustment of Rates and Charges Applicable to Electric Service in North Carolina and Performance-Based Regulation	)	**ATTORNEY GENERAL'S OFFICE NOTICE OF APPEAL AND EXCEPTIONS**
	)	
DOCKET NO. E-7, SUB 1134	)	
	)	
Application of Duke Energy Carolinas, LLC for Approval to Construct a 402 MW Natural Gas-Fired Combustion Turbine Electric Generating Facility in Lincoln County	)	

NOW COMES the North Carolina Attorney General's Office (AGO), pursuant to N.C.G.S. §§ 7A-29(b), 62-90 *et al.*, and Rule 18 of the North Carolina Rules of Appellate Procedure, and hereby gives Notice of Appeal to the North Carolina Supreme Court from the North Carolina Utilities Commission's (Commission) *Order Accepting Stipulations, Granting Partial Rate Increase, Requiring Public Notice, and Modifying Lincoln CT CPNC Conditions* (Order) issued on 15 December 2023 in the above-captioned proceedings.

Pursuant to N.C.G.S. § 62-90(a), the AGO sets forth the below exceptions and grounds on which it considers the Commission's Order to be unlawful, unjust, unreasonable, or unwarranted and prejudicial; in excess of the Commission's statutory or constitutional authority; affected by errors of law; unsupported by

competent, material, and substantial evidence in view of the entire record as submitted; arbitrary or capricious; violative of due process or equal protection rights; and/or an abuse of discretion.

EXCEPTION NO. 1 (Rate of Return on Common Equity)

The Company sought the opportunity to earn a rate of return on common equity (ROE) of 10.4%. Other parties argued and put forth evidence supporting approval of a significantly lower ROE. The Commission approved an ROE of 10.1%—an increase from the Company's currently approved ROE of 9.6%. The Commission based this number on "a zone of reasonableness" that it identified "of 9.99% to 10.18%." To reach the 10.1% figure, the Commission concluded "that the rate of return on common equity of 10.1% will not cause undue hardship to customers even though some will struggle to pay the increased rates." Order at 216.

The Commission's findings of fact and conclusions of law[1] setting an ROE for Duke Energy Carolinas, LLC (DEC or the Company) at 10.1% are unlawful, unjust, unreasonable, or unwarranted and prejudicial; 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; arbitrary and capricious; violative of due process or equal protection rights; and constitute an abuse of discretion, in light of the following:

- While the Commission's ROE determinations are afforded some deference, that deference and the Commission's discretion are not

[1] Findings of fact nos. 48-50, Order at 28; Conclusions, Order at 179-220.

unbounded. The Commission's ROE determination treated differently substantially similar facts and circumstances and similarly situated entities—Duke Energy Progress, LLC (DEP), and DEC. In this Order, the Commission approved an ROE 30-basis points higher for DEC than DEP, despite the similar proceedings being conducted mere months apart, and despite the parties eliciting the same or substantially similar evidence and advancing the same or substantially similar arguments in each proceeding, in violation of due process and equal protection rights. The Commission failed to offer sufficient explanation for any differential treatment between the DEP and DEC proceedings; its ROE determination is therefore arbitrary and capricious and constitutes an abuse of discretion. The Commission's determination is also violative of the requirement that it fix rates as low as may be reasonably possible, consistent with the requirements of due process. *See, e.g., State ex rel. Utils. Comm'n. v. Power Co*., 285 N.C. 377, 388, 206 S.E. 2d 269, 276 (1974). The ROE determination is therefore in excess of the Commission's statutory authority and is unlawful, unjust, unreasonable, unwarranted, and prejudicial.

- The Commission erred in its ROE determination by failing to appropriately consider and account for the lessened risk to the Company resulting from adoption and approval of the multi-year rate plan (MYRP) and performance based regulation (PBR) mechanisms, to include certain performance incentive metrics. The Commission also failed to

consider and account for whether it is in the public interest to approve a MYRP/PBR application if there is no downward adjustment due to the implementation of a MYRP or PBR. These errors are in violation of the intent, purpose, and mandate of N.C.G.S. § 62-133.16(c)(1)(a) and (d)(1). The Commission's failure to include such a downward adjustment was also not supported by the greater weight of the competent, material, and substantial evidence or by its explanation.

- The Commission's ROE determination erred in failing to appropriately consider the impact that such a high ROE would have on customers and the potential for rate shock flowing from its decision, in conjunction with other Commission actions and other external factors, in violation of N.C.G.S. §§ 62-133 and 62-133.16(d)(1). *See, e.g., State ex rel. Utils. Comm'n v. Cooper*, 367 N.C. 430, 440-43, 758 S.E.2d 635, 641-43 (2014).
- The Commission's findings of fact numbers 48 through 50 are not sufficient to support the Commission's ROE determinations. The Commission's other findings of fact are also insufficient to support the same. *See, e.g., State ex rel. Utils. Comm'n. v. Public Staff*, 322 N.C. 689, 701, 370 S.E. 2d 567, 574 (1988); *State ex rel. Utils. Comm'n. v. The Public Staff*, 317 N.C. 26, 34, 343 S.E. 2d 898, 904 (1986).

EXCEPTION NO. 2 (Hazard Tree Removal Projects)

The Company included in its proposed MYRP projects what it labeled as "Hazard Tree Removal" (HTR) projects that it believed warrant capital treatment.

Other parties introduced testimony that challenged the inclusion of these vegetation management expenses as part of the Company's proposed MYRP projects. The Company's witnesses recognized that there was nothing extraordinary about HTR and admitted the HTR activities are simply part of the Company's overall vegetation management approach, with the work being no different than what the Company has been doing for years. The Company's own vegetation management policy and the Federal Energy Regulatory Commission's (FERC) Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act requires that the cost of labor, materials used, and expenses incurred for trimming trees and clearing brush (subsequent to the construction of the line) be treated as operating expenses. Nevertheless, the Company's and the Public Staff's Revenue Requirement Stipulation included HTR as a MYRP project warranting capital or rate base treatment.

The Commission's findings of fact and conclusions of law[2] allowing for and approving the Company's HTR Projects as a MYRP project are unlawful, unjust, unreasonable, or unwarranted and prejudicial; 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; arbitrary and capricious,

[2] The Commission's approval of the Revenue Requirement Stipulation allowed HTR as a MYRP project. No finding of fact or specific reasoning addressing hazard tree removal is set forth in the Order; at best, the Commission's Order at pages 102-03 relates to this exception.

violative of due process rights, and constitute an abuse of discretion, in light of the following:

- The Commission's Order failed to acknowledge or address the AGO's and Carolina Utility Customers Association's (CUCA) arguments that argued for denying HTR as a capital project. *See* N.C.G.S. § 62-79; *State ex rel. Utils. Comm'n. V. Public Staff*, 323 N.C. 481, 496-97, 374 S.E.2d 361, 369-70 (1988).
- The Commission's Order failed to make sufficient findings of fact to support including HTR as a MYRP or capital project; the Order also failed to include any reasoning or conclusions of law that address this issue aside from broadly approving the Revenue Requirement Stipulation, which included HTR as a MYRP project. As a partial settlement, this stipulation is not sufficient standing alone to support the Commission's decision. *See State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n Inc.*, 348 N.C. 452, 466, 500 S.E.2d 693, 703 (1998).
- Even were this Court to conclude that the Commission's Order adequately addresses the HTR issue, under North Carolina law the Commission has no discretion or authority to give rate-base treatment to ordinary operating expenses. *See, e.g., State ex rel. Utils. Comm'n. v. Carolina Water Serv.*, 335 N.C. 493, 507-08, 439 S.E.2d 127, 135 (1994). Under N.C.G.S. § 62-133, only property that is "used and useful . . . in providing the service rendered to the public within the State" is eligible for inclusion in rate base. The Company's HTR program

cannot qualify for inclusion into rate base because it is not currently property “used and useful” and, because it is an ongoing expense, it is never finished or placed into service.

EXCEPTION NO. 3 (Electric Vehicle Revenues)

The Commission’s findings of fact and conclusions of law[3] allowing for the exclusion of certain electric vehicle revenues from the residential decoupling mechanism are unlawful, unjust, unreasonable, or unwarranted and prejudicial; 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; and arbitrary and capricious in light of the following:

- The plain language of N.C.G.S. § 62-133.16(c)(2) authorizes the exclusion of “rate schedules or riders for electric vehicle charging[.]” The Commission’s Order is erroneous as a matter of law and exceeds this limited statutory authority by allowing the utility to exclude an estimate of electric vehicle revenues. No "schedules or riders for electric vehicle charging” were identified in the record or by the Commission’s Order, as state law requires.
- The evidence in the record is entirely speculative and insufficient to support the method for calculating electric vehicle revenues that is approved by the Commission’s Order. In fact, the Commission’s Order does not include a description of the methodology, the evidence or rationale supporting its approval, or the weight given to conflicting

[3] Findings of fact nos. 67 & 68, Order at 30; Conclusions, Order at 261-65.

testimony regarding its reasonableness. The determination therefore cannot be the result of a reasoned decision. Further, the method of calculation allowed by the Order rewards the Company for matters outside of its control where the plain language of the statute conveys the legislature's intent to reward a utility only for specific, measurable performance.

- The Commission's findings of fact numbers 67 and 68 are not sufficient to support the Commission's conclusions of law allowing for the exclusion of certain electric vehicle revenues from the residential decoupling mechanism. The Commission's other findings of fact are also insufficient to support the same.
- As a partial settlement, the PIMs Settlement is not sufficient standing alone to support the Commission's exclusion of revenues related to electric vehicles. *See State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n Inc.*, 348 N.C. 452, 466, 500 S.E. 693, 703 (1998).

EXCEPTION NO. 4 (COVID-19 Payments)

DEC gave certain eligible employees a one-time cash payment of $1,500 to help with unplanned expenses associated with the COVID-19 pandemic (amounting to approximately $1.1 million overall plus deferral costs). The Public Staff testified that the one-time cash payment was unverified and constituted goodwill on the part of DEC and therefore should not be recovered from customers.

The Commission's findings of fact and conclusions of law[4] allowing for the recovery of costs related to employee stipends during the COVID-19 pandemic are unlawful, unjust, unreasonable, or unwarranted and prejudicial; 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; arbitrary and capricious; violative of due process or equal protection rights; and constitute an abuse of discretion, in light of the following:

- The Commission in its DEP Order denied recovery of these amounts because DEP exercised no oversight over the stipends once given and did not verify usage of the stipends. The Commission erred in allowing DEC to recover the costs for these employee stipends when it denied recovery of those very same costs in the DEP Rate Case. The Commission's decision treated differently substantially similar facts and circumstances and similarly situated entities despite the similar proceedings being conducted mere months apart, and despite the parties eliciting the same or substantially similar evidence and advancing the same or substantially similar arguments in each proceeding, in violation of due process and equal protection rights. The Commission also failed to set forth an adequate explanation for this differential treatment; its determination is therefore arbitrary and capricious and constitutes an abuse of discretion.

[4] Finding of fact no. 52, Order at 28; Conclusions, Order at 232, 237-45.

For the reasons stated above, the Commission's Order is unlawful, unjust, unreasonable, or unwarranted and prejudicial; in excess of the Commission's statutory and constitutional authority; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; arbitrary or capricious; violative of due process or equal protection rights; and/or constitutes an abuse of discretion.

Respectfully submitted, this the 13th day of February, 2024.

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CERTIFICATE OF SERVICE

The undersigned certifies that he has served a copy of the foregoing ATTORNEY GENERAL'S OFFICE NOTICE OF APPEAL upon the parties of record in this proceeding by email, this the 13th day of February, 2024.

/s/ Tirrill Moore
Tirrill Moore
Assistant Attorney General