STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1142

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Duke Energy Progress, LLC For Adjustment of Rates and Charges Applicable to Electric Service in North Carolina	))))	NC WARN'S BRIEF

NOW COMES, the North Carolina Waste Awareness and Reduction Network, Inc. ("NC WARN"), through the undersigned attorney, with a brief on recovery of nuclear development and coal ash costs in the above-captioned matter.

ISSUES PRESENTED

I. Duke Energy Progress ("DEP") should be limited on recovering costs associated with the Harris nuclear development.

II. DEP should be severely limited on recovering costs associated with coal ash management.

A. None of the costs associated with coal ash mitigation and cleanup should be borne by the ratepayers.

B. DEP should not make profits on selling coal ash from its existing coal ash basins as part of a permanent disposal scheme.

SCOPE OF REVIEW

The general public policy of the State as declared in G.S. 62-2(a)(3) is "to promote adequate, reliable and economical utility service to all of the citizens and

residents of the State." In the context of rate proceedings, this policy is explained in G.S. 62-2(a)(4):

> To provide just and reasonable rates and charges for public utility services without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices and consistent with long term management and conservation of energy resources by avoiding wasteful, uneconomic and inefficient uses of energy.

To carry out these policies, the "Commission shall make, fix, establish or allow just and reasonable rates for all public utilities subject to its jurisdiction." G.S. 62-130. This authority includes both the Commission's duty to the public as well as to the utility. *State ex rel. N.C. Utilities Commission v. Westco Tel. Co.*, 266 N.C. 450, 146 S.E.2d 487 (1966).

However, "the primary purpose of the Public Utilities Act is not to guarantee the stockholders of public utility constant growth in value of and in dividend yield from their investment, but is to assure public of adequate service at reasonable charge. *State ex rel. Utilities Commission v. Mountain Elec. Coop.*, 423 S.E.2d 516, 108 N.C. App. 283, affirmed 435 S.E.2d 71, 334 N.C. 681 (1992). In rate cases, such as the one *sub judice*, the Commission's findings of fact on the Return on Equity ("ROE") are of utmost importance because of the ROE's overall impact on the rates.

> ROE is the return that a utility is allowed to earn on its capital investment, which is realized through rates collected from its customers. The ROE affects profits to the Utility's shareholders and has a significant impact on what customers ultimately pay the utility. The higher the ROE, the higher the resulting rates that customers will pay to the utility.

State ex rel. Utilities Commission v. Carolina Util. Customers Ass'n, 323 N.C. 238, 245, 372 S.E.2d 692, 696 (1988). "What constitutes a fair return on common equity is a conclusion of law that must be predicted on adequate factual findings." *State ex rel. Utilities Commission v. Carolina Utils. Customers Ass'n*, 348 N.C. 452, 461, 500 S.E.2d 693, 700 (1998).

NC WARN's position is that any of the significant components that make up the rates require the same scrutiny and detailed findings, all are fundamental parts of the rates and bear an influence on the Commission's decision about ROE. A major component in what is a reasonable and prudent capital investment in the present case is the inclusion of costs related to coal ash mitigation and cleanup, and costs related to a subsequently abandoned nuclear facility. On both of these issues, the Commission is required "to make an independent determination regarding the ROE based upon appropriate findings of fact that weigh all the available evidence." *Id.* In its discussion in that case, the court discussed the Commission's failure to make findings beyond accepting what the court designated as a "nonunanimous" settlement agreement, and required the Commission to conduct a full review of the reasonableness of the ROE, including a weighing of the credibility of witness testimony and other evidence. In the matter *sub judice*, the Commission cannot rely solely on the settlement agreement on such issues as the ROE, what constitutes a reasonable and prudent capital investment, and ultimately, the fair and reasonableness of the resulting rates.

Another restriction on the Commission's rate-making authority is the requirement that rates must reflect the need for the utility service, and this requires an examination of proposed generating facilities and other major expenses the utility proposes to incur. The "present rate payers may not be required to pay excessive rates for service to provide a return on property which will not be needed in providing utility service within the reasonable future." *State ex rel. N.C. Utilities Commission v. General Tel. Co. of Southeast.*, 281 N.C. 318, 189 S.E.2d 705 (1972). The relevant corollary to this is that present ratepayers should not pay excessive rates for service they do not need or will not receive.

ARGUMENT

I. Duke Energy Progress ("DEP") should be limited on recovering costs associated with the Harris nuclear development.

In 2008, DEP filed a combined operating license application with the Nuclear Regulatory Commission ("NRC") for two additional units at the Harris Nuclear Power Plant in Wake County. Effective May 2, 2013, DEP suspended its Combined Operating License Application ("COLA") "as the Company had determined that proceeding with this project, at this time, was no longer necessary and that to continue to do so was no longer in its customers' best interests." Order Approving Request for Deferral Accounting ("Accounting Order")[1]; further discussed by DEP witness Fallon, Tr. Vol. 12, pages 38 – 39, 45.

[1] NC WARN requests the Commission take judicial notice of the Accounting Order issued in Docket E-2, Sub 1035.

On August 15, 2013, DEP filed a petition to this Commission for an accounting order to defer in a regulatory asset account certain costs incurred with the COLA development. The Commission issued the Accounting Order on September 16, 2013. It noted that the decision is "entered without prejudice to the right of all parties to take issue with the reasonableness and/or prudency of the costs in question in future proceedings before the Commission." See also DEP witness Fallon, Tr. Vol. 12, page 44.

In the period between 2008 and 2013, DEP incurred costs of approximately $69 million on the project; of this, the COLA preparation was $18 million, the fees for NRC review and licensing was $30 million, and allowance for funds used during construction ("AFUDC") was $20 million, with operational planning and site preparation, less than $200,000. The North Carolina jurisdictional allocation of this is approximately $45 million. Accounting Order, page 1; see also DEP witness Fallon, Tr. Vol. 12, page 48.

In its application, DEP seeks recovery of the entire amount of funds spent on the licensing of the Harris Units. DEP witness Bateman, at page 22 - 23 of her direct testimony, updated the cost figures and stated:

> In Docket No. E-2 Sub 1035, the Company petitioned for approval to defer certain capital costs incurred for the development of Units 2 and 3 of the Harris Nuclear Station. The Commission approved the Company's petition on September 16, 2013. Witness Fallon discusses these costs in more detail. The total deferred costs are $45.3 million on a North Carolina retail basis ($70.3 million on a system basis.) This adjustment amortizes the deferred balance over a 5-year period, resulting in an annual revenue requirement of $9.1 million. Consistent with the Commission's order, the deferred balance is excluded from rate base and no return is included in this request.

Tr. Vol. 6, page 121 – 122.

The recovery of costs associated with the Harris COLA was included in the Preliminary Notice of Partial Settlement between the Public Staff and DEP. Provision B.7. states "[t]he Company agrees with the Public Staff's recommendation to amortize such costs over an eight year period." The subsequent Agreement and Stipulation of Partial Settlement, provision III.G., stated "[t]he Company will amortize Harris Combined Construction and Operating License Application (COLA) costs over an eight-year period." Nonetheless, the Commission is not under any obligation to approve the stipulation agreement *in toto,* but is required to make its own independent findings of fact and conclusions of law. *State ex rel. Utilities Commission v. Cooper.*, 366 N.C. 484, 739 S.E.2d 541 (2013). As noted above, the final determination as to what is a just and reasonable rate belongs to the Commission, not to the settling parties.

DEP witness Wright described the "cost decision tree" for cost recovery of placing costs of generating facilities and other infrastructure and their placement in the rate base. First, is it "used and useful," if not it cannot be placed in rate base. Second, if it is used and useful, then are the costs associated with the expenditure, "reasonable and prudent". If not, it does not go into rate base. Third, if used and useful, and reasonable and prudent, then the Commission addresses issues related to the equities between the utility and the ratepayers, such as delaying recovery, or extending amortization of the asset. Tr. Vol.21, page 46. Dr. Wright's analysis is in line with the statutory test for fixing rates. Rates are

fixed only after a finding by the Commission that the property is used and useful. This is further shown in G.S. 62-133(b), mandating how rates are fixed:

> (b) In fixing such rates, the Commission shall:
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> (1) Ascertain the reasonable original cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within the State, less that portion of the cost that has been consumed by previous use recovered by depreciation expense. In addition, construction work in progress may be included in the cost of the public utility's property under any of the following circumstances:
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> a. To the extent the Commission considers inclusion in the public interest and necessary to the financial stability of the utility in question, reasonable and prudent expenditures for construction work in progress may be included, subject to the provisions of subdivision (4a) of this subsection.

Prior to the passage of Senate Bill 3, Session Law 2007-397, one could reasonably argue the development costs for any project should be totally borne by the utility, and not its ratepayers, unless the plant comes on line and becomes used and useful. See for example, *State ex rel. Utilities Commission v. NC Textile Mfrs. Ass'n Inc.*, 328 S.E.2d 264, 313 N.C. 215 (1985); *State ex rel. Utilities Commission v. N.C. Textile Mfrs. Ass'n Inc.*, 296 S.E.2d 487, 59 N.C.App 240, rev. 306 S.E.2d 113, 309 N.C. 238 (1982). Costs associated with applications and predevelopment arise from business decisions about future needs and likely future earnings.

In Senate Bill 3, the General Assembly made an exception to the general rule, and specifically for nuclear plants as the costs of development and construction are disproportionate to those of other generating facilities, and the time line for development and construction, and including NRC review of the

COLA, is measured in decades rather than years. The new law, Section 7 of Senate Bill 3, G.S. 62-110.7, allowed recovery for the project development costs for a nuclear facility under certain conditions. ATTACHED. In the present case, DEP did not apply to the Commission for a certificate of public convenience and necessity ("certificate") pursuant to G.S. 62-110.1 (and did not do so in South Carolina). This step is a condition precedent for cost recovery pursuant to G.S. 62-110.7(b) and without it, none of the costs expended are reasonable (in terms of passing the costs on to ratepayers). As noted by the Public Staff in its position on the regulatory accounting application: "Although the Statute [G.S. 110.7] is permissive, not mandatory, and does not specifically apply in this case, it is instructive on the treatment of prudently incurred cancelled plant costs." In the Accounting Order, the Commission recognized the Public Staff position in its conclusion but did not rule specifically on the issue.

Even when a certificate has been issued and construction begun, and then the plant is cancelled, the Commission is required to make a finding of whether the plant is "in no longer in the public interest." G.S. 62-110.1(e) states, "[o]nce the Commission grants a certificate, no public utility shall cancel construction of a generating unit or facility without approval from the Commission based upon a finding that the construction is no longer in the public interest." After the public interest finding, Commission must then determine if the costs associated with the project were reasonable and prudent.

The prudency of the costs incurred was the principal issue in the Carolina Power & Light (now Duke Energy Progress) rate cases on the initial Harris

construction. In that case, the initial plan was four units at approximately $1 billion, but cost overruns limited the final operation to more than $4 billion for the one unit. See Dockets E-2, Sub 537, and E-2, Sub 333; discussed by DEP witness Wright, Tr. Vol. 21, page 32. As part of setting rates, the Commission conducted a prudency audit of costs associated with major equipment purchases and construction for the multiple cancelled units. Unlike the present case the first round of Harris construction was made pursuant to a certificate, and the one unit currently operating was credibly found to be used and useful. *State ex rel. Utilities Commission v. Thornburg.*, 385 S.E.2d 463, 325 N.C. 484 (1989).

Lastly, it should be noted that G.S. 62-110.7, S.L. 2007-297, § 7, relating to nuclear development costs and COLA preparation did not become effective until January 1, 2008, pursuant to § 16 of the bill. No costs incurred for nuclear plant construction prior that date should be recoverable under any legal theory for the plant was never used or useful. DEP witness Fallon testified that by the end of 2007, DEP has spent $13 million on the Harris project and confirmed that was the North Carolina jurisdictional share. Tr. Vol. 12, pages 67.

In conclusion, the Commission should find that none of the costs associated with the predevelopment and COLA preparation for the Harris nuclear facility should be borne by ratepayers.

II. DEP should be severely limited on recovering costs associated with coal ash management.

A. None of the costs associated with coal ash mitigation and cleanup should be borne by the ratepayers.

In its request to raise rates, DEP witness Fountain presented the amount for coal ash mitigation and cleanup:

> [DEP] is requesting recovery of ash basin closure compliance costs incurred since January 1, 2015, in the amount of $66.5 million per year for five years. The Company is seeking recovery of these costs over a five-year period in order to mitigate customer rate impacts associated with these significant compliance expenses. Based on actual coal ash expenses incurred during the 2016 test year, the Company is also seeking recovery of ongoing ash basin closure compliance spend in the amount of $129.1 million per year, with any difference from future spend being deferred until a future base rate case.

Tr. Vol. 6, pages 40 – 42. Like Mr. Fountain, other DEP witnesses referred to the coal ash mitigation and cleanup as "ash basin closure compliance costs" even when the costs were mandated by court orders, administrative notices, or the plea agreement for the nine criminal convictions. See for example, Public Staff Wright Rebuttal Cross Exhibit 1 and Public Staff Wells Cross Exhibit 8.

NC WARN's position is that none of the costs associated with mitigation and cleanup of coal ash should be borne by the ratepayers. DEP mishandled its coal ash for decades, taking the least expensive options and disregarding its substantial negative impacts on families, property, and water supplies adjacent to the coal ash basins. It allowed its liabilities to grow appreciably without taking any positive actions to remedy a significant public health and environmental catastrophe.

NC WARN bases its position on the testimony and exhibits of the Attorney General witnesses Polich and Witliff, and Sierra Club witnesses Quarles, along with the comprehensive cross-examination exhibits used by the Attorney General and Public Staff relating to coal ash. The testimony and exhibits demonstrate

criminal negligence leading to Federal criminal convictions, millions in fines and penalties, and a considerable number of significant judicial decisions and regulatory actions requiring DEP to do what it should have done all along. NC WARN relies on the other parties to cogently put forward the facts supporting these conclusions in their briefs and proposed orders.

There are several essential matters for the Commission to analyze related to recovery for coal ash mitigation and cleanup. Again referencing DEP witness Wright's "cost decision tree" for cost recovery of generating facilities, mitigating the environmental violations caused by the leaking and unlawful discharges of coal ash into groundwater and drinking water sources, is not and never will be "used and useful." Tr. Vol.21, page 46. As such, the compliance with federal and state laws, and court orders mandating cleanup cannot be placed in rate base.

The Commission may further find it useful to review G.S. 62-133.6 which allowed environmental compliance costs recovery for compliance with the air emissions established by the NC Clean Smokestacks Act, Session Law 2002-4. Although not directly relevant to cleaning up coals ash, it does provide guidance to the Commission on what definitely should not be allowed. Compliance costs in the Act specifically does not include

> a. Costs required to comply with a final order or judgment rendered by a state or federal court under which an investor-owned public utility is found liable for a failure to comply with any federal or state law, rule, or regulation for the protection of the environment or public health.
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> * * * *
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> c. Any criminal or civil fine or penalty, including court costs imposed or assessed for a violation by an investor-owned public utility of any federal or state law, rule, or regulation for the protection of the environment or public health.

G.S. 62-133.6(a)(2). From the evidence and testimony presented at the hearing, all of the costs incurred by DEP relating to coal ash issues came from court orders and criminal plea agreements; nothing was done voluntarily.

The burden of proof is on DEP to show the costs of the cleanup was a normal part of its operation. The evidence in the record shows the company "knew or should have known" about the significant problem of leaking coal ash basins in the early to mid-1980s, if not before. The industry standard increasingly became lining coal ash basins to prevent water contamination. As testified by Sierra Club witness Quarles, a significant report to Congress was issued by the US Environmental Protection Agency in 1988, compiling data from the 1970s on leaking basins and the need for lined landfills. Tr. Vol. 13, pages 182 – 183; the report is Sierra Club Kerin Cross Exhibit 1.

The Commission should also assess whether DEP knew of its own corporate liabilities and what it did to mitigate those liabilities. What may be more pointed to the issues of what DEP knew or should have known about its liabilities at its coal basins, or what the industry standard was at any particular year, is DEP's seeking payout from its insurance companies in 1996, 2011, and 2016 for potential damages and future compensation for mitigation and cleanup costs. AGO Fountain Cross Exhibits 1 – 8. Refusal by the insurance companies to cover these multi-million dollar claims and the resulting legal actions demonstrates overwhelmingly DEP's culpability for at least the last 20 years.

In conclusion, DEP should not be allowed to recover any of the costs for the mitigation and cleanup of its coal ash basins.

B. DEP should not make profits on selling coal ash from its existing coal ash basins as part of a permanent disposal scheme.

One of the most egregious examples of how DEP is planning to make profits from its mishandling of coal ash is DEP's characterization of the coal ash as structural fill at a beneficial reuse project at the Brickhaven site in Moncure, NC.[2] DEP witness Kerin states:

> DE Progress has also historically pursued opportunities to sell ash for reuse and will continue to do so as feasible. As the regulatory requirements for ash reuse tightened, the Company limited its sale of ash to situations in which compliance could be carefully monitored. The most significant reuse project undertaken by the Company prior to CAMA was a joint effort with the Asheville Airport, discussed further below. DE Progress is now selling excavated ash for reuse in the Brickhaven mine reclamation project, a large scale, fully-lined, beneficial reuse project in Moncure, NC….As a means to handle that by-product, ash is sold to the Brickhaven mine to be used as structural fill, which is a beneficial reuse.

Tr. Vol. 16, pages 116 -117. Mr. Kerin subsequently stated DEP had hired Charah, Inc., to excavate the coal ash from the Sutton coal ash basin, transport it to Chatham County, and permanently dispose of it at the Brickhaven site. Because DEP and Charah characterized the coal ash as structural fill for mine reclamation, they claimed it had a value and DEP could then take profits on its "sale" to Charah.

Contrary to DEP's claim, the use of coal ash as mine reclamation at the Brickhaven site is not a "beneficial use." In his Order on Judicial Review, issued

[2] As disclosed at the hearing, counsel for NC WARN also represents the community groups opposing the coal ash disposal in Lee and Chatham Counties. NC WARN Kerin Cross Exhibit 1 is the Order on Judicial Review issued in that case. Subsequent to the hearing, the matter has been set for hearing at the NC Court of Appeals on January 24, 2018.

on April 20, 2017, Superior Court Judge Fox revoked state permits allowing the coal ash to be used as mine reclamation in “areas not already mined or otherwise excavated.” NC WARN Kerin Cross Exhibit 1, page 21. Judge Fox based his decision on comprehensive findings of fact and conclusions of law, criticizing the state agencies for the scheme.

Conclusion 15 addressed the flaws in the permits issued by the NC Division of Waste Management:

> Ed Mussler, a licensed Professional Engineer and the Permitting Supervisor of the Solid Waste Section of the Division of Waste Management, has been properly delegated the authority to issue structural fill permits which meet all of the requirements of CAMA under N.C. Gen. Stat. § 130A, Article 9. Mr. Mussler acted outside his authority and jurisdiction when he issued the structural fill permits for the Brickhaven and the Colon mine sites, to the extent areas of the two sites had never been mined or otherwise excavated. By statute, structural fill can only be used for mine reclamation, and not for other purposes. Mining does not include excavation solely in aid of purposed other than mining.

Id. page 18. Conclusion 23 addressed the flaws in the permits issued by the NC Division of Energy, Mineral and Land Resources:

> A preponderance of the evidence at hearing proved that Tracy Davis, a licensed Professional Engineer and the Director of the Division of Energy, Mineral and Land Resources (DEMLR), has been properly delegated the authority to issue mining permits, and modified mining permits which meet all of the requirements of the Mining Act of 1971 under N.C. Gen. Stat. § 74, Article 7. Mr. Davis acted outside his authority and jurisdiction when he issued the modified mining permits for the Brickhaven and the Colon mine site, because coal ash cannot be used as structural fill for mine reclamation in the areas of the two sites which never have been mined or otherwise excavated.

Id. pages 19 – 20.

Even in light of the Order on Judicial Review, Mr. Kerin continued to maintain that the coal ash is "reclaiming that mine as a structural fill, which is classified as a beneficial reuse." Tr. Vol. 16, page 149. This position is contrary to Judge Fox's ruling in Conclusion 19:

> N.C. Gen. Stat. § 74-52 (the Mining Act of 1971) describes the bases upon which a mining permit may be modified. As noted above, mining does not include excavation for purposes other than mining. The use of coal as structural fill can only be used for genuine mine reclamation, and not as a scheme to dispose of coal ash.

Id. page 19. DEP's scheme to contract with a third-party to clean up an existing coal ash problem, transport the ash across the state, and then sell the coal ash to the third-party before it is permanently disposed is both illogical and problematic.

DEP should not make profits on selling coal ash from its existing coal ash basins as part of a permanent disposal scheme.

CONCLUSION

In light of the above, DEP should not be allowed to recover predevelopment costs for the cancelled Harris nuclear project or costs associated with the mitigation and cleanup of its coal ash impoundments.

Respectfully submitted, this the 12th day of January 2018.

/s/John D. Runkle

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing NC WARN'S BRIEF (E-2, Sub 1142) upon each of the parties of record in this proceeding or their attorneys of record by deposit in the U.S. Mail, postage prepaid, or by email transmission.

This is the 12th day of January 2018.

/s/John D. Runkle

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Attorney at Law

§ 62-110.7. Project development cost review for a nuclear facility.

(a) For purposes of this section, "project development costs" mean all capital costs associated with a potential nuclear electric generating facility incurred before (i) issuance of a certificate under G.S. 62-110.1 for a facility located in North Carolina or (ii) issuance of a certificate by the host state for an out-of-state facility to serve North Carolina retail customers, including, without limitation, the costs of evaluation, design, engineering, environmental analysis and permitting, early site permitting, combined operating license permitting, initial site preparation costs, and allowance for funds used during construction associated with such costs.

(b) At any time prior to the filing of an application for a certificate to construct a potential nuclear electric generating facility, either under G.S. 62-110.1 or in another state for a facility to serve North Carolina retail customers, a public utility may request that the Commission review the public utility's decision to incur project development costs. The public utility shall include with its request such information and documentation as is necessary to support approval of the decision to incur proposed project development costs. The Commission shall hold a hearing regarding the request. The Commission shall issue an order within 180 days after the public utility files its request. The Commission shall approve the public utility's decision to incur project development costs if the public utility demonstrates by a preponderance of evidence that the decision to incur project development costs is reasonable and prudent; provided, however, the Commission shall not rule on the reasonableness or prudence of specific project development activities or recoverability of specific items of cost.

(c) All reasonable and prudent project development costs, as determined by the Commission, incurred for the potential nuclear electric generating facility shall be included in the public utility's rate base and shall be fully recoverable through rates in a general rate case proceeding pursuant to G.S. 62-133.

(d) If the public utility is allowed to cancel the project, the Commission shall permit the public utility to recover all reasonable and prudently incurred project development costs in a general rate case proceeding pursuant to G.S. 62-133 amortized over a period equal to the period during which the costs were incurred, or five years, whichever is greater. (2007-397, s. 7.)