

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-7, SUB 1146

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

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

NOW COMES, NC WARN, Inc., through the undersigned attorneys, with a brief on recovery by Duke Energy Carolinas ("DEC") of costs in the above-captioned matter.

ISSUES PRESENTED

- I. **The Order allowing DEC to recover costs in its test year should reflect the influence money paid by Duke Energy Corporation.**
- II. **DEC should not be able to recover and profit from costs arising from its managerial mistakes.**
 - A. **DEC should be severely limited on recovering costs associated with coal ash management with none of the costs relating to coal ash clean up placed in rate base.**
 - B. **DEC should be limited on recovering costs associated with the development of the cancelled Lee Nuclear Station.**
- III. **DEC has not met its burden showing the Grid Reliability and Resiliency Rider ("GRR") and programs under Power/Forward will provide a cost-effective benefit.**
- IV. **The funds within the Nuclear Decommissioning Trust Fund should not be compromised at this time.**

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).

A 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. Cross

generational subsidies, as well as subsidies between classes, are to be discouraged.

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 each of the significant components that make up the rates require the same scrutiny and detailed findings as each is a fundamental part of the rates and bear an influence on the Commission’s decision about ROE. DEC has the burden of showing that the costs they seek to recover are reasonable and prudent and the rates they seek are fair and

equitable. A major component in what is a reasonable and prudent capital investment in the present case is the inclusion of cost recovery related to expenditures to influence legislators, regulators, and the general public; coal ash mitigation and cleanup; costs related to an abandoned nuclear facility; decommissioning costs for nuclear plants; tax recovery; and expenditures on new grid projects. On all 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.* The court further 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. *Id.*

In the matter *sub judice*, while some of the issues were included in the Agreement and Stipulation of Partial Settlement (“Agreement”) between DEC and the Public Staff (and to a lesser extent settlements with some of the other intervenor parties), other significant issues were not. DEC and the Public Staff have fundamental disagreements over several major issues, in particular the recovery of coal ash clean-up costs, return on the cancelled Lee Nuclear Station, the Job Retention Rider, Nuclear Decommission expense, the impacts of the Federal Tax Cuts and Jobs Act, depreciation rates, the Grid Reliability and Resiliency Rider, and the basic facility charge. Although NC WARN has not developed a position on several of these issues, it maintains each issue before the Commission, including those purportedly resolved in the Agreement, should

be addressed in full. The Commission cannot rely on the 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.

ARGUMENT

I. The Order allowing DEC to recover costs in its test year should reflect the influence money paid by Duke Energy Corporation.

In the present proceeding, DEC is requesting a rate hike of \$611 million, a 12.8% increase, to raise the company's revenue each year. Not only will DEC receive an increase to pay for operations and maintenance, the rate hike continues to allow DEC to gain profits from captive customers. Specifically, DEC's residential customers' basic customer charge will increase by approximately 50% from the present \$11.80 to \$17.79. The average residential customer monthly bill would increase by \$18.72. For many residents in North Carolina, this increase to their monthly expenses would be a serious hardship. In North Carolina, 31.5% of all households are cost-burdened, and cannot afford their housing expenses, Tr. Vol. 26, page 349. Many families already need public assistance to pay for their electricity. An increase in the basic facilities charge would be borne by customers who are least able to bear the burden, Tr. Vol. 26, page 354. The average rates for commercial customers would increase by 11.4% and the average rates for industrial customers would increase by 9.9%. All customer classes will bear the burden of higher rates.

With this in mind, when allowing DEC to recover costs in its test year, the Commission should reflect the influence money paid by Duke Energy

Corporation and its affiliated organizations. In this context “influence money” is not a pejorative term, but one selected by NC WARN to describe a wide variety of actions and expenditures. Tr. Vol. 6, page 371. The question is what is DEC attempting to accomplish with the influence money it spends. The purpose of the proposed DEC rate hike request and many of the decisions Duke Energy tries to influence is to support its business model to place more fracked gas power plants into rate base and then raise customers’ rates, which in the end, brings more money to the corporation.

As shown below, DEC seeks recovery to pay for their managerial mistakes regarding coal ash mismanagement as well as the abandonment of the Lee Nuclear Station. DEC would get away with criminal negligence and be rewarded with return on equity while ratepayers suffer the financial consequences. Duke Energy and its affiliated organizations and political action committees spends more than \$80 million yearly to influence Federal, state, and local government officials, news media, civic leaders, and the public. At the hearing, DEC failed to counter with sufficient evidence to prove otherwise. DEC’s only defense is that shareholders pay for the cost to influence. NC WARN’s argument raises an important question as to where shareholder money comes from.

According to DEC witness Wright, ratepayers pay rates that are used by DEC for a variety of reasons such as to pay for fuel, generation for plants, transmission lines, operation, and debt services. Tr. Vol. 12, page 210. Generally, profits are built into rate payments, which is the revenue made in

excess of expenses. DEC in return can retain the profits or transfer profits to the holding company. The holding company can use the profits to reinvest in the company or use the profits to pay dividends to shareholders. The holding company can use profits to service their corporate debt or pay for operations and salaries. In addition, the holding company can use profits to pay for lobbying and advertising expenses. Tr. Vol. 12, pages 211-212. Dr. Wright further testified that lobbying is used to educate and ask legislators to support the company's position on certain statutes and amendments. Tr. Vol. 12, pages 212-214. Whether or not DEC agrees with NC WARN's characterization of the money, the function of advertising and lobbying is to educate or persuade people to think or act a certain way, whether to support a bill or to provide brand awareness, the function of advertising and lobbying is to influence. NC WARN argues that rate payers should not bear the cost of DEC lobbying or advertisement expenses.

DEC witness Fountain, the North Carolina President of Duke Energy, testified that a portion of advertising expenses is included in its electric-related expenses. Tr. Vol. 7, page 80. The electric-related advertising expenses would be paid by customers through rates. Duke Energy uses influence money such as advertising to influence customers and to ensure customers pay their bills. NC WARN inquires as to why a monopoly spends millions of dollars to advertise when there is no competition, especially when a portion of the expenses are borne by ratepayers. Mr. Fountain stated the purpose of advertising is to educate customers about "the good work the Company is doing," to convince customers that Duke Energy is focused on a cleaner energy future, and to provide brand

awareness. Duke Energy spent over \$7.8 million to “educate” customers in 2016. DEC now seeks to recover its advertising expenses, used to provide education and brand awareness, from customers.

NC WARN’s evidence provides that Duke Energy Foundation spent \$32,636,336 in 2016 to influence the public and civic leaders. NC WARN Fountain Cross Exhibits 1 – 11. Contributions to Duke Energy Foundation come from employees, customers, and shareholders. Duke Energy spends millions of dollars to influence community leaders to maintain public support. Duke Energy spends more than \$1 million to lobby and influence NC state legislation and another \$6.6 million to lobby and influence Federal legislation. DEC witness McManeus testified that 66% of the lobbying expenses are recorded as nonelectric expenses for Federal affairs, Tr. Vol. 6, page 386. The other third of lobbying expenses would be considered expenses which will be passed down to ratepayers. For state government affairs, Ms. McManeus stated approximately 75% of lobbying cost was recorded as nonelectric, leaving a quarter of the cost for customers to pay, Tr. Vol. 6, page 386.

Duke Energy continues to seek opportunities to build new fracked gas plants, pipelines, and transmission and distribution infrastructure, all essential to raising rates and obtaining return on equity. NC WARN argues that Duke Energy continues to maintain its support from Federal, state and local government officials, news media, civic leaders and the public through influence money. NC WARN asks the Commission to consider its evidence demonstrating how DEC uses ratepayers’ money to influence.

- II. DEC should not be able to recover and profit from costs arising from its managerial mistakes.**
- A. DEC should be severely limited on recovering costs associated with coal ash management with none of the costs relating to coal ash clean up placed in rate base.**

Although NC WARN recognizes the Commission's Order in the recent Duke Energy Progress ("DEP") rate case, Docket E-2, Sub 1142, generally allowing recovery of all costs associated with the coal ash cleanup, it maintains its position in this docket that DEC should not be allowed to recover any of the costs for the mitigation and cleanup of its coal ash basins. Based on the extensive managerial mistakes and failures to take prompt action to correct known liabilities, none of the costs associated with coal ash cleanup should not be borne by the ratepayers.

In its case before the Commission, DEC has not met its fundamental burden of showing which of the costs associated with coal ash management are capital expenses and which are operating expenses. The long-term impact on the ratepayers could vary considerably as capital expenses for infrastructure needs, such as new facilities to handle coal ash or a reengineered wastewater treatment system, may be put into the rate base while some of the costs associated with the closure of the basins, disposal of the wastes, dewatering, and transportation, should be operating expenses and recoverable as normal expenses. Rate based items can receive a return on equity, an additional profit on top of the expenditure, and it appears DEC's plan is to place as much of the coal ash management into capital expenses as possible. This basic obfuscation

of the components of coal ash management costs can yield hundreds of millions of dollars in additional return to DEC for its managerial mistakes.

G.S. 62-133(b)(1) limits rate base recovery in rates to “property used and useful,” and does not include operating costs, stating:

(b) In fixing such rates, the Commission shall:

(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.

(emphasis added). The essential questions of what is property associated with coal ash management and what are expenses used in managing coal ash were not addressed by DEC. If this fundamental issue is unresolved, none of the other issues around coal ash, such as those discussed below, can be determined by the Commission.

In DEC’s request to raise rates, DEC witness Fountain presented the amount for coal ash mitigation and cleanup as simply compliance with the Federal coal combustion residuals (“CCR”) rules, 80 FR 21301 (April 17, 2015), and the N.C. Coal Ash Management Act , S.L. 2014-122,(referred to in testimony as “CAMA”):

DE Carolinas seeks to recover costs incurred since January 1, 2015 through November 30, 2017 to comply with these requirements. To mitigate rate impacts to customers, we request to recover these previously incurred expenses over a five-year period in the amount of \$135 million per year. Based on actual coal ash expenses incurred during the 2016 test year, the Company has also included ongoing expenses in revenue requirements in the amount of \$201 million, reflecting the ongoing nature of ash basin closure and compliance costs.

Including this revenue requirement will provide customers with a measure of predictability of future coal ash expenses and mitigate the significance of future rate changes related to coal ash. By collecting these costs as we go, with deferral treatment for any over- or under-collection, our proposal helps reduce impacts in future years.

Tr. Vol. 6, pages 169 – 170. Like Mr. Fountain, other DEC 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. DEC witness Wright suggested that “costs underlying or directly causing such fines or penalties should be separated from prudently incurred, ongoing costs.” Tr. Vol. 12, page 130. None of the DEC witnesses provided a clear test on how the Commission should separate actions leading to fines from ongoing costs, especially given the myriad of judicial and agency directives requiring DEC to clean up its coal ash.

There are several essential matters for the Commission to analyze related to recovery for coal ash mitigation and cleanup. DEC witness Wright described the “cost decision tree” for placing costs of generating facilities and other infrastructure in the rate base. First, the costs sought to be recovered need to be known and measurable. Second, unless the costs are for something “used and useful,” they cannot be placed in rate base. As discussed above, there is a fundamental difference between capital expenditures for property that is used and useful and operating costs. Third, if it is used and useful, then are the costs associated with the expenditure, “reasonable and prudent,” and if not, it does not go into rate base. Lastly, 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. 12, pages 202 – 206. Dr. Wright’s analysis is in line with the statutory test for establishing rates. Rates are fixed only after a finding by the Commission that the property is used and useful. As such, the compliance with federal and state directives stemming from the violations, and court orders mandating cleanup cannot be placed in rate base or otherwise recovered.

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

Compliance costs in the Act specifically do 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.

* * * *

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 DEC relating to coal ash issues came from court orders and criminal plea agreements. Nothing was done voluntarily, even actions that could have minimized subsequent costs and mitigated environmental damage.

The burden of proof is on DEC to show the costs of the cleanup were a normal part of its operation rather than in response to court orders or agency mandates. 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. As an example, in December 1984, Duke Energy conducted an investigation of its coal ash disposal and its impact on groundwater. Sierra Club Wells Cross Exhibit 1. The industry standard increasingly became lining coal ash basins to prevent water contamination.

The Commission should also assess whether DEC knew of its own corporate liabilities and what it did to mitigate those liabilities. What may be more pointed to the issues of what DEC knew or should have known about its liabilities at its coal basins, or what the industry standard was in any particular year, is DEC’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 – 6; Tr. Vol. 7, pages 96 – 97. Refusal by the insurance companies to cover these multi-million dollar claims and the resulting legal actions demonstrate overwhelmingly DEC’s culpability for at least the last 20 years.

NC WARN’s position is that none of the costs associated with mitigation and cleanup of coal ash should be borne by the ratepayers. NC WARN bases its position on the testimony and exhibits of the Attorney General witness Witliff; Public Staff witnesses Junis, Garrett, and Moore; and Sierra Club witness Quarles, along with the comprehensive cross-examination exhibits used by the

Attorney General and Public Staff of DEC witnesses Fountain, Kerin, Wells, and Wright relating to coal ash. Rather than duplicate the arguments of the other intervenors, NC WARN relies on them to cogently put forward the facts supporting these conclusions in their briefs and proposed orders.

It is clear DEC mishandled its coal ash for decades, taking the least expensive options, and disregarding the substantial negative impacts of coal ash 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. The testimony and exhibits in the record 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 DEC to do what it should have done all along.

B. DEC should be limited on recovering costs associated with the development of the cancelled Lee Nuclear Station.

On December 13, 2007, DEC filed a combined operating license application (“COLA”) with the Nuclear Regulatory Commission (“NRC”) for two AP1000 units at the Lee Nuclear Station in Gaffney, South Carolina. In his testimony, DEC witness Fallon describes the rationale for the plant as evidenced by the DEC annual integrated resource plans (“IRPs”). Tr. Vol. 10, pages 182 – 185. The original estimate for receiving the combined operating license (“COL”) from the NRC was 42 months. Tr. Vol. 10, page 233. The 2008 IRP projected at least one of the two units would come on-line in 2018. Tr. Vol. 10, page 187. On

December 19, 2016, the NRC issued the authorizing DEC to build and operate the two units. Tr. Vol.10, pages 179 – 181

On August 25, 2017, DEC sought permission from the Commission to cancel the project due to the bankruptcy of Westinghouse, the company owning the design for the AP1000 reactors, as well as "other market activity", and uncertainties within the nuclear industry. Docket E-7, Sub 819 (consolidated with the present docket). DEC witness Fallon describes the circumstances leading to DEC's decision to cancel the project and references the cancellation of the Summer nuclear plant under construction in South Carolina, another Westinghouse-designed plant, because it far exceeded its budget. Tr. Vol. 10, pages 195 – 196, 200 – 201. In its filing in Docket E-7, Sub 819, and in Mr. Fallon's testimony, DEC stated its intent to retain the option of restarting the project at some point in the future if circumstances change. Tr. Vol. 10, pages 198 – 199. DEC witness Diaz described the COL as a "readily available asset." Tr. Vol. 10, page 250.

DEC witness Diaz, former Chairman of the NRC and current consultant to the nuclear industry purported to address the strategy and efforts of DEC to obtain the COL. Chairman Diaz provided a series of rationales why the issuance of the COL was significantly delayed, including the nuclear industry's failure to handle high level waste, the Fukushima reactor accident, and seismic flaws in nuclear designs. Tr. Vol. 10, pages 234 – 241. He described the 34 nuclear units seeking COLs in 2007 and admitted the Vogtle plant in Georgia was the only one under construction. Diaz Exhibit 2.

Chairman Diaz described the cost of reactors in 2007 as being in the range of \$5-6 billion per reactor. Tr. Vol. 10, page 270. He further explained the cost increases since that period were due to incomplete designs and the failure of the supply chain. Tr. Vol. 10, pages 273 – 275. On cross-examination, Chairman Diaz accepted that the estimated cost of the two Vogtle reactors was now \$26.5 billion. Tr. Vol 11, pages 15 – 16; NC WARN Diaz Cross Exhibit 1.

NC WARN agrees with DEC that it was reasonable and prudent to cancel the nuclear project, although argued in the IRPs and in Docket E-7, sub 819 that the decision should have been made earlier. The Commission should allow DEC to cancel the project and require DEC to surrender the COL to the NRC as there is no economic path forward for the project. However, the reasonableness of cancelling the plant does not automatically allow for cost recovery.

On September 20, 2006, DEC filed to recover preconstruction costs with the Commission in Docket E-7, Sub 819. On March 20, 2007, the Commission issued a declaratory ruling stating it was generally appropriate for DEC to proceed and make expenditures through December 31, 2007. On December 7, 2007, DEC returned to the Commission for further approval. On June 11, 2008, the Commission approved further development but put a cap of \$160 million on expenditures in 2008 and 2009. In November 5, 2010, DEC returned and in its Order Approving Decision to Incur Limited Additional Project Development Costs, August 5, 2011, the Commission made the following conclusions:

1. That, in light of Duke's position that it will not proceed with construction absent legislation allowing recovery of CWIP financing costs outside a general rate case, and the fact that no such legislation is now pending before the General Assembly, it is

not appropriate to approve Duke's application at this time. Instead, the approval granted by this Order is limited to Duke's decision to incur only those nuclear project development costs that must be incurred to maintain the status quo with respect to the Lee Station, including Duke's COL application at the NRC.

2. That nuclear project developments costs incurred on or after January 1, 2011, shall be subject to a not-to-exceed cap of the North Carolina allocable portion of \$120 million.

Docket E-7, Sub 819.

Prior to the plant's cancellation, DEC far exceeded the 2011 Order's cap. Pursuant to the most recent Report of Preconstruction Costs (February 7, 2018 revision), the total spent on the project was \$558 million, and of this, \$25 million was for the preparation of the COLA, \$110 million for NRC review, \$44 million for land purchases, \$22 million for site preparation, \$80 million for "supply chain, construction planning, and detailed engineering," \$29 million for other activities, and \$248 million for AFUDC. Docket E-7, Sub 819; Tr. Vol. 10, page 202. DEC witness Fallon further testified that the North Carolina retail share of the total was \$353.2 million. Tr. Vol. 10, pages 178-179. In its application for the rate case DEC seeks recovery of the entire cost of preconstruction, including AFUDC. DEC witness Fountain stated DEC was seeking to recover \$53 million annually for 12 years. Tr. Vol. 7, page 167; supported by DEC witness McManeus, Tr. Vol., pages 257 – 258.

In this docket, NC WARN supports the recommendations and finding by Tech Customer witness Kee regarding potential cost recovery. He carefully and methodically follows the time line of DEC actions and the Commission orders regarding the Lee Station, and concludes:

The Commission's orders in Docket No. E-7, Sub 819, adopting "not-to-exceed" spending caps for the Lee nuclear project provide controlling guidance for significant portions of the costs that DEC seeks to recover. As a starting point, DEC should not be permitted to recover more than its actual spending (including AFUDC) corresponding to the recovery periods set out in each order, subject to the applicable not-to-exceed caps (which DEC substantially exceeded in the post-2010 recovery period). Further, as to costs arising in the post-2010 recovery period, the Commission's 2011 Order plainly authorizes recovery only of costs necessary to maintain the "status quo." An examination of the costs claimed by DEC shows that many of the costs DEC seeks to recover from ratepayers for this period are costs not related to maintaining the status quo and, therefore, they should not be recovered.

Tr. Vol. 18, page 160.

Again referencing Dr. Wright's decision tree for cost recovery of generating facilities and their placement in the rate base, the costs DEC is seeking to recover are known and measurable, but it is highly questionable whether the total costs were for something "used and useful," as the plant never generated any electricity and was unlikely to do so because of the costs to complete the plant, therefore, DEC should not be allowed to put the costs into rate base. A significant portion of costs were not "reasonable and prudent," and as Mr. Kee maintains, the costs far exceeded the Commission's spending caps. Lastly, it is categorically unfair to push all of the costs for an abandoned plant into rate base for recovery, and in particular the allowance for funds used during construction ("AFUDC"), i.e., the amounts spent on financing the failed project.

Prior to the passage of Senate Bill 3, Session Law 2007-397, one could reasonably argue all 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 this instance, DEC's decision to continue to accrue costs at the Lee Station in excess of spending caps was unmistakably a business decision and the risks associated with exceeding the caps were DEC's alone and should not be pushed onto the ratepayers.

In Senate Bill 3, the General Assembly made an exception to the general rule, specifically for nuclear plants as the costs of development and construction are disproportionate to those of other generating facilities, and the timeline for development and construction, 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 of predevelopment costs for a nuclear facility under certain conditions. ATTACHED.

In the present case, DEC 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 “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, the Commission must then determine if the costs associated with the project were reasonable and prudent.

The prudence of the costs incurred for cancelled plants 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. As part of setting rates, the Commission conducted a prudence audit of costs associated with major equipment purchases and construction for the multiple cancelled units. Unlike the present case the 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).

The Commission should carefully determine which of the costs associated with the predevelopment and COLA preparation for the Lee Station should be borne by ratepayers. Following Mr. Kee's recommendations, any amount in excess of the spending caps, beyond merely preserving the status quo, should be excluded. NC WARN has the additional concern about putting any amount of the failed project into rate base, thus allowing DEC to profit from its failure, or allowing any recovery of AFUDC, as the risk for licensing the project was DEC's and should not be transferred to the ratepayers.

III. DEC has not met its burden showing the Grid Reliability and Resiliency Rider ("GRR") and programs under Power/Forward will provide a cost-effective benefit.

NC WARN opposes the GRR because DEC has not justified the need for most of the activities it proposes to undertake in the Power/Forward Carolinas Initiative, DEC's grid modernization program, as being anything other than normal spending on the operation and maintenance ("O&M") of its grid infrastructure. DEC witness Fountain states DEC proposes to spend \$13 million over the next ten years, although intends to keep the program going indefinitely. Tr. Vol. 5, page 192; see also testimony and exhibits of DEC witness Simpson providing details of the Power/Forward programs.

Rather than assess the need for an activity and how it will fit into the modern grid, the GRR would regularize cost recovery for these activities without being incorporated into rate proceedings. As such, much of the proposed GRR appears to be primarily a scheme to rate base as much infrastructure as possible

and accelerate recovery of expenses. Lastly, there are unanswered questions about the scope of the activities under the GRR, the open-ended nature of the proposal, and the costs to ratepayers and any possible benefits received.

In its determination about the proposed GRR, the Commission should follow the recommendations presented by NCSEA witness Golin in her testimony. Tr. Vol. 14, pages 13 – 75; Exhibits. Dr. Golin carefully analyzes the GRR and DEC’s expressed justifications for it and discusses the costs and benefits of different aspects of the proposal. She recommends the denial of the GRR and instead opening of a stand-alone docket to define grid modernization and plan for a modernized grid benefiting distributed resources. She then recommends a separate docket to “assess the impacts of the Company’s shift in investment strategy on current cost recovery mechanisms and the implications for rate design.” Tr. Vol. 14, page 75.

Public Staff witness Williamson also questions the rationale for the proposed grid modernization program and its scope in his direct testimony. At the hearing, he provides the Public Staff’s position stating the “Company’s current description of [Power/Forward] is extremely broad, open-ended, and lacks sufficient detail to warrant Commission approval of the Company proposed cost recovery method” in the proposed GRR. He continues by stating “[t]he Public Staff opposes this [GRR] and recommends that [Power/Forward] costs be recovered through the general ratemaking process, the same as the Company’s other transmission and distribution expenses.” Tr. Vol. 16, page 156. In short,

many of the components of Power/Forward are part of DEC's normal, ongoing obligation to provide adequate and reliable service to its customers.

Being opposed to the GRR or DEC's proposed grid modernization does not mean NC WARN is opposed to improvements to the grid, and in particular any such improvements that promote distributed energy, such as solar energy. A section of Dr. Golin's testimony focuses on the grid improvements needed for the encouragement of distributed energy resources ("DERs"):

In terms of planning moving forward as a Company that stated that it is growing with distributed energy resources, particularly solar, doing that type of hosting capacity analysis and that type of grid planning would streamline interconnection costs, it would give individual customers who want to invest in DERs and the industry that wants to invest in DERs better information. It allows for better planning in terms of what grid investments might be needed moving forward. That just takes advantage of the resource more broadly in a better, more thoughtful planning way.

Tr. Vol. 14, page 76. She defines "hosting capacity analysis" by saying that, in order "to determine the grid's capacity to interconnect distributed generation ("DG") and other DER, utilities must conduct an analysis of each circuit to identify the maximum amount of DER that can be added without violating system constraints." Tr. Vol 14, pages 41 – 45. She then provides details about the methodologies for conducting the analysis and the substantial benefits to distributed resources.

A program for the modernization of the grid should have a definite and planned purpose, rather than just greater spending on the same activities currently being undertaken.

IV. The funds within the Nuclear Decommissioning Trust Fund should not be compromised at this time.

The Nuclear Decommissioning Trust Fund (“Trust Fund”) was established by the NRC to provide financial assurance for the owners of nuclear facilities to cover the cost of decommissioning activities, including license termination, spent fuel handling, and site restoration. The NRC has several different types of decommissioning; the one selected by DEC, DECON, begins decommissioning not long after the plant is completed. Tr. Vol. 20, page 283.

The Trust Funds are funded by the rate payers and are set aside by the utilities exclusively for decommissioning. As part of its oversight, the Commission adopted Guidelines in Docket E-100, Sub 56, providing for a site-specific cost study at least once every five years and a funding report to show adequate funds in the Trust Fund. The most recent cost and funding report was issued by DEC in October 2014. DEC witness Doss stated DEC is not currently collecting any funds from the Trust Fund. Tr. Vol. 12, pages 48 – 49. As of December 31, 2016 the Trust Fund balance was at \$2.19 billion with an estimated need when decommissioning activities begins of \$2.46 billion. The date when decommissioning begins is dependent on the life and licensing of each particular plant. The Public Staff estimates overfunding of more than \$2 billion when decommissioning activities are complete in the 2058 – 2067 time range. Tr. Vol. 4, pages 79 – 80. The other confounding factor is the projected rate of return used in calculating the fund balance at the time decommissioning starts or when it is completed. Tr. Vol. 20, pages 250 – 251.

In the present rate case, the Public Staff proposes to reduce the Trust Fund through an “advance” to ratepayers of \$29.1 million annually as a way to finance an expense reduction.¹ Tr. Vol. 4, page 260. DEC witnesses oppose this and characterize the proposal as a “forced loan.” DEC witness Doss expressed concern that the Public Staff’s proposal runs contrary to NRC and Internal Revenue Service rules, as well as other rules of accounting. Tr. Vol. 12, pages 58 – 59. DEC witness De May concluded the Trust Fund “is adequately funded to meet the Company’s projected future decommissioning obligations, but is by no means ‘overfunded’ to the point where one could prudently contemplate returning funds to customers, even were it legally possible or permissible to do so.” Tr. Vol. 4, page 80.

NC WARN opposes the position taken by the Public Staff regarding the Trust Fund and believes the funds within it should be retained for the near future solely for decommissioning costs. In addition to the arguments propounded by DEC, NC WARN believes at present the costs of decommissioning a nuclear plant are still uncertain as the nuclear industry has just begun the process at several of the nuclear plants. As the first 17 nuclear plants are decommissioned around the country, cost estimates should become more precise. NC WARN Hinson Cross Exhibit 1. DEC’s next cost and funding report will be filed in 2019 and will be based on better “real world” data. Public Staff witness Hinson testified “the engineering companies that come up with these cost analyses of these projected decommissioning costs, they now have real live data. In the past, back

¹ Note a previous amount of \$19.4 million had been used erroneously but was corrected by Public Staff witness Hinson in his supplemental testimony. Tr. Vol. 4, page 260.

in 2001, back in — before that, we were shooting in the dark. We didn't know what the cost really was.” Tr. Vol. 20, page 286.

It is premature at this point to make a decision about the adequacy of the Trust Fund to pay for decommissioning costs, especially as the next, more-informed, cost and funding report will be filed in 2019.

CONCLUSION

In light of the above, NC WARN prays the Commission in its Order:

1. consider the influence money spent by Duke Energy and the purposes it is used for OR IN THE ALTERNATIVE establish a separate docket to investigate Duke Energy's influence money;
2. severely limit DEC recovery of costs associated with coal ash management;
3. limit DEC's recovery of costs associated with the development of the cancelled Lee Nuclear Station;
4. deny the proposed GRR and fully investigate DEC's proposed grid modernization programs under Power/Forward;
5. prevent the funds within the Nuclear Decommissioning Trust Fund from being used for other purposes; and
6. take other actions that are just and equitable in setting rates.

Respectfully submitted, this the 27th day of April 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 27th day of April 2018.

/s/ Kristen Wills

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.)