STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. M-100, SUB 138

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Implementation of House Bill 998 – An Act to Simplify the North Carolina Tax Structure and to Reduce Individual and Business Tax Rates	)	ORDER AFFIRMING DOMINION NORTH CAROLINA POWER'S AND PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC.'S EXCEPTIONS

BY THE COMMISSION: On July 23, 2013, North Carolina Session Law 2013-316 (House Bill (HB) 998), An Act to Simplify the North Carolina Tax Structure and to Reduce Individual and Business Tax Rates (the Tax Simplification and Reduction Act), became law.

After receiving initial, reply, and responsive comments from the parties, on May 13, 2014, the Commission issued an Order Addressing the Impacts of HB 998 on North Carolina Public Utilities (HB 998 Order), requiring, among other things, that all electric, natural gas, water, and sewer utilities, other than those addressed specifically by the HB 998 Order, adjust their rates to reflect the mandated changes (and the non-mandated changes in the case of water and sewer companies) to the gross receipts tax (GRT) and the general franchise tax, as well as the non-mandated change to the state corporate income tax rates stated in HB 998.

On July 10, 2014, Virginia Electric and Power Company, d/b/a Dominion North Carolina Power (DNCP) and Public Service Company of North Carolina, Inc., d/b/a PSNC Energy (PSNC) (hereinafter collectively the Joint Movants), filed a Notice of Appeal, Motion for Reconsideration, and Request to Stay Corporate State Income Tax Rate Adjustment Pending Reconsideration (Exceptions). The Joint Movants set forth four exceptions pursuant to G.S. 62-90. The Joint Movants further made a Motion for Reconsideration of the Order pursuant to G.S. 62-80 based upon the exceptions. Lastly, the Joint Movants asked that the Commission stay any order to adjust rates to reflect the January 1, 2014, corporate state income tax change and to refund the incremental revenue requirement impact currently being collected provisionally until the Commission addresses the Joint Movants' motion for reconsideration. No party filed notice of cross appeal pursuant to G.S. 62-90(a), nor did any party file any response to the Joint Movants' exceptions.

Joint Movants' Motion to Grant Exceptions to the Commission's HB 998 Order:

Joint Movants set forth four exceptions to the HB 998 Order pursuant to G.S. 62-90. G.S. 62-90(c) states:

> The Commission may on motion of any party to the proceeding or on its own motion set the exceptions to the final order upon which such appeal is based for further hearing before the Commission.

The Commission finds good cause to review and affirm the exceptions set forth by the Joint Movants. The Commission finds that an evidentiary hearing in this matter is not necessary as this is a generic docket to be decided upon written comments and for which there has been no evidentiary hearing per se thus far and no party has requested any further opportunity to be heard on Joint Movants' exceptions. Moreover, the May 13, 2014 HB 998 Order is based on determinations made by the Commission for reasons not argued by any party. These are reasons formulated by the Commission alone. The Commission accepts and relies upon the contentions of the North Carolina Utilities Commission - Public Staff (Public Staff) and the North Carolina Attorney General (Attorney General), the only parties likely to disagree with this order, only disagreeing with the result these parties advocate on the basis of fairness. The Commission, as set forth below, is constrained by law and precedent to reach a different result. As a generic docket where the Commission exercises its legislative authority without requiring sworn testimony, and without a requirement in G.S. 62-90 that it set the exceptions for further hearing, the Commission in its discretion declines to do so. The Commission considers Joint Movants' four exceptions as set forth below.

Exception No. 1

The Joint Movants argue that the "Commission's conclusion that 'HB 998 should be viewed in its totality and the corresponding changes in rates should comprehensively reflect the full intent of the changes effectuated by HB 998, including the changes to the corporate state income tax rate' cannot be reconciled with the clear and unambiguous language of Session Law 2013-316, is unlawful, and exceeds the Commission's delegated statutory authority." Exceptions, at 3. The Joint Movants argue that the General Assembly did not grant the Commission authority in HB 998 to make a single-issue adjustment to corporate state income tax rates and the Commission's adjustment for corporate state income taxes violates the principle against single-issue ratemaking. State ex rel. Utilities Comm'n. v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

Summary Determination in Response to Exception No. 1

The Commission agrees with the Joint Movants. HB 998 clearly mandated in Section 4.2(a) that the Commission "must adjust" rates for electric public utilities to reflect the GRT repeal, the general franchise tax change, and the sales tax increase and that it "must adjust" rates for piped natural gas to reflect the excise tax repeal, and the general franchise tax and sales tax changes. Part IV, specifically Section 4.2(a), did not include changes to the corporate state income tax. Rather, the changes to corporate state income taxes are located in Part II of HB 998 which contains no similar mandate. "A long-standing

rule of statutory construction declares that a facially clear and unambiguous statute requires no interpretation." Taylor v. City of Lenoir, 129 N.C. App. 174, 179, 497 S.E.2d 715, 719 (1998) (citing Peele v. Finch, 284 N.C. 375, 382, 200 S.E.2d 635, 640 (1973)). Upon review of HB 998, the mandated changes within Part IV provide no support for adjusting the corporate state income tax changes in Part II. Therefore, any adjustments to base rates to reflect the reductions to corporate state income tax rates outside of a rate case violates the principle against single-issue ratemaking.

Exception Nos. 2 and 3

In the Joint Movants' second exception, the Joint Movants argue that the "Order's determination that a substantial and material analysis of the corporate state income tax reductions is 'not appropriate' is unlawful and exceeds the Commission's statutory authority." Exceptions, at 8. The Joint Movants argue that the Commission exceeds its statutory authority because the Commission's conclusion is inapposite with the clear precedent against single-issue ratemaking. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976). In the Joint Movants' third exception, the Joint Movants argue that "the Order's failure to apply the Nantahala[1] standard for evaluating the appropriateness of ratemaking adjustment by rulemaking [for corporate state income tax rates] on the grounds that 'the issue in this matter is whether to include or exclude certain tax changes from a rulemaking that has already been initiated to adjust rates for tax changes' is unlawful and exceeds the Commission's statutory authority." Exceptions, at 8-9.

Summary Determination in Response to Exception Nos. 2 and 3

The Commission agrees with the Joint Movants. The Commission is charged with setting just and reasonable rates for public utilities. Chapter 62 authorizes the Commission to modify base rates in a general rate case. The purpose of this requirement is to allow the Commission and all parties to carefully scrutinize all components of cost of service. See G.S. 62-133. In this manner rates are set on an adjusted historic test year on the assumption that while rates are in effect the level of revenues, expenses, and investment will permit the appropriate level of earnings even though individual components will change over time. Single-issue rate adjustments outside rate cases throw the base rates out of balance. Thus, historically, the Commission has, with few limited exceptions, disallowed the use of single-factor rate riders or cost recovery adjustments outside of a general rate case because it is unlawful to do so. See State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 451, 469, 232 S.E.2d 184, 194-95 (1970).

The North Carolina Supreme Court has allowed a change in rates using a rulemaking proceeding only in limited instances. State ex rel. Utilities Comm'n. v. Nantahala Power & Light Co., 326 N.C. 190, 198, 388 S.E.2d 118, 122-23 (1990). See also State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978) (Edmisten III). The Commission should only engage in single-issue ratemaking in the context of a rulemaking when a change is clearly substantial and material enough that to not address the change would result in unreasonable rates. Nantahala, 326 N.C. 190, 388

[1] State ex rel. Utilities Comm'n v. Nantahala Power and Light Co., 326 N.C. 190, 388 S.E.2d 118 (1990).

S.E.2d 118 (1990); Order Denying Application for Rate Adjustment and/or Institution of a Rulemaking Investigation, Docket No. M-100. Sub 122 (Oct. 23, 1991). Further, when applying the substantial and material test, the Commission should measure the change in terms of its impact on a utility's cost of service and not in terms of raw percentage changes of a tax rate. Comparing raw percentage changes of the actual tax rate, without looking to its effect on a utility's revenue requirement, is divorced from the purpose of the principle against single-issue ratemaking and should not be used.

The Commission agrees with the Joint Movants and determines that the Commission exceeded its authority in finding that it did not need to apply the substantial and material analysis to the corporate state income tax changes. The Commission, therefore, erred in determining that because it was adjusting rates for the mandated tax changes in a rulemaking, it could adjust rates for the changes to the corporate state income tax rates in that same rulemaking irrespective of whether or not the change was material and substantial.

Exception No. 4

Lastly, the Joint Movants argue that the "Commission's finding that the staggered corporate state income tax changes are 'not insignificant' cannot be reconciled with a proper application of the substantial and material standard and therefore is unjust, unlawful and arbitrary and capricious." Exceptions, at 13.

Summary Determination in Response to Exception No. 4

The Commission agrees with the Joint Movants. If the Commission properly applied the substantial and material test, the corporate state income tax changes would not meet the standard to adjust rates outside of a general rate case. The Joint Movants provided comment in this proceeding that the staggered corporate state income tax rate reductions, in total, would equate to a 0.20% change to DNCP's cost of service and an approximately 0.12% change to PSNC's test year revenues. These changes are significantly less than the 0.53% change in Nantahala Power and Light's test year revenues resulting from the 1991 0.75% corporate state income tax change which the Commission found not material and substantial in Docket No. M-100, Sub 122. Therefore, the corporate state income tax change does not meet the test to allow for a single-issue ratemaking adjustment to rates in a rulemaking proceeding.

Upon a full review of the record in this case and the filings of the parties, the Commission finds good cause to grant the Joint Movants' Exception Nos. 1 through 4.

Joint Movants' Motion for Reconsideration:

The Joint Movants requested that the Commission reconsider its HB 998 Order pursuant to G.S. 62-80. An aggrieved party may also seek reconsideration of the Commission's order pursuant to G.S. 62-80, which provides as follows:

> The Commission may at any time upon notice to the public utility and to the other parties of record affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it. Any order rescinding, altering or amending a prior order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original orders or decisions.

The Commission's decision to rescind, alter or amend an order upon reconsideration under G.S. 62-80 is within the Commission's discretion. State ex rel. Utilities Comm'n v. MCI Telecommunications Corp., 132 N.C. App. 625, 630, 514 S.E.2d 276, 280 (1999). However, the Commission cannot arbitrarily or capriciously rescind, alter or amend a prior order. Rather, there must be some change in circumstances or a misapprehension or disregard of a fact that provides a basis for the Commission to rescind, alter or amend a prior order. State ex rel. Utilities Comm'n v. North Carolina Gas Service, 128 N.C. App. 288, 293-294, 494 S.E.2d 621, 626, rev. denied, 348 N.C. 78, 505 S.E.2d 886 (1998).

The Commission concludes that since the Commission is granting the Joint Movants' exceptions pursuant to G.S. 62-90, which is within its discretion, the Commission need not address the Joint Movants' request for reconsideration pursuant to G.S. 62-80.

Further Conclusions in Response to Exceptions

I.

The only contested issue before the Commission in this docket is whether and to what extent the Commission should flow through as a reduction in utility rates the two step reduction in state corporate income taxes required in Part II of HB 998. The Public Staff and the North Carolina Attorney General, while conceding that Part II of HB 998 is silent on the issue of adjusting utility base rates to take into account this reduction in state corporate income taxes,[2] nevertheless argue that because other tax changes in Part IV of HB 998, some of which increase utility base rates, must be taken into account in setting utility rates, "fairness" justifies adjusting base utility rates for the impact of the

[2] "Section 4 of HB 998 directs the Commission to adjust the rates of electric and gas utilities for the provisions of HB 998 that affect the liability of these utilities with regard to GRT, piped gas taxes, corporate franchise taxes, and sales taxes. HB 998 is silent with regard to the income tax changes for all utilities and the effect of the GRT and corporate franchise tax changes on water and sewer utilities." Reply Comments of the Public Staff, Docket No. M-100, Sub 138, p. 2 (December 16, 2013) (emphasis added).

"Session Law 2013-316 is silent with respect to the income tax changes for all utilities and the effect of the gross receipt tax and corporate franchise tax changes on water and sewer utilities." Attorney General's Reply Comments, Docket No. M-100, Sub 138, p. 2 (December 16, 2013) (emphasis added).

state corporate income tax changes in this generic proceeding too. The consumer advocates cite no authority for this proposition.

A number of the utilities argue that, as the General Assembly did not require the changes in HB 998 to state corporate income tax rates to be reflected in utility rates, the Commission must analyze the question of utility rate adjustments for this tax change under criteria established by the North Carolina Supreme Court in Nantahala and the Commission precedent in applying these criteria. They argue that when measured against these criteria the utility rates should not be adjusted in a generic docket such as this one, but only in a general rate case where all revenues and costs can be analyzed. The primary reason, they argue, is because the impact on utility rates from the state corporate income tax changes, when appropriately measured on a cost of service basis, is immaterial and insubstantial and therefore fails the Nantahala criteria.

II.

In its May 13, 2014 HB 998 Order the Commission agreed with the result advocated by the Public Staff and the Attorney General that the reduction in state corporate income taxes should be flowed through to utility base rates "along with" the changes to other taxes required in Part IV of HB 998. However, the Commission's reasoning was different from that urged by the consumer advocates. The Commission's justifications for this determination were (1) the General Assembly intended that all HB 998 tax changes be flowed through in a generic docket; (2) parties resisting this result failed to show it would be harmful to them; (3) the scope of this proceeding limits arguments that the utilities are affected non-uniformly by HB 998; (4) the scope of this proceeding limits analysis of changes to state corporate tax under the "material and substantial" criterion; and (5) were the state corporate income tax changes to be assessed under this criterion, the changes would be material and substantial.

More particularly, the Commission made the following determinations:

(1) "The Commission concludes that HB 998 should be viewed in its totality and corresponding changes in rates should comprehensively reflect the full intent of the changes effectuated by HB 998, including the changes to the State corporate income tax rate." HB 998 Order, pp. 24-25.

(2) "No party to this proceeding has presented evidence that, were the Commission not to address the state corporate income tax change through the current rulemaking, the resulting rates would be unreasonable or cause the utilities to exceed the returns authorized in each utility's most recent rate case." HB 998 Order, p. 24.

(3) Utility arguments that the utilities are not uniformly affected by the different HB 998 tax changes so flow through of the corporate income tax changes is inappropriate should not be addressed because the issue is "the application of changes to the State corporate income tax", not other Part IV of HB 998 taxes. HB 998 Order, p. 27. The order concludes that this utility argument to the contrary should support a determination that "the GRT and the general franchise tax would not be suitable in a rulemaking." HB 998 Order, p. 27.

(4) The issue raised by the utilities that flow through to utility rates of the changes to state corporate income taxes is inappropriate because the effect on cost of service is not substantial and material cannot be addressed in this docket because "the question posed in this matter is whether it is appropriate to adjust rates for all relevant tax changes enacted as part of comprehensive tax reform, or to only adjust for changes the Commission was specifically mandated to make, in a rulemaking proceeding that has already been initiated." HB 998 Order, p. 28. Also, "the Commission does not find that an analysis to determine if the state corporate income tax reductions are 'substantial and material,' similar to that conducted by the Commission in ... Docket No. M-100, Sub 122, is appropriate in this specific scenario (where a rulemaking has already been initiated to consider several tax changes and the question posed is simply which changes to include.)" HB 998 Order, p. 28.

(5) While the Commission concluded that "an analysis to determine if the state corporate income reductions are 'substantial and material' ... is [not] appropriate," it nevertheless opined that the change in the state corporate income tax rate is comparable to other "percentage change[s]" in rates found material and substantial in past dockets. HB 998 Order, p. 28.

III.

In response to Joint Movants' Exceptions and upon more in-depth reflection, the Commission determines that the justifications in the May 13, 2014 HB 998 Order fail to support a determination that a flow through to base rates of the HB 998 Part II state corporate income tax changes should be approved in this generic docket.

A.

The Commission finds no expression of legislative intent in Part II of HB 998 to flow through to utility base rates the changes in state corporate income taxes either in the discrete operative provisions or in the title to the bill. No party to this docket makes any argument that the General Assembly expresses the intent the May 13, 2014 HB 998 Order attributes to it. The May 13, 2014 HB 998 Order cites no authority to support its conclusion, only that the authority cited to the contrary by DNCP is unpersuasive. In Part IV of HB 998 the General Assembly unequivocally mandated that utility specific changes, to become effective or to begin to become effective on July 1, 2014, to GRT and franchise taxes be flowed through and that changes in sales taxes be reflected on utility customer bills. Section 4.2(a) states: "Pursuant to G.S. 62-31 and G.S. 62-32, the Utilities Commission must adjust the rate set for the following utilities." (emphasis added). No such equivalent mandate is found in Part II. Public utility corporate taxpayers are not mentioned, much less set forth in a distinct category in Part II, but are indistinctly grouped with all other C Corporation taxpayers. The Public Staff and the Attorney General are correct – Part II is silent on flow through to utility rates for the change in state corporate income taxes. Intent to mandate cannot be inferred from silence. Had the General Assembly intended to mandate the utility flow through of the state corporate income tax rate changes, it has demonstrated in Part IV its ability to do so.

B.

The Commission determines that failure of the utilities resisting flow through to utility rates for the changes in state corporate income taxes to show that their earnings would be jeopardized provides no basis for reducing utility rates to reflect a reduction in the state corporate income tax rate in this generic docket. The effect on earnings from cost of service expense changes is an issue for a general rate case under G.S. 62-133. Making changes to utility base rates in a generic docket is a limited exception to this general rule and permits rate changes without analysis of the change on the impact on earnings. Making such changes is single-issue ratemaking, which is forbidden unless it falls within a very limited exception. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976). The base rates at issue in this docket were in fact established and approved in general rate cases where the effect of utility costs on earnings was a primary consideration. Thereafter, the rates so approved are to receive a presumption of justness and reasonableness. G.S. 62-132.

In a generic docket such as this where the effect on earnings should not be an issue, the burden to change rates should fall on those seeking to change them, not on those resisting the change. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 424, 230 S.E.2d 647 (1976). Moreover, in Nantahala, the utility resisting the flow through to rates for the decrease in federal corporate income tax expense in that generic docket sought to do so by demonstrating that its authorized return on equity of 12.52% had fallen to 8% as a result of the increase in other expenses and that this shortfall should be recognized as an offset to the decrease in federal income tax expense.[3] The Commission rejected this effort, and the North Carolina Supreme Court agreed.

> The facts which Nantahala contends are in dispute, mainly the fact that Nantahala is currently collecting a rate of return which is less than that which it was allowed to collect as a result of its last general rate hearing, pertain to Nantahala alone and not to the other utilities affected by this order. Moreover, the fact that Nantahala is currently collecting a rate of return less than that previously authorized by the Commission has nothing to do with the change in the tax laws. Nantahala's failure to realize its allowed rate of return was a problem for Nantahala before the TRA-86 was enacted. Therefore, the facts which Nantahala claims should prevent it from having to follow the Commission's order are adjudicative-type facts which should be decided in an individualized proceeding such as a complaint hearing or a general rate case.

Id. at 201-202, 388 S.E.2d at 125.

[3] State ex rel. Utilities Comm'n v. Nantahala Power and Light Co., 326 N.C. 190, 194, 388 S.E.2d 118, 120, (1990).

C.

The Commission concludes, in response to Joint Movants' exceptions, that the issue of the effects of the various tax changes in HB 998 in addition to the change in state corporate income taxes, including the changes to GRT, franchise and sales taxes, is an appropriate issue for consideration in addressing the flow through of HB 998 tax changes, especially where the issue is whether rates should be adjusted for all tax changes, and that the scope of this proceeding does not limit consideration of the issue.

The October 1, 2013 Order Initiating Generic Proceeding and Requesting Comments in this docket contains no such limitations:

> HB 998, among other things, made changes to the general statutes concerning the corporate income tax. It appears that these changes will impact the cost of services provided by affected investor-owned public utilities subject to the jurisdiction of the Commission.
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> . . .
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> In consideration of the foregoing, the Chairman finds good cause to solicit comments and reply comments in regard to how the Commission should proceed in response to the enactment of HB 998. The Chairman requests that comments address all aspects of HB 998 that are relevant to the particular company and/or interest submitting comments.

Order Initiating Generic Proceeding and Requesting Comments, Docket No. M-100, Sub 138 (October 1, 2013) (emphasis added).

In so ordering the Commission complied with the North Carolina Supreme Court's instructions in Nantahala with respect to scope of a generic investigation into the appropriateness of flowing through the effect of tax rate changes:

> Should corporate taxes be increased so that they uniformly and substantially increase taxes for utilities in the same manner as taxes were decreased by the TRA '86, the Commission could on its own initiative, as it did here, or at the urging of the utilities it regulates, as in Edmisten III, determine in a rulemaking proceeding whether and to what extent rates should be increased to offset the increase in taxes.

Nantahala, 326 N.C. at 198, 388 S.E.2d at 123 (emphasis added).

As requested, the parties, in their comments and reply comments, addressed all aspects of HB 998 affecting them, including the non-mandated tax changes in Part II and the mandated ones in Part IV. It would be inappropriate and inequitable for the Commission to seek extensive comments and after the fact refuse to address those comments on the basis that they addressed issues beyond the scope of this proceeding.

This proceeding is different from past generic dockets where the issue was flow through to utility rates of changes to tax rates in that HB 998 contains mandated flow through as well as non-mandated flow through tax rate changes. Consequently, this difference and others required an initiating order unlike those in previous generic dockets.

The Commission order initiating Docket No. M-100, Sub 113 was different from the initiating order in this docket:

> On October 22, 1986 President Reagan signed into law the Tax Reform Act of 1986. Among other provisions which are contained in this wide-ranging tax reform are provisions which upon implementation significantly reduce the tax rate of most, if not all, investor-owned public utilities engaged in providing electric, telecommunications, and natural gas distribution services in North Carolina .... It is incumbent upon this Commission to take appropriate action as required so as to preserve and flow through to ratepayers, as a reduction to public utility rates, any and all cost savings in this regard ....

Order Initiating Proceeding, Docket No. M-100, Sub 113 (October 23, 1986) (emphasis added).

The Tax Reform Act of 1986 (TRA-86), enacted by Congress of course, proposed no mandated flow through of tax changes to North Carolina utilities. Also, the Commission signaled at the outset its intent to flow through to utility base rates the significant reduction in federal tax rate expense.

Likewise, Docket No. M-100, Sub 122 arose in a completely different context:

> On August 6, 1991, Nantahala Power and Light Company (Nantahala) filed an application pursuant to G.S. 62-23, 62-30, 62-31, State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978), and State ex rel. Utilities Comm'n v. Nantahala Power and Light Co., 326 N.C. 190, 388 S.E.2d 118 (1990), for an adjustment in its rates and charges to reflect an increase in state income and sales and use tax expense and the imposition of a regulatory fee.

Order Denying Application for Rate Adjustment and/or for Institution of a Rulemaking Investigation, Docket No. M-100, Sub 122 (October 23, 1991) (Docket No. M-100, Sub 122 Order).

Docket No. M-100, Sub 122 involved no mandated tax changes, and the initial issue was whether to grant the single requesting utility's request or to expand the docket to a consideration of the effect of tax changes on other utilities.

The HB 998 mandated tax changes are to be flowed through to utility rates in a generic docket like this one under the authority of G.S. 62-31 without Commission discretion to refuse to do so, or, for those utilities like Piedmont Natural Gas Company, Inc. (Piedmont), Aqua North Carolina, Inc. (Aqua), and Carolina Water Service, Inc. of North Carolina (CWSNC), with pending general rate cases, pursuant to G.S. 62-132 and G.S. 62-133, in those cases, but with authority for the Commission to set off the

changes against other changes in the cost of service. Unlike the non-mandated changes to state corporate income taxes, the mandated changes were to be made or to begin to be made July 1, 2014. From a practical and cost point of view, for utilities without a pending general rate case, a generic proceeding was the only vehicle available to permit the rate changes within the time allowed. To suggest that utilities without pending rate cases be required to undertake an expensive and protracted general rate case to flow through a rate reduction limited to HB 998 changes is to suggest an absurd result. For electric utilities, for example, the E-1 filing requirements take months to prepare, and the Commission seldom, if ever, issues rate orders in less than seven months from the filing of the request.

As the Public Staff maintained and as the Commission noted in its order in Docket No. M-100, Sub 122, one way rate changes are authorized is "pursuant to a specific, limited statute, like the fuel clause. G.S. 62-133.2." Docket No. M-100, Sub 122 Order, p. 3. The Commission determines that the HB 998 Part IV changes to taxes other than state corporate income taxes fall within this category – a category quite distinct from the HB 998 Part II non-mandated tax changes.

While the Commission determines that no constraints exist in HB 998 or elsewhere that would prevent the flow through to rates of the mandated tax changes in Part IV of HB 998 in this generic docket (as all of the parties concede) and that no legislative intent is expressed that the state corporate income tax changes in Part II of HB 998 be flowed through along with the mandated tax changes here (as all of the parties concede), nevertheless, the Public Staff and the Attorney General ask the Commission to do so. Were the Commission to flow through all HB 998 tax changes in this generic docket so that the criteria of Nantahala were to be applied to all the HB 998 tax changes, this result would violate and run afoul of Nantahala express criterion number one:

> The Commission properly formulated a rule which applied uniformly to the affected utilities which were similarly situated. The circumstances surrounding this procedure made it appropriate for the Commission to use a rulemaking procedure because: 1) the tax reduction affected all utilities uniformly; ...

Nantahala, 326 N.C. at 203, 388 S.E.2d at 126.

No question exists that the HB 998 tax changes affect utilities non-uniformly. The Public Staff expressly notes this.

> If only the HB 998 Section 4 changes are considered, the revenue requirement for the electric utilities would decrease significantly because the decrease due to the repeal of the GRT would exceed the increase resulting from the franchise tax increase, whereas the revenue requirement of the LDCs, which do not pay the GRT, would increase. The piped gas tax paid by the LDCs is not a component of the revenue requirement, but rather an excise tax added to the customer's bill. Likewise, the sales tax collected by the electric utilities and paid to the State is a non-revenue-requirement excise tax. Cardinal Pipeline, which

> does not pay the GRT, franchise tax, or piped gas tax, is affected only by the change in the State income tax rate. With the exception of DEC and DEP, the decrease in State income taxes offsets or nearly offsets the increase in corporate franchise taxes for all the major electric and gas utilities. For DEC and DEP, the decrease in State income taxes offsets approximately 70% of each utility's corporate franchise tax increase.

Reply Comments of the Public Staff, Docket No. M-100, Sub 138, p. 8 (December 16, 2013).

For water and sewer utilities the gross receipts tax changes require different rates than for other utilities. For sales taxes the natural gas utilities and the electric utilities, while ending at the same rate, start at a different beginning point: 0 to 7% for natural gas utilities, 3% to 7% for electric utilities. With respect to state income taxes, some utilities are Subchapter S Corporations and sole proprietorships, not C Corporations, to which the changes apply. Pineville Telephone Company (Pineville) and Toccoa Natural Gas (Toccoa) are municipal systems and pay no state income taxes.[4]

Dominion North Carolina Power has raised the issue of non-uniformity from the outset:

> Second, it appears to be a controverted issue whether the various Utilities are sufficiently similarly situated that a rulemaking approach would even be appropriate. DNCP's review of the comments of the various parties suggests that the Electric Utilities are not similarly situated to any of the other Utilities impacted by HB 998. This lack of uniformity is most clearly shown in the Public Staff's main argument in support of imposing the SIT change via rulemaking. Specifically, the Public Staff argues that "it is only fair that the Commission include the effect of the income tax reductions in determining the appropriate rate adjustments for the utilities" because, otherwise, "it would be inequitable to increase the rates of the LDC's for the Corporate Franchise Tax when the effect is more than offset by the income tax rate reduction." However, this rationale applies only to the Gas LDCs (as they have not been subject to the GRT), while the Electric Utilities are currently subject to the higher of the General Franchise Tax or the GRT.

Reply Comments of Dominion North Carolina Power, Docket No. M-100, Sub 138, p. 5 (January 15, 2014).

[4] For natural gas utilities, PSNC in particular, the changes in franchise taxes, if viewed in isolation, would increase utility rates. The changes in state corporate income taxes would reduce them. Consequently, when viewing these changes together, the impact on rates is offsetting and therefore less substantial and material under the Nantahala criteria than when the change in state corporate income taxes is viewed alone.

The issue of compliance with the "affects all utilities uniformly" criterion was raised in Docket No. M-100, Sub 122:

> The Public Staff, however, disagrees that either the regulatory fee or the sales tax increase can be added to present rates in a rulemaking procedure. Looking again at the three Nantahala elements, the Public Staff asserts that at least two of them are not met in either case. First, neither the fee nor the sales tax changes will affect all utilities uniformly. The fee will vary from year to year depending on the amount of jurisdictional revenues collected during the year and the rate of the fee set by the General Assembly. Because it is based on what the utility will actually pay, it is simply a regulatory expense dependent on several adjudicative facts. While many utilities presently have the fee included in their rates, most at the 0.12% figure, many others, including the Company, do not. The Public Staff states that if the Commission decides to adjust rates for the fee, it may not only have to add the fee to the rates of some, like the Company, but to reduce it for those whose rates include the old, higher fee.
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> . . .
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> Nantahala argued that its application should be approved based on the Supreme Court's decision in the Nantahala case. Nantahala asserts that the Public Staff's lack of uniformity arguments are without merit because the regulatory fee factor and the sales and use tax rate are the same for all utilities regulated by the Commission. Therefore, Nantahala finds it impossible to distinguish between the tax rate changes addressed in Docket No. M-100, Sub 113 ... .

Docket No. M-100, Sub 122 Order at 4-5 (emphasis in original).

The Commission agreed with Nantahala.

> The Commission has carefully considered Nantahala's application and concludes that it is not supported by good cause and should be denied in its entirety. While we agree with Nantahala that the tax rate increases and regulatory fee sought by the Company in this proceeding (1) affect all utilities uniformly, (2) affect a large number of utilities, making individual hearings for all inappropriate, and that (3) no adjudicative facts are in dispute so as to require a trial-type hearing for each individual utility, we do not agree that rates should be increased to reflect these tax rate changes and the regulatory fee in the context of a rulemaking proceeding. In our opinion, the tax rate changes and regulatory fee cited by Nantahala are not substantial or material when considered in the context of the Company's total cost of service. That being the case, they do not justify initiation of a rulemaking proceeding for all public utilities subject to our regulation. For instance, Nantahala's TRA-86 rate reduction was approximately $762,390 per year versus the $113,459 Nantahala seeks to recover for 1991 in this proceeding. The TRA-86 rate reduction was clearly substantial. It was almost seven times greater than the rate

> increase Nantahala is now seeking. Furthermore, the TRA-86 rate reduction was 3.57% of Nantahala's test year level of revenues in its last general rate case while the increase proposed in this proceeding for implementation through rates in 1991 amount to only 0.53% of the Company's test year revenues.

Id. at 8 (emphasis added).

The Commission concludes that it is inappropriate to refuse to address DNCP arguments that the HB 998 tax changes, mandated and non-mandated, affect the utilities non-uniformly. The Commission likewise concludes that to flow all the HB 998 tax changes through to rates in this generic docket while refusing to acknowledge that should the Commission do so, criterion 1 of Nantahala is violated, would be inappropriate.

The fact that some of the utilities otherwise subject to rate changes due to HB 998 are already in for general rate cases more appropriately has relevance to Nantahala criterion 2, addressing the large number of utilities affected. While not determinative of the Commission's conclusions, the Commission notes that the number of utilities affected are substantially fewer than those effected by TRA-86 in 1986. The 20[5] telephone utilities that were affected by TRA-86 in Docket No. M-100, Sub 113 either no longer exist or as G.S. 62-133.5 (h) or (m) telephone companies are no longer subject to the Commission's regulation. The number of water and sewer companies affected by tax law changes has decreased from 386[6] to 152.[7] MidSouth Water Systems, Inc., and Rayco Utilities, Inc.,[8] have been acquired. Some are non-profits and their revenue requirements do not contain an income tax allowance. North Carolina Natural Gas Corporation and NUI North Carolina Gas are no longer North Carolina LDCs. Nantahala Power and Light Company has been acquired by Duke Energy Corporation. The May 13, 2014 HB 998 Order eliminates Ellerbe, Toccoa and Pineville as well as Frontier Gas. Carolina Water Service, Aqua and Piedmont Natural Gas are eliminated because of the pendency of general rate cases.

D.

As the May 13, 2014 HB 998 Order determined to flow through to rates the state corporate income tax rate changes based on a determination that to do so was consistent with legislative intent, the order expressly declined to assess the change in state corporate income taxes against the "material and substantial" criterion of Nantahala and Docket No. M-100, Sub 122. Likewise, no effort was made to assess the change in state corporate income taxes or any of the HB 998 mandated tax changes against any of the other Nantahala criteria. The Commission agrees with Joint Movants that the changes to

[5] Commission's Statistical and Analytical Data Report, p. 103 (1988).

[6] Commission's Statistical and Analytical Data Report (1982).

[7] Commission's Statistical and Analytical Data Report (2011).

[8] The Public Staff advocated removing water and sewer companies with revenues under $250,000 from consideration. Had the Commission done so, the number of utilities affected in this docket could hardly be classified as "large."

state corporate income taxes should be assessed against the Nantahala criteria, and, when this is done, the changes in state corporate income taxes, when appropriately measured on a cost of service basis, are neither substantial nor material.

The substantial and material criterion first was imposed in North Carolina Supreme Court review of the Commission's orders in Docket No. M-100, Sub 113 where the tax change at issue was a reduction of the federal corporate tax rate from 46% to 34%, one of, if not the most, marked changes in income tax rates in history. The Commission acknowledged the magnitude of the change and its impact on utility cost of service in its Order Initiating Investigation, Docket No. M-100, Sub 113 (October 23, 1986):

> On October 22, 1986, President Reagan signed into law the Tax Reform Act of 1986. Among other provisions which are contained in this wide-ranging tax reform are provisions which will upon implementation significantly reduce the tax rate of most, if not all, investor-owned public utilities engaged in providing electric, telecommunications, and natural gas distribution services in North Carolina. This reduced tax rate when effectuated will have an immediate and favorable impact on the cost of providing the aforementioned public utility services to consumers in North Carolina. It is incumbent upon this Commission to take the appropriate action as required so as to preserve and flow through to ratepayers, as a reduction to public utility rates, any and all cost savings realized in this regard which would otherwise accrue solely to the benefit of the companies' stockholders.

Order Initiating Investigation, Docket No. M-100, Sub 113 (October 23, 1986) (emphasis added).

The North Carolina Supreme Court in Nantahala reviewed the Commission's order in Docket No. M-100, Sub 113. The facts, as the law is applied to the facts, must be examined to assess the precedential value of the Court's ruling. The issue was whether to flow through income tax changes to utility rates outside of a general rate case or to apply the doctrine against single-issue ratemaking. The issue addressed was the TRA-86 federal tax rate change from 46% to 34%.[9]

The North Carolina Supreme Court in Nantahala upheld the Commission's October 23, 1986 Order in Docket No. M-100, Sub 113, which stated that the TRA-86:

> "[W]ill upon implementation significantly reduce the tax rate for most if not all investor-owned public utilities ... ."

Id.

[9] An illustration shows how this tax change might affect utility cost of service: Assume a taxpayer with taxable income of $1 million. Before the change the taxpayer paid $460,000 in federal income tax. Afterward the income tax expense drops down to $340,000. In contrast, a change from 6.9% (of $69,000), as is the case in this docket, to 5% ($50,000) is far less material and substantial. This simple comparison is presented for illustrative purposes and does not take into account the fact that state corporate taxable income differs somewhat from federal corporate taxable income.

The North Carolina Court of Appeals had said that no authority existed for the Commission to change rates outside of a complaint or general rate case. State ex rel. Utilities Comm'n v. Nantahala Power & Light Co., 92 N.C. App. 545, 375 S.E.2d 515 (1989). The North Carolina Supreme Court, citing Edmisten III, disagreed based on "proceedings in special circumstances such as in this case." Nantahala, 326 N.C. at 195-196, 388 S.E.2d at 121-122. In responding to the holding by the Court of Appeals, the Supreme Court refers to "substantial" decrease in taxes referred to by the Commission. Id. at 198, 388 S.E.2d at 123. The Supreme Court said Edmisten III could be cited to change rates in a rulemaking "under the proper circumstances." Id. at 196, 388 S.E.2d at 122. The Court of Appeals had said that rulemaking was inappropriate because no rule was established as the investigation addressed only specific facts of the case – the TRA-86 reduction. In explaining why it was reversing and rejecting this determination, the Supreme Court explained why it disagreed:

> Whether Congress might at some time in the future enact a substantial increase in taxes is too speculative and tenuous to require the attention of the Commission in this proceeding. Should corporate tax rates be increased so that they uniformly and substantially increase taxes for utilities in the same manner as taxes were decreased by the TRA-86, the Commission could, on its own initiative, as it did here, or at the urging of the utilities it regulates, as in Edmisten III determine in a ratemaking proceeding whether and to what extent rates should be increased to offset the increase in taxes.

Id. at 198, 388 S.E.2d at 123 (emphasis added).

This is an essential aspect of the Court's holding. This is not hypothetical or dictum because it explains the reasoning and holding of the Court.[10] These excerpts show that the substantial and material aspect of the TRA-86 change was part of the holding.

The Supreme Court, quoting FERC, stated:

> FERC explained in the Notice that the last corporate income tax reduction had been in 1978 when the rates were decreased from 48% to 46%. At that time FERC did not issue a statement of policy or a final rule. It merely considered this tax change on a case-by-case basis. The Commission explained the situation is different in this case (TRA-86) because TRA-86 represents a dramatic decrease in the corporate income tax rates. In its Notice, FERC stated:
>
> > The Commission believes that the federal corporate income tax decrease mandated by the Tax Reform Act of 1986 may result in significant overcollections by a public utility after July 1, 1987, if the public utility fails to adjust its rates to reflect this decrease. For this reason, the Commission is

[10] "Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand ..." – dictum. Black's Law Dictionary 541 (4th ed. 1968).

> proposing to institute a procedure to encourage public utilities to voluntarily file rate reductions with the Commission.

Id. at 202, 388 S.E.2d at 125 (emphasis added).

The Court, quoting FERC, draws a distinction between the 1978 change from 48% to 46% – deemed not substantial – and TRA-86 change from 46% to 34% – deemed substantial – to justify a ratemaking rate change in the latter and not in the former. "Substantial" is clearly part of the Supreme Court's holding.

The Commission's Docket No. M-100, Sub 122 Order provides further precedent establishing that "material and substantial" is part of the Nantahala criteria. The Commission quoted its Order in Docket No. M-100, Sub 113 that refers to "significantly" in addressing the TRA-86 change. Docket No. M-100, Sub 122 Order, p. 7. The provisions of Docket No. M-100, Sub 113 and Nantahala quoted above are those cited by the Commission in applying the "clearly material and substantial test." Id. at 7-9. The clearly material and substantial test is part of the Nantahala criteria. The Commission's determination that the changes to cost of service from the tax changes at issue in Docket No. M-100, Sub 122 should not be flowed through as an increase to Nantahala's utility rates and that no wider investigation into the rates of other utilities was warranted was based solely on the failure to meet the substantial and material test. The Commission concluded that all other Nantahala criteria had been met.

Based on the foregoing the Commission determines that it should examine the impact of HB 998 Part II state corporate income tax rate changes on utility cost of service under the Nantahala substantial and material test and that it should do so in a manner consistent with the approach followed by the Commission in Docket No. M-100, Sub 122.

Impact on cost of service and revenues was the primary metric in Docket No. M-100, Sub 122 where failure to meet the material and substantial test was the sole justification for the Commission's refusal to adjust utility rates in that generic docket.

> The Commission has carefully considered Nantahala's application and concludes that it is not supported by good cause and should be denied in its entirety. While we agree with Nantahala that the tax rate increases and regulatory fee sought by the Company in this proceeding (1) affect all utilities uniformly, (2) affect a large number of utilities, making individual hearings for all inappropriate, and that (3) no adjudicative facts are in dispute so as to require a trial-type hearing for each individual utility, we do not agree that rates should be increased to reflect these tax rate changes and the regulatory fee in the context of a rulemaking proceeding. In our opinion, the tax rate changes and regulatory fee cited by Nantahala are not substantial or material when considered in the context of the Company's total cost of service. That being the case, they do not justify initiation of a rulemaking proceeding for all public utilities subject to our regulation. For instance, Nantahala's TRA-86 rate reduction was approximately $762,390 per year versus the $113,459 Nantahala seeks to recover for 1991 in this proceeding. The TRA-86 rate reduction was

clearly substantial. It was almost seven times greater than the rate increase Nantahala is now seeking.[11] Furthermore, the TRA-86 rate reduction was 3.57% of Nantahala's test year level of revenues in its last general rate case while the increase proposed in this proceeding for implementation through rates in 1991 amounts to only 0.53% of the Company's test year revenues.

While some may argue that the 11% increase in the state corporate income tax rate from 7.0% to 7.75% is substantial, we do not agree, particularly when compared to the TRA-86 rate reduction of 26.1%.[12] Furthermore, the increase in the state income tax rate of 0.75 percentage point plus the surcharge pales in comparison to the federal rate reduction of 12 percentage points from 46% to 34%. For example, if the TRA-86 federal and the 1991 state corporate income tax rate changes are compared in terms of net effect (i.e., after recognition of the federal income tax effect arising from the state income tax increase), the result is that the impact of the TRA-86 federal income tax rate reduction was 24 times greater than the current state income tax increase. Simply put, federal income taxes compose a much larger and more significant part of the cost of service for all regulated utilities in North Carolina than state corporate income taxes.

We also note in support of our decision that when the federal corporate income tax rate was reduced from 48% to 46% in 1978, the Commission did not then initiate a rulemaking proceeding to reduce public utility rates. That tax rate reduction was not substantial in the eyes of the Commission. Like the rate increase being sought by Nantahala in this case, it was not material and did not warrant initiation of a generic rulemaking proceeding affecting all public utilities. Likewise, the Commission has never before initiated a rulemaking proceeding to flow through changes in other tax rates, such as Social Security taxes or sales taxes which frequently change. Such changes are clearly insubstantial when measured against the total cost of service of the public utilities we regulate. Rulemaking procedures should only be used to increase or decrease public utility rates when changes are clearly substantial and material. Otherwise, a general rate case where all items of the cost of service are carefully scrutinized is the most appropriate forum for rate relief. Furthermore, our decision to deny Nantahala's application is a matter within our sound discretion as

[11] Here the Commission is discussing the issue in terms of changes in utility rates, not in terms of changes in the federal corporate tax rate.

[12] This is the only sentence in two pages that measures impact by looking at a percentage change in income tax rates. When taken in context, this sentence, while accurate, supports the Commission's ultimate conclusion in Docket No. M-100, Sub 122, but a similar percentage comparison, taken out of context, as was the case in the May 13, 2014 HB 998 Order in this docket, fails to support a conclusion that the impact on cost of service from the HB 998 state corporate income tax changes is clearly material and substantial. From this point on in its discussion the Commission switches back to cost of service principles.

indicated by the following language of the Supreme Court in the Nantahala case:

> Should corporate tax rates be increased so that they uniformly and substantially increase taxes for utilities in the same manner as taxes were decreased by the TRA-86, the Commission could, on its own initiative, as it did here, or at the urging of the utilities it regulates, as in Edmisten III, determine in a rulemaking proceeding whether and to what extent rates should be increased to offset the increase in taxes.

Id. at 8-9 (emphasis added).

As the Commission stated in its order in Docket No. M-100, Sub 122, the Commission must exercise its discretion in applying the substantial and material test. Docket No. M-100, Sub 122 Order, p. 9. In exercising its discretion the Commission must do so in a well-articulated and reasoned way. State ex rel. Utilities Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985). In this case the Commission has precedent it may refer to so as to exercise its discretion fairly and rationally. Also, the Commission in its order initiating this docket asked that the parties quantify the impact on cost of service from the HB 998 tax changes, including the state corporate income tax changes.

The Duke Energy Corporation operating companies, DEC and DEP, stated that the benefit to customers of the HB 998 changes to the corporate state income tax rate is small, and would amount to approximately $0.25 per month for DEC customers and $0.15 per month for DEP customers based on a typical residential customer's monthly bill. DNCP noted that each staggered state corporate income tax rate reduction would approximate a 0.1% change to DNCP's cost of service. PSNC noted that the reduction in expenses associated with HB 998's enactment, disregarding the increased expense associated with taxes other than income taxes, would amount to approximately 0.12% of PSNC's test-year revenues.

Past efforts to quantify the impact on rates from changes in tax expense in applying the substantial and material test either explicitly or implicitly have measured the impact in terms of cost of service, not in terms of raw changes in percentages or tax rates alone. "In our opinion, the tax rate changes and the regulatory fee cited by Nantahala are not substantial or material when considered in the context of the Company's total cost of service. ... For instance, Nantahala's rate reduction was approximately $762,390 per year versus $113,459 Nantahala seeks to recover for 1991 in this proceeding." Docket No. M-100, Sub 122 Order, p. 4.

For Nantahala, the utility at issue with respect to TRA-86 in Docket No. M-100, Sub 113 and the 1991 tax change in Docket No. M-100, Sub 122, the TRA-86 income tax changes had a 3.57% impact on Nantahala's revenues. The 1991 tax changes, deemed not material and substantial, had an impact of 0.53%. For DNCP the HB 998

state corporate income tax changes affect its revenues between 0.23% and 0.39%,[13] substantially less than the change deemed insubstantial and immaterial for Nantahala. The Public Staff and utilities measure and quantify the impact of tax changes by their change in the revenue requirement or cost of service. Public Staff Second Revision of Letter, Docket No. M-100, Sub 138 (January 15, 2014). The Commission cannot lose sight of the fact that the only issue here is whether and to what extent it should adjust utility rates for the state corporate income tax changes. To look at raw percentage changes in state corporate income taxes and ignore the impact on consumer rates as the May 13, 2014 HB 998 Order did, was not an appropriate exercise of discretion and was not proper.

The Public Staff acknowledges the difference in materiality between the change in the federal income tax rate that led to the rate reductions ordered by the Commission in Docket No. M-100, Sub 113, and the changes in the state income tax rate pursuant to HB 998 that are being addressed in this docket. The Public Staff also acknowledges that the Commission denied the request of Nantahala Power & Light Company in Docket No. M-100, Sub 122, for a rate increase to reflect an increase in the state corporate income tax rate from 7% to 7.75%, plus a surtax, an increase in the sales and use tax, and the imposition of a regulatory fee, stating that the tax rate increases were "insubstantial" compared to the federal income tax rate decrease from 46% to 34% in Docket No. M-100, Sub 113, and noting that the Commission did not require rate reductions when the federal income tax rate decreased from 48% to 46% in 1978. Reply Comments of the Public Staff, Docket No. M-100, Sub 138, pp. 8-9 (December 16, 2013).

IV.

Dominion North Carolina Power and the Public Staff, in their comments, calculate the impact on DNCP's utility rates from the state corporate income tax rate changes differently. This difference arises from a disagreement over the treatment to be accorded excess deferred income taxes. Income tax expense for ratemaking purposes is calculated based on straight line depreciation, among other things. For actual filing of income taxes, however, utilities take advantage of accelerated depreciation. For ratemaking purposes, this difference is reflected as a rate base deduction in the form of accumulated deferred income taxes. When tax rates change, adjustments must be made to the accumulated deferred income tax account. Those adjustments affect cost of service in various ways, impacting tax expense and rate base, among other things. As indicated, there is an unresolved difference between DNCP and the Public Staff in this regard.

Nantahala criterion 3 states that utility rates may be adjusted in a rulemaking case when "no adjudicative-type facts were in dispute so as to require a trial-type hearing for each individual utility." While it is unclear exactly what the court had in mind

[13] The difference arises because DNCP and the Public Staff have an unresolved issue over accumulated deferred income taxes. See infra pp. 20-21.

in establishing this dichotomy,[14] should the Commission determine to adjust DNCP's base rates in this generic docket, the Commission must determine how to resolve the issue between DNCP and the Public Staff concerning the excess deferred income taxes before it can order the rate change. To the extent Nantahala criterion 3 classifies disputes over adjudicative-type facts as those requiring the Commission to analyze the evidence and resolve, as between two adverse positions, which is correct, the dispute between DNCP and the Public Staff constitutes a dispute over adjudicative-type facts. As such, were the Commission to flow through the changes in state corporate income tax expense, it would be required to resolve this dispute because otherwise DNCP would not know what new base rates to charge. Consequently, Nantahala criterion 3 would be violated.

This dispute between DNCP and the Public Staff differs from the issue Nantahala sought to raise in Docket No. M-100, Sub 113. In that docket Nantahala sought to set off against the decrease in federal income tax expense increases in other non-income tax items of cost of service. Likewise, the DNCP-Public Staff dispute here is different from the offsets the Commission approved in Docket No. M-100, Sub 113 for the telephone utilities. The Commission permitted a set off for increases to access charges the telephone companies were required to pay against the decrease in federal income tax expense. The access charge costs and federal income tax costs are unrelated.

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[14] Unfortunately, there are a number of anomalies in the Nantahala decision that make the Commission's task in compliance with its requirements difficult. On the one hand the Court quotes the stated purpose of the Commission in Docket No. M-100, Sub 113 "to take the appropriate action as required so as to preserve and flow through to ratepayers, as a reduction to public utility rates ...." Nantahala 326 N.C. at 192, 388 S.E.2d at 119. On the other hand, inconsistently, the Court states "[t]he purpose of the proceeding in the present case was not to set rates but to take the effect of the reduction in the tax rate and flow it through to the ratepayers." Id. at 197, 388 S.E.2d at 122.

In establishing the dichotomy between actions the Commission takes in its legislative capacity versus actions it takes in its judicial capacity, the Court operates on the assumption that when it is addressing the offsets to cost of service Nantahala sought, this would be an issue only appropriate for the Commission to undertake in a general rate case, not in a rulemaking case where the Commission only operates in its legislative capacity. The assumption then is that in addressing this issue in a general rate case the Commission would be operating in its judicial capacity. However, long standing North Carolina Supreme Court precedent clearly establishes that when the Commission sets rates in a general rate case, it also is operating in its legislative capacity.

> The rate making activities of the Commission are a legislative function. State ex rel. Utilities Comm'n v. General Telephone Company, 281 N.C. 318, 189 S.E. 2d 705 (1972). Rule making is likewise an exercise of the delegated legislative authority of the Commission, under G.S. 62-30 and G.S. 62-31, to supervise and control the public utilities of this State and to make reasonable rules and regulations to accomplish that end. Actions of an administrative agency which involve the exercise of a legislative rather than a judicial function are not res judicata. 73 C.J.S., Public Utilities, § 59, pp. 1138-1139. Exercises of the Commission's rule making power, therefore, are not governed by the principles of res judicata and are reviewable by this court in later appeals of closely related matters. See also, 2 K. Davis, Administrative Law Treatise, § 18.08 (1958).

State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 603, 242 S.E.2d 862, 866 (1978).

Consequently, the Commission should proceed with caution in making exceptions to the rule against single-issue ratemaking based upon undue reliance on Nantahala.

V.

The Commission sympathizes with the sentiment expressed by the Public Staff and the North Carolina Attorney General in this docket and with the conclusion reached by the Commission in the May 13, 2014 HB 998 Order. When state corporate income tax rates are reduced and where it is legally permissible to do so, utility rates should be reduced to flow through this reduction in utility costs. However, the ratemaking doctrine against single-issue ratemaking in full force in this state, designed to prevent changes to utility rates outside general rate cases, should be adhered to except in limited, closely circumscribed situations. The insubstantial and immaterial changes at issue in this docket do not fit within the exception. The limitations should be preserved to prevent single-issue ratemaking in the future when tax rates increase in insubstantial and immaterial ways. Otherwise, as argued by Commissioner Sarah Lindsay Tate in Docket No. M-100, Subs 113 and 122, the Commission will have "opened the flood gates to future confusion in dealing with future tax increases or decreases." Docket No. M-100, Sub 122 Order (Tate, S. L., dissenting).

As the rate reductions approved by the Commission in the May 13, 2014 HB 998 Order were from the outset permitted on a provisional basis, have been subject to appeal and subject to review under G.S. 62-80 and G.S. 62-90, changes made pursuant to this order relate back to January 1, 2014. State ex rel. Utilities Comm'n v. Nantahala Power & Light Co., 313 N.C. 614, 741-742, 332 S.E.2d 397, 471-472 (1988), reversed on other grounds, 476 U.S. 953 (1986). For those utilities that wish to do so, they may recoup the amounts foregone from customers resulting from the flow through of the HB 998 reduction in state corporate income tax expense. However, as the amounts are small, the Commission will not mandate that they do so. Likewise, to the extent utilities wish voluntarily to leave the reductions in place prospectively, the Commission hereby authorizes this practice as well.

IT IS, THEREFORE, ORDERED as follows:

1. Joint Movants' Exceptions 1 through 4 are hereby affirmed pursuant to G.S. 62-90.

2. That to the extent, if any, utilities have refunded to customers and/or credited to customer accounts amounts collected on a provisional basis pursuant to the Commission's December 6, 2013 Order (entered in this docket), such utilities shall be, and are hereby, authorized to recover said amounts from customers. Further, to the extent, if any, that the present provisionally-collected amounts, have not been refunded to customers and/or credited to customer accounts, the utilities so situated shall be, and are hereby, authorized to retain said amounts.

3. That, for the purpose of implementing the provisions of this Order, each affected utility, not later than 15 days from the date of this Order, shall file the following for Commission approval:

(a) Proposed revised rates and charges; and/or

(b) Other proposed plans, as may be considered appropriate; and

(c) A proposed customer notice.

The Public Staff is requested to, and the Attorney General and other parties to the docket may, file comments on the utilities' proposals not later than 15 days after they are filed with the Commission.

4. That to the extent any public utility has not previously filed proposed revised rates in accordance with the Commission's May 13, 2014 HB 998 Order requiring rate changes to effectuate the changes in the GRT and the General Franchise Tax, such companies shall filed proposed revised rates and charges, including a proposal to refund customers the incremental revenue requirement collected provisionally since July 1, 2014, associated with the repeal of the GRT based on the Commission's June 30, 2014 Order, and a proposed customer notice not later than 15 days from the date of this Order. The Public Staff is requested to, and the Attorney General and other parties to the docket may, file comments on the Utilities' proposed revised rates and charges not later than 15 days after they are filed with the Commission.

ISSUED BY ORDER OF THE COMMISSION.

This the 9th day of October, 2014.

NORTH CAROLINA UTILITIES COMMISSION

Paige J. Morris

Paige J. Morris, Deputy Clerk

Commissioners Bryan E. Beatty, Susan W. Rabon, and ToNola D. Brown-Bland dissenting.

DOCKET NO. M-100, SUB 138

COMMISSIONERS BRYAN E. BEATTY, SUSAN W. RABON, AND TONOLA D. BROWN-BLAND DISSENTING: The Majority's decision, rescinding, in part, the Commission's May 13, 2014 Order in this docket, allows the utilities to charge ratepayers in perpetuity to collect for taxes that the utilities no longer pay. The Majority's decision errs with respect to fairness to ratepayers; errs procedurally with respect to due process and the limitations of the Commission's right to rescind, alter, or amend an Order; and errs in its content with respect to its legal conclusions.

The legislature passed HB 998 as a comprehensive set of tax reforms; the Commission's May 13, 2014 Order, likewise, viewed these changes comprehensively. HB 998, as implemented by the Majority, will increase ratepayers' total electric bill by approximately 1% and increase an average ratepayer's natural gas bill by approximately 3-4%.[1] The Majority has permitted the three electric utilities (DEC, DEP, and DNCP) and PSNC to over-collect approximately $21 million dollars per year from ratepayers based on a no longer applicable higher tax rate. There is no set end to this over-collection, which will continue indefinitely each year until each utility's next general rate case.[2] Even then, ratepayers will never be refunded the over-collected funds; the utilities have simply been afforded an unearned gain at the expense of North Carolina ratepayers. Prior to the Majority's decision, all four natural gas and electric utilities affected by the Majority's decision were overearning on their approved return on equity and rate of return.[3] The Majority has chosen to implement HB 998 to create an additional windfall for the utilities. We do not believe this to be a fair outcome to ratepayers or a just legal conclusion.

The Commission has a duty to "provide fair regulation of public utilities in the interest of the public." G.S. 62-2(a)(1). The Majority's decision does not adhere to this

[1] The electric utilities will increase the sales tax applied to bills by 4% and further increase rates to account for the application of the general franchise tax, which is partially offset through the repeal of the gross receipts tax (GRT). Natural gas utilities will increase the applicable sales tax from 0 to 7% and further increase rates to account for the application of the general franchise tax, which is partially offset by the repeal of the piped natural gas excise tax. As the repealed excise tax was calculated on a per-therm basis and the newly applicable sales tax is applicable to sales, an exact percentage increase for every bill is not determinable. However, estimates for a typical $100 natural gas bill show an increase in the total bill of approximately 3-4% when the sales tax and general franchise tax are applied and the excise tax is removed. The Commission's May 13, 2014 Order required a further offset to the increases for the reduction of the State corporate income tax to 6% in 2014 and 5% in 2015. The Majority's decision has disallowed that requirement, allowing the utilities to charge rates based on the prior rate of 6.9%.

[2] A period of 25 years elapsed in between DEP's two most recent general rate cases.

[3] The Commission's latest Quarterly Report, available at http://www.ncuc.net/activities/activit.htm, states that for the fiscal year ending June 30, 2014, DEC had a return on equity (ROE) of 11.12% and a rate of return (ROR) of 8.36% compared to the 10.2% and 7.88% authorized in its last general rate case; DEP had an ROE of 11.29% and an ROR of 8.06% compared to the 10.2% and 7.55% authorized in its last general rate case; DNCP had an ROE of 12.19% and an ROR of 8.84% compared to the 10.2% and 7.80% authorized in its last general rate case; and PSNC had a ROE of 11.31% and a ROR of 9.07% compared to the 10.6% and 8.54% authorized in its last general rate case.

tenet. We do not believe that the General Assembly intended for HB 998 to create a windfall for regulated utilities or an overcharge for ratepayers. The Majority notes the "insubstantial" or "immaterial" nature of the potential savings to ratepayers as one of the key factors to its decision. However, the Majority fails to recognize that the Commission has the discretion to require that the offset be applied and that, for those who struggle to pay utility bills in a challenging economy, every cent counts. This is especially true in this case, as the over-collections amass cumulatively over time and a large portion of ratepayers will be hit with the over-collection multiple times; their electric bill will overcharge, their natural gas bill will overcharge, and their water and sewer bills will overcharge. The Majority's decision is also unfair to several utilities, placing them on an unlevel playing field. A utility that was involved in a general rate case simply by chance when HB 998 was passed will charge rates based on the correct State corporate income tax rate, while a utility not in a general rate case at that time, pursuant to the Majority's Order, can charge rates based on the no longer applicable higher tax rate.

The Majority stresses that its decision protects the fundamental principle of avoiding single issue ratemaking. This assertion fails to acknowledge that, regardless of the inclusion or not of the State corporate income tax changes, a rulemaking is adjusting rates to account for tax changes. The question at hand is not whether to adjust rates via a rulemaking; instead, it is what changes to include in the adjustment. The Majority's decision no more avoids single issue ratemaking than the May 13, 2014 Order did. Common sense, as well as case law and Commission precedent, dictate that the incorporation of all the tax changes in HB 998 ensures the most equitable result. This is true especially, as is the case in this matter, when applying less than all the changes will result in large increases for consumers, which could be mitigated in part. On the contrary, the Majority's decision accounts for all of the tax increases in HB 998 but fails to adjust for all of the concurrent decreases.

The Majority's decision is also inherently inconsistent on single issue ratemaking. The Majority goes to great lengths to establish that the Commission has no authority to enact a single issue ratemaking adjustment regarding the pass through of the State corporate income tax, and, then subsequently, with no further justification, authorizes the utilities to choose to enact the exact same adjustment if they are so inclined. The Commission either has the authority to enact the adjustment or it does not. If the Commission can authorize the utilities to choose to enact the adjustment, then the Commission has the authority to, and should in the present circumstances, require that the adjustment be made. The Commission establishes the appropriate rates; the utilities are not, and should not, be free to choose what to include or exclude from their rates.

Finally, as discussed in the first section below, the Majority's procedure in this matter sets a dangerous impermissible precedent—allowing the Commission to reverse an Order without a change in circumstance, as has been required by the Courts, and without the statutorily required hearing. This unprecedented approach violates parties' due process rights and calls into question the certainty of every Commission Order. As established in the second section below, contrary to the Majority's decision, the Commission does have the authority to require that the utilities cease over-collecting

based on the no longer applicable higher State corporate income tax rates. Having such authority, in the present circumstances when a rate adjustment increasing consumers' bills to account for other tax changes is already being made, the Commission should exercise this authority to protect the ratepayers of the State.

The Majority's Order Exceeds the Commission's Authority to Rescind, Alter or Amend an Order.

The Majority's decision states that the Commission is affirming the Joint Movants' exceptions and is permitting the utilities to retain and/or recover the amounts collected provisionally based on the no longer applicable State corporate income tax. Thus, the Majority is rescinding, in part, the May 13, 2014 Order. The Majority takes this action without a hearing, or even requesting comment from other parties, and without a finding that a change of circumstances or misapprehension of a material fact has occurred. The Majority cites its authority to do so as pursuant to G.S. 62-90. This action is a clear abuse of the Commission's authority. G.S. 62-90 in no part authorizes the Commission to rescind, alter, or amend an Order.[4] G.S. 62-80 is the statute that provides the Commission with this authority, and, then, it is only permissible following a hearing and only if the Commission finds a change in circumstances. The Majority has not provided, and we have been unable to locate, a single instance in the history of the Commission in which the Commission has rescinded, altered, or amended an Order, and/or affirmed exceptions, based solely on authority granted by G.S. 62-90. This is most likely because there is no such authority in G.S. 62-90.

G.S. 62-90(c), the only subsection of G.S. 62-90 cited by the Majority, states that:

> The Commission may on motion of any party to the proceeding or on its own motion set the exceptions to the final order upon which such appeal is based for further hearing before the Commission.

G.S. 62-80, in pertinent part, states that:

> The Commission may at any time upon notice to the public utility and to the other parties of record affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it.

[4] G.S. 62-90(a) establishes the time limitations within which a party may appeal or cross-appeal a Commission order. G.S. 62-90(b) establishes that a party may appeal the Commission's order in full or in part and prescribes the notice requirements of an appeal. G.S. 62-90(c) provides the Commission with the right to set exceptions for hearing. G.S. 62-90(d) states that the appeal lies with the appellate division of the General Court of Justice as provided in G.S. 7A-29. There are no other subsections to G.S. 62-90.

The Joint Movants correctly identified the role of the two statutes in their Notice of Appeal and Motion for Reconsideration stating that they:

> 1) pursuant to [G.S.] 62-90 and Rule 18 of the North Carolina Rules of Appellate Procedure, give Notice of Appeal to the North Carolina Court of Appeals from the [Commission's] May 13, 2014, Order Addressing the Impacts of HB 998 on North Carolina Public Utilities, issued in the above captioned proceeding; and 2) respectfully move the Commission for reconsideration of the Order pursuant to [G.S.] 62-80.

The Commission summarized the role of the two statutes in its January 14, 2013 Order in Docket No. E-17, Sub 1017, stating: "[a]s under G.S. 62-90(c), the Commission can initiate a reconsideration of its order under G.S. 62-80 on its own motion." Further, the North Carolina Supreme Court has also clearly recognized the interplay of the two statues in Utilities Commission v. Edmisten stating:

> Moreover, G.S. 62-90(c), pursuant to which these hearings were held, states, "The Commission may on motion of any party to the proceeding or on its own motion set the exceptions to the final order upon which such appeal is based for further hearings before the Commission." … Should the Commission determine that any of the exceptions are well-taken, it may set the case for further hearing under its authority in G.S. 62-80 to rescind, alter or amend its decisions or orders.

Utilities Commission v. Edmisten, 294 N.C. 598 at 608-609, 242 S.E.2d 862 at 869 (1978) (emphasis added). There is nothing in G.S. 62-90 that resembles a grant of authority to rule on the exceptions and rescind, alter, or amend an order as provided in G.S. 62-80. Rather, it is a procedural statute, creating an exception to the general rule that the Commission is divested of jurisdiction once a notice of appeal is filed. The Majority's use of G.S. 62-90 is an impermissible circumvention of the requirements of G.S. 62-80.

The Commission is free to deny a motion for reconsideration or a request to hear exceptions without a hearing, as no adverse party would be negatively affected by such an action.[5] In contrast, for the Commission to rescind, alter, or amend an order, the Commission must provide other parties to the proceeding an opportunity to be heard. As discussed above, G.S. 62-90(c) only provides the Commission with the authority to "set the exceptions to the final order upon which such appeal is based for further hearing"; thus, the Commission's authority to rescind, alter, or amend an order must be based in G.S. 62-80. G.S. 62-80 is very clear that the Commission may only rescind, alter, or amend an order "upon notice to the public utility and to the other parties of record affected, and after opportunity to be heard as provided in the case of

[5] The moving party has had an opportunity to make its case. Additionally, a decision not to reconsider does not rescind, alter or amend any part of an order, and, thus, would not require a hearing.

complaints."[6] No such opportunity has been afforded any party. The Majority in this instance has not even taken the one step that G.S. 62-90(c) actually authorizes, that of setting the exceptions for hearing.

The Majority stated that it:

> [A]ccepts and relies upon the contentions of the [Public Staff] and the [Attorney General], the only parties likely to disagree with this order, only disagreeing with the result these parties advocate on the basis of fairness.

Majority decision at 2. The Majority cannot possibly know or foresee what agreement or disagreement the "parties likely to disagree" may have with the Joint Movants' exceptions, or even which parties may agree or disagree—especially, as discussed below, when the Joint Movants introduce different legal arguments than those initially brought to the Commission. The Majority continues that:

> As a generic docket where the Commission exercises its legislative authority without requiring sworn testimony, and without a requirement in G.S. 62-90 that it set the exceptions for further hearing, the Commission in its discretion declines to do so.

Id. The Majority provides no support for this assertion. Nothing in G.S. 62-90 or G.S. 62-80 distinguishes one type of proceeding from any other type of proceeding; G.S. 62-80 clearly states that it applies to "any order or decision made by [the Commission]." There is also no requirement that the Commission hold a hearing prior to rescinding, altering, or amending an Order under G.S. 62-90, because there is no authority to rescind, alter, or amend an Order contained in G.S. 62-90. This authority, as has long been established, resides under G.S. 62-80, which does require a hearing.

The Majority further states multiple times, as justification for its action, that no party has filed a response to the Joint Motion or requested further opportunity to be heard. The onus is not on the parties to request that the Commission follow procedure; it is on the Commission to follow procedure. As the Commission cannot by law rescind, alter, or amend an Order without a hearing and historically has never taken the action that the Majority takes in this matter, there would be no reason for a party to request an opportunity to be heard. The "parties likely to disagree," identified by the Majority as the

[6] G.S. 62-73 governs the case of complaints and states in pertinent part " … the Commission shall fix a time and place for hearing, after reasonable notice to the complainant and the utility complained of, which notice shall be not less than 10 days before the time set for such hearing." See also State ex rel. Utilities Commission v. Public Service Company, 59 NC App. 448 at 451-52 (1982) ("The defendant argues that since the statute provides that before an order may be "altered or amended" the matter shall "be heard as provided in the case of complaints", this means there must be a complaint hearing pursuant to G.S. 62-73 and all the elements required by G.S. 62-133 must be considered. We do not so read G.S. 62-80. We believe it requires that the procedures of complaint hearings shall be used before amending an order but it does not require a general rate hearing before an order may be amended." (emphasis added).)

Public Staff and the Attorney General in this matter, would have no reason to file comments or motions until there is reason to believe that the Commission is actually considering changing its original Order.[7] The Commission would provide this notice by setting the exceptions for hearing as provided in G.S. 62-90(c) to consider the exceptions under G.S. 62-80.

The Majority concludes that "since the Commission is granting the Joint Movants' exceptions pursuant to G.S. 62-90, which is within its discretion, the Commission need not address the Joint Movants' request for reconsideration pursuant to G.S. 62-80." Majority decision at 5. The Commission has noted, in numerous orders responding to motions for reconsideration, the principles under which it must review such a motion, stating that:

> The Commission's decision to rescind, alter, or amend an order upon reconsideration under G.S. 62-80 is within the Commission's discretion. State ex rel. Utilities Commission v. MCI Telecommunications Corp., 132 N.C. App. 625, 630, 514 S.E.2d 276, 280 (1999). However, the Commission cannot arbitrarily or capriciously rescind, alter or amend a prior order. Rather, there must be some change in circumstances or a misapprehension or disregard of a fact that provides a basis for the Commission to rescind, alter, or amend a prior order. State ex rel. Utilities Commission v. North Carolina Gas Service, 128 N.C. App. 288, 293-294, 494 S.E.2d 621, 626, rev. denied, 348 N.C. 78, 505 S.E.2d 886 (1998).[8]

The Court in State ex rel. Utilities Commission v. North Carolina Gas Service further stated that:

> The rescission must be made only due to a change of circumstances requiring it for the public interest. In the absence of any additional evidence or a change in conditions, the Commission has no power to reopen a proceeding and modify or set aside an order made by it.

State ex rel. Utilities Commission v. North Carolina Gas Service at 293-94. The Majority's reliance solely on G.S. 62-90 can only be viewed as an attempt to circumvent this standard of review and the requisite hearing requirements.

The Joint Movants state no change of circumstance or misapprehension or disregard of a fact in their motion and the Majority disregards this standard of review.

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[7] This is especially true in this matter where no change in circumstance was stated by the Joint Movants in their Motion and the original May 13, 2014 Order was decided as a 6-1 decision.

[8] See, for example, the Commission's October 14, 2013 Order on Motion for Reconsideration in Docket E-7, Sub 1017; the December 10, 2012 Order Denying NC Warn's Motions for Reconsideration and to Compel for Discovery in Docket Nos. E-2 Sub 998 and E-7, Sub 986; and the June 24, 2013 Order Amending Tariff to Include an NSF Charge and Denying Request to Amend Tariff to Recover Rates for Periods When Customer Was Disconnected in Docket No. W-1282, Sub 8.

Rather, the Joint Movant's motion for reconsideration is substantially quoted from legal arguments contained in the dissent to the May 13, 2014 Order. No change has occurred in the time since the issuance of the Commission's original decision, and the issue at hand, as evidenced by the dissent, was before the Commission when the May 13, 2014 Order was issued. The sole issue in contention is the Commission's authority to adjust rates via a rulemaking to account for HB 998 in its totality, including the changes to the State corporate income tax rate in HB 998. In the time since the May 13, 2014 Order was issued there has been no legislative change to HB 998, no relevant case law has been published, and no other facts surrounding the issue in contention have changed. The Majority in this matter, to the expense of the ratepayers and to the fruitful gain of the utilities, has simply changed its mind; attempting to create an authority to do so under G.S. 62-90 is misguided and impermissible. The Commission cannot create its own authority where the Commission's precise authority has been addressed in G.S. 62-80.

Were we to accept the Majority's unprecedented interpretation of G.S. 62-90—that the Commission can reverse an Order without opportunity to be heard by adverse parties and without a change in circumstances—it would render G.S. 62-80, together with its established protections and limitations, meaningless. There would be no reason for the Commission to ever subject itself to the constraints of G.S. 62-80 if it could accomplish the same means with no limitations via G.S. 62-90. Moreover, parties desiring that the Commission change its mind would bypass G.S. 62-80 because its constraints would require the parties to meet a higher bar in order to secure a change of the Commission's decision. The Commission's action violates the well-established canon of statutory interpretation that an interpretation of one provision cannot render another meaningless.[9] By proceeding in this unlawful manner, the Majority has violated established due process protections and undermined the certainty of every order issued by the Commission.

[9] See Brown v. Brown, 112 N.C. App.15, at 21, 34 S.E.2d 873, at 878 (1993) ("Another well-established principle of statutory construction is that a provision will not be read in a way that renders another provision of the same statute meaningless. Porsh Builders, Inc. v. City of Winston–Salem, 302 N.C. 550, 276 S.E.2d 443 (1981), appeal after remand, 61 N.C.App. 682, 301 S.E.2d 530, disc. rev. denied, 308 N.C. 675, 304 S.E.2d 757 (1983) (statute must be construed so that none of its provisions shall be rendered useless or redundant); State v. Tew, 326 N.C. 732, 392 S.E.2d 603 (1990); Sutton v. Aetna Cas. & Sur. Co., 325 N.C. 259, 382 S.E.2d 759, reh'g denied, 325 N.C. 437, 384 S.E.2d 546 (1989).)". See also In re K.W. , 191 N.C.App. 812, at 815, 664 S.E.2d 66, at 68 (2008) ("We must give full effect to the plain language of a statute. In re R.L.C., 361 N.C. 287, 292, 643 S.E.2d 920, 924 (2007) (citations omitted). Furthermore, in interpreting a statute, we must presume the legislature meant for every word and provision to have meaning, and that our interpretation, if possible, does not render any provision meaningless. In re Robinson, 172 N.C.App. 272, 275, 615 S.E.2d 884, 887 (2005).").

The Majority's Order Improperly Concludes that the Commission Lacks the Authority to Require an Adjustment via a Rulemaking to Account for the Changes in HB 998 to the State Corporate Income Tax Rate.

The Majority has determined that the Commission has no authority to require the adjustment of rates via a rulemaking to account for the HB 998 changes in their totality, including the change to the State corporate income tax rate, thus, shielding it from criticism for its decision allowing the utilities to over-collect, because, according to the Majority, the Commission had no choice in the matter. This determination is contrary to the relevant prior case law and Commission precedent.

In Docket No. M-100, Sub 122 Order (1991 Order), as the Majority notes on page 13 of its decision, the Commission held that changes to the sales and use tax, regulatory fee, and the very same State corporate income tax,[10] met the three criteria enumerated in State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 326 N.C. 190, 198, 388 S.E.2d 118, 122-23 (1990) (Nantahala).[11] The Commission determined that it had the authority pursuant to Nantahala to require the adjustment, but, that the exercise of this authority would be "inappropriate" as the changes were not substantial and material. The Commission did not determine that an adjustment would be impermissible. Thus, in the 1991 Order the Commission determined that it possessed the authority to adjust rates, but, that it would exercise discretion not to act pursuant to that authority. The Commission clearly establishes its choice in the 1991 Order, stating: "Furthermore, our decision to deny Nantahala's request is a matter within our sound discretion" (emphasis added). Had the Commission determined, as the Majority has in this matter, that the Commission lacked the authority, the Commission would have had no discretion whatsoever in the matter.

Additionally, the Majority has devoted a considerable amount of its decision analyzing its perceived rationale for the Commission's May 13, 2014 Order. Specifically the Majority states that the Commission's justifications were that:

> (1) the General Assembly intended that all HB 998 tax changes be flowed through in a generic docket; (2) parties resisting this result failed to show it would be harmful to them; (3) the scope of this proceeding limits arguments that the utilities are affected non-uniformly by HB 998; (4) the scope of this proceeding limits analysis of changes to state corporate tax under the "material and substantial" criterion;

[10] The 1991 Order addressed, among other legislative changes, a change to the State corporate income tax rate from 7% to 7.75%.

[11] The 1991 Order states "… we agree with Nantahala that the tax rate increases and regulatory fee sought by the company in this proceeding (1) affect all utilities uniformly, (2) affect a large number of utilities, making individual hearings for all inappropriate, and that (3) no adjudicative facts are in dispute so as to require a trial-type hearing for each individual utility."

Majority decision at 6. We do not agree with these assessments of the Commission's rationale in the May 13, 2014 Order. The Commission was clear in its conclusion stating:

> Therefore, as it is within the Commission's authority, a rulemaking has already been initiated, and rates must already be adjusted, the Commission finds it appropriate to address the tax changes that will affect utility rates in HB 998 comprehensively, including the changes to the State corporate income tax rate.

The key question is the Commission's authority. The Majority has concluded that the Commission lacks the authority to view the changes to HB 998 comprehensively and to include the State corporate income tax rate in the required adjustment. For the reasons stated below, we disagree. As the Majority has asserted that the Commission lacks the authority to act, we find it useful to examine the Commission's authority under the specific circumstances presented by the implementation of HB 998. We conclude that (1) the General Assembly's mandate did not relieve the Commission of the limitations to its authority under G.S. 62-31 as enumerated in Nantahala; (2) that the Mandated Tax Changes[12] and the change to the State corporate income tax meet the three requisite Nantahala criteria; and, (3) that the changes effectuated by HB 998 are substantial and material, and, thus, it is appropriate to adjust rates for the changes effectuated by HB 998 in its totality. We discuss each conclusion in detail in its respective section below.

(1) The General Assembly's Mandate to Adjust Rates Does Not Render the Nantahala Criteria Inapplicable to the Mandated Tax Changes

In the Motion for Reconsideration the Joint Movants make a new previously unaddressed assertion that "[t]he Mandated Tax Changes are being implemented through this rulemaking pursuant to the General Assembly's express direction, while the corporate state income tax change must be reviewed under the Nantahala standard."[13] The Majority agreed with the Joint Movants stating: "The HB 998 mandated tax changes are to be flowed through to utility rates in a generic docket like this one under the authority of G.S. 62-31 without Commission discretion to refuse to do so." Majority decision at 10. The Majority, therefore concludes that the Nantahala holding is inapplicable to the implementation of the Mandated Tax Changes. Additionally, the

[12] The mandate in section 4.2(a) of HB 998 applied to the GRT, the general franchise tax, piped natural gas excise tax, and the sales tax changes with respect to natural gas and electric utilities.

[13] In the May 13, 2014 Order the Commission addressed several arguments that the General Assembly's mandate to adjust rates for the Mandated Tax Changes negated, via the doctrine of expressio unius est exclusion alterius, the Commission's authority to adjust for the State corporate income tax rate as no mandate was given for that specific change. The Joint Movants' argument in the Motion for Reconsideration differs in that they argue, not that the mandate precludes an adjustment for the State corporate income tax, but, rather, that the mandate negates the Commission's requirement to analyze the Mandated Tax Changes with respect to the Nantahala criteria. The Majority has agreed with the Joint Movants on this interpretation.

Majority states that a rulemaking was necessary because "[u]nlike the non-mandated changes to state corporate income taxes, the mandated changes were to be made or to begin to be made July 1, 2014." Id. Thus, the Majority determines that the Commission can only adjust for the Mandated Tax Changes in a rulemaking that is not subject to the limitations of G.S. 62-31 as enumerated by Nantahala. We disagree.

The General Assembly's mandate in Section 4.2(a) of HB 998 states that "[p]ursuant to G.S. 62-31 and G.S. 62-32, the Utilities Commission must adjust the rate set for the following utilities." "Pursuant to" is defined as "in a way that agrees with or follows (something): in accordance with (something)" and "in carrying out: in conformity with." By definition and case law, "pursuant to" is not a term that expands authority; rather, it is a restrictive term.[14] We find no justification for the assertion that by stating that the Commission must adjust rates in a way that agrees with, follows, or is in accordance or conformity with G.S. 62-31 and G.S. 62-32, that HB 998 lifted the explicit limitations on the Commission's authority under G.S. 62-31, as articulated by the Nantahala Court. The Majority cites no cases to support its notion that a direction to act "pursuant to" a particular statute can negate the limitations of that same cited statute. Had the General Assembly desired such an outcome it could have accomplished this by simply by stating that the Commission must adjust rates in a rulemaking "notwithstanding the limitations of G.S. 62-31."[15] Additionally, the General Assembly identified both the Commission's rulemaking and ratemaking authority, acknowledging that two possible methods of adjustment exist. The Majority has concluded that the General Assembly's mandate required the Commission to adjust for the Mandated Tax Changes via a rulemaking for the affected utilities. This conclusion disallows the possibility that an adjustment can be made via a general rate case, rendering the General Assembly's reference to G.S. 62-32 meaningless with regard to the affected

[14] Pursuant To. Definition, *Merriam-Webster.com*, http://www.merriam-webster.com/ (last visited Oct. 3, 2014). See Knowles v. Holly, 82 Wash.2d 694, 702, 513 P.2d 18, 23 (1973) ("Pursuant to' means 'in the course of carrying out: in conformance to or agreement with: according to.' Webster's Third New Int'l Dictionary (1968) at 1848. It is a restrictive term." citing State ex rel. Ickes v. Slinger, 79 Ohio App. 334, 73 N.E.2d 385 (1946); Fabianich v. Hart, 31 A.2d 881 (1943). See also U.S. v. El-Amin, 268 F.Supp.2d 639, 641 (2003) (" … the Court finds no ambiguity in the language in question. The ordinary meaning of "pursuant to this agreement" is "according to this agreement" or "in conformity with this agreement."); Old Colony Trust Co. v. Commissioner of Internal Revenue, 301 U.S. 379, 383 (1937) ("'Pursuant to' is defined as 'acting or done in consequence or in prosecution (of anything); hence, agreeable; conformable; following; according.'" citing Webster's New International Dictionary, Unabridged (2d Ed.) 1935.)

[15] "Notwithstanding" is a well established drafting term meaning "in spite of." Notwithstanding. Definition, *Merriam-Webster.com*, http://www.merriam-webster.com/ (last visited October 3, 2014). The General Assembly is well aware of this type of statutory construction. In fact, it is used elsewhere in HB 998 in Section 8.(a) stating: "Notwithstanding G.S. 105-449.80(a), for the period October 1, 2013, through June 30, 2015, the motor fuel excise tax rate may not exceed thirty-seven and one-half cents (37 1/2¢) a gallon."

utilities. The Majority's determination results in an impermissible interpretation of the legislation as each word or provision must be given some effect.[16]

Further, the majority's reliance on a drop dead date of July 1, 2014, for Commission action on the Mandated Tax Changes is both inaccurate and erroneous. The Majority's decision adjusting rates, refunding, and allowing the utilities to collect after-the-fact, well after July 1, 2014, evidences that no such hardline existed. The intent of the General Assembly should always be first ascertained from the plain language of the statute.[17] Here the plain language states nothing regarding a deadline by which the Commission must act. Furthermore, the Mandated Changes themselves become effective on different dates. The GRT is repealed effective July 1, 2014; however, the general franchise tax does not become applicable to the affected utilities until January 1, 2015.

Finally, the Majority states:

> As the Public Staff maintained and as the Commission noted in its order in Docket No. M-100, Sub 122, one way rate changes are authorized is "pursuant to a specific, limited statute, like the fuel clause. G.S. 62-133.2." Docket No. M-100, Sub 122 Order, p. 3. The Commission determines that the HB 998 Part IV changes to taxes other than state corporate income taxes fall within this category – a category quite distinct from the HB 998 Part II non-mandated tax changes.

Majority decision at 11. There is nothing in the mandate to support the contention that the General Assembly has created a "specific, limited statute, like the fuel clause. G.S. 62-133.2." G.S. 62-133.2 is an expansive statute with 11 subsections and 24 subdivisions that details the procedure to be followed and creates a unique methodology to be applied under very specific circumstances. The General Assembly's mandate in HB 998 does not create a specific statute; rather, it is contained solely in uncodified language. Further, the mandate does not detail specific procedures and provides no unique methodology. The mandate is in fact quite the opposite of a specific limited statute as it relies solely on the Commission's existing general rulemaking and ratemaking authority (G.S. 62-31 and G.S. 62-32) as the basis for any adjustment.

Stating that the Commission must adjust rates "pursuant to" either its rulemaking or ratemaking authority is not permission to exceed that authority. Rather, this language clarifies that for the Commission to adjust rates for the Mandated Tax Changes via a rulemaking it must be within the constraints of, and in conformity with, G.S. 62-31. Thus, the three criteria established by the Nantahala Court must be met. Under general

[16] See Kornegay v. Aspen Asset Group, LLC, 204 N.C. App. 213, 230 (2010) ("It is a fundamental principle of statutory construction that courts will not interpret a statute in a manner that negates any portion of it. See, e.g., State v. Ward, 31 N.C.App. 104, 106, 228 S.E.2d 490, 491 (1976) ('It is presumed that no meaningless or useless words or provisions are used in a statute, but that each word or provision is to be given some effect.')").

[17] See cases cited supra note 9.

circumstances, the Commission has three options when presented with tax changes: (1) the Commission can adjust rates for individual utilities via general rate cases pursuant to G.S. 62-32; (2) the Commission can adjust rates via a rulemaking pursuant to G.S. 62-31, as prescribed by Nantahala; or, (3) the Commission can take no action, as the Majority has noted the Commission has done on several occasions. The effect of the General Assembly's mandate in regards to the Mandated Tax Changes is simply to eliminate the Commission's third option, that of taking no action.

(2) The Mandated and Non-Mandated Tax Changes Meet the Nantahala Criteria

Having determined that any rulemaking adjustment to rates to account for the changes in HB 998, mandated or otherwise, must be pursuant to the Commission's authority under G.S. 62-31, we next consider if the present circumstances fall within the scope of that authority. Thus, the three Nantahala criteria must be satisfied, and, as discussed later, to be consistent with prior Commission precedent, the changes in their totality should be substantial and material. The Nantahala Court specifically enumerated the three criteria necessary for the implementation of a rulemaking to adjust rates to reflect a tax change,[18] stating

> that the Commission was acting within its authority when it ordered the affected utilities, including Nantahala, to determine the amount of savings resulting from the [Tax Reduction Act of 1986] and to pass these savings on to the ratepayers. The Commission properly formulated a rule which applied uniformly to the affected utilities which were similarly situated. The circumstances surrounding this procedure made it appropriate for the Commission to use a rulemaking procedure because: 1) the tax reduction affected all utilities uniformly; 2) a large number of utilities were affected, making individual hearings for all inappropriate; and 3) no adjudicative-type facts were in dispute so as to require a trial-type hearing for each individual utility.

Nantahala at 203. The Majority has dismissed these requirements for the Mandated Tax Changes and further stated that, if applied to HB 998 in its totality, the changes would fail the first and third criteria. Based on both Nantahala and Commission precedent, we again disagree with the Majority.

Our determination that the adjustment for both the State corporate income tax and the Mandated Tax Changes in the May 13, 2014 Order does not violate the Nantahala criteria is consistent with Commission precedent on the matter. In the M-100, Sub 122 proceedings, the Public Staff argued that the State corporate income tax changes met the Nantahala criteria and should be passed through as a rate increase, but that other tax changes and the regulatory fee did not meet the criteria. The Public Staff contended, in similar fashion to the Majority in this matter, that the sales tax and regulatory fee

[18] We will discuss below the Majority's determination that Nantahala presented a fourth required criteria that the change be substantial and material.

changes did not meet the first and third Nantahala criteria. The Public Staff based its argument on the fact that, unlike the State corporate income tax changes, several entities already included the regulatory fee in their rates and there were questions that would be raised unique to each utility to facilitate a pass-through of the regulatory fee and sales tax changes. Additionally, the Public Staff noted an accounting dispute with the Company, as DNCP notes in this case, regarding the calculation of the appropriate rate adjustment associated with the State income tax rate change.[19] In its 1991 Order, the Commission concluded that the S.L. 1991-689 tax changes, including an increase to the exact same State corporate income tax rate as discussed in this matter, and the regulatory fee met the Nantahala criteria. The Commission in the 1991 Order stated:

> we agree with Nantahala that the tax increases and regulatory fee sought by the company in this proceeding (1) affect all utilities uniformly, (2) affect a large number of utilities, making individual hearings for all inappropriate, and that (3) no adjudicative facts are in dispute so as to require a trial-type hearing for each individual utility.

Thus, the Commission has previously held, despite the presence of accounting discrepancies between the parties, that a change to the State corporate income tax and other tax-like changes meet the three Nantahala criteria. In addition, the Commission's Orders in Docket No. M-100, Sub 113, upheld by the Nantahala Court, allowed utilities to offset ordered rate reductions accounting for the federal Tax Reform Act of 1986 (TRA-86) reductions by also adjusting for a 1% increase to the State corporate income tax rate.[20] Were we to accept the Majority's argument that the State corporate income tax changes and other HB 998 changes violate the Nantahala criteria, the very facts considered by the Nantahala Court would fail to meet the criteria.

Nantahala Criterion #1—The Tax Change Affects Similarly Situated Utilities Uniformly

The Joint Movants have stated that exceptions in the May 13, 2014 Order allowing certain companies to adjust for the changes to the State corporate income tax within the context of currently ongoing general rate cases exemplify that not all utilities are affected uniformly. The Joint Movants state that

> not all utilities are similarly situated, as '[e]xceptions are made for Toccoa, Frontier, Pineville, CWSNC, Aqua, Piedmont, and Ellerbe' Dissent at 6. Both Joint Movants also asserted in comments filed in this proceeding that

[19] The 1991 Order states: "The Public Staff disagrees with the Company's calculations as shown in the exhibits attached to the application. The Company should be allowed to increase its rates and charges by only .0088$/kWh to collect the additional revenues needed to cover the new tax liability."

[20] Docket M-100, Sub 113, was initiated to address TRA-86, which effectuated a change to the federal corporate income tax rate. While the proceeding was ongoing the North Carolina General Assembly passed House Bill 1155. House Bill 1155, Chapter 622 of the 1987 Session Laws of North Carolina, increased the State corporate income tax rate from 6% to 7%. The Commission, in similar fashion to the May 13, 2014 Order, offset the required reduction accounting for TRA-86 by the 1% increase to the same State corporate income tax in question in this proceeding.

> all utilities are not similarly situated. For example tax changes in [HB 998] impact utility industries differently and some utilities are adjusting rates through general rate cases.

Additionally, the Majority states that "[n]o question exists that the HB 998 tax changes affect utilities non-uniformly." Majority decision at 11. The Majority's justifications for this assertion are that the natural gas utilities were not subject to the repealed GRT; that the GRT is different for the water and sewer utilities; that the sales tax started at different points for electric and natural gas utilities; and that State corporate income taxes apply only to C Corporations, not S corporations and sole proprietorships. Id. at 12. These justifications are inconsistent with Nantahala, the M-100, Sub 122 Order, and the Majority's own decision. Under such an analysis the facts of Nantahala would not pass its own uniformity requirement, nor would the Majority's decision in this Docket. The uniformity requirement in Nantahala does not state that all utilities must be similarly situated, rather, the Court required that the rule be "applied uniformly to the affected utilities which were similarly situated." Nantahala at 203. The corollary that follows is that the rule need not be uniformly applicable to dissimilarly situated utilities.

In Nantahala, the Court states, regarding the Commission's final Order held by the Court to have met the three requisite criteria, including the first uniformity criterion, that

> Some utilities were not affected by this final order because they had either voluntarily complied with the order or were currently involved in rate cases. The telephone companies as a group were allowed to offset part of their savings with revenue reductions previously ordered by the Commission, and, therefore, they were not affected by this final order. Water and sewer companies were likewise, as a group, treated differently from the rest of the utilities in this order.

Nantahala at 194-195. The distinctions in applicability of the State corporate income tax to S corporations, sole proprietorships, and C corporations, noted by the Majority to display a lack of uniformity, are also true for the federal corporate tax rate at issue in Nantahala.[21] Additionally, the Nantahala Orders included a provision allowing the utilities to offset the required rate reductions accounting for the federal corporate income tax reductions with an increase to the very same State corporate income tax rate that the Majority now alleges fails to meet the uniformity requirement.[22] Once again, under this interpretation of the uniformity criterion the facts in Nantahala would fail its own test.

Additionally, the Majority has noted its belief that, were the whole of HB 998 subjected to the Nanthala criteria, the changes to the GRT would fail the uniformity

[21] Both the federal corporate income tax and State corporate income tax rates changed by TRA-86 and House Bill 1155 respectively, which the Commission adjusted for in Docket No. M-100, Sub 113, subsequently upheld by the Court in Nantahala, apply to C corporations but would not apply to S corporations or sole proprietorships.

[22] See legislation cited supra note 20.

requirement because natural gas utilities were not subject to the GRT and notes other instances where the beginning rate was different for different classes of utilities.[23] Again, Nantahala clearly states that the rule must be "applied uniformly to the affected utilities which were similarly situated." The May 13, 2014 Order applied a rule which required those similarly situated utilities to which the GRT was applicable to adjust for its repeal and the resulting rate of 0% is the same for all utilities. As discussed above, the Orders upheld by the Nantahala Court affected dissimilarly situated utilities differently. This is also consistent with the Commission's application of the first criterion in the 1991 Order. The Commission, in the 1991 Order, noted that:

> The Public Staff stated that if the Commission decides to adjust rates for the fee, it may not only have to add the fee to the rates of some, like the Company, but to reduce it for those whose rates include the old, higher fee.

The Commission's 1991 Order determined that the changes to the regulatory fee met the Nantahala uniformity requirement.

Finally, the May 13, 2014 Order required water and sewer utilities to adjust their rates to account for the changes to the GRT. As is noted by the Majority, the General Assembly's mandate in HB 998 did not state that the Commission must adjust the rates of water and sewer utilities.[24] Thus, there can be no dispute that for the Commission to require that the water and sewer utilities adjust their rates via a rulemaking to reflect the repeal of the GRT it must be done pursuant to Nantahala. The Majority's decision has not amended the determination that water and sewer utilities adjust rates for the GRT repeal and the May 13, 2014 dissent did not take issue with that portion of the May 13, 2014 Order. The GRT applied to water companies was 4%, the GRT applied to sewer companies was 6%, and the GRT applied to electric companies was 3.22%. An interpretation of the Nantahala uniformity requirement that ignores the application of the criterion to similarly situated utilities and requires that all utilities have identical circumstances regardless of type and situation is inconsistent with the facts present in Nantahala, the 1991 Order, and portions of the May 13, 2014 Order unaltered by the Majority's decision. Under this interpretation, the Majority has asserted that changes to the GRT, the sales tax, and the very same corporate income taxes addressed in Nantahala, all fail the uniformity requirement; it is difficult to imagine a change that would meet this criterion as interpreted by the Majority.

[23] We note that if one were to determine that the treatment of natural gas utilities failed the Nantahala requirements, or the substantial and material threshold, and, thus, a rulemaking is inappropriate, the General Assembly has recognized this possibility and provided in its HB 998 mandate that the Commission must adjust rates via either a rulemaking (G.S. 62-31) or a ratemaking (G.S. 62-32). The solution, if one were to accept this determination, is to require that PSNC come in for a general rate case to necessitate the mandated adjustment accounting for the application of the general franchise tax.

[24] Section 4.2(a) of HB 998 specifically directed the Commission to adjust rates pursuant to G.S. 62-31 and G.S. 62-32 for electricity and natural gas utilities. There is no mention of water and sewer utilities.

Nantahala Criterion #2—A Large Number of Utilities are Affected

No party has alleged that the HB 998 changes fail to affect a large number of utilities as required in the second Nantahala criterion. The Majority, regarding the second criterion, states that it was "not determinative of the Commission's conclusions." Majority decision at 14. As this criterion is not in dispute and HB 998 clearly affects a large number of utilities,[25] we do not find it necessary to further analyze this criterion.

Nantahala Criterion #3—Adjudicative Facts in Dispute

The Majority asserts that a disagreement between the Public Staff and DNCP related to the treatment of accumulated deferred income tax (ADIT) when adjusting for the State corporate income tax rate evidences that there are adjudicative facts in dispute so as to require an evidentiary hearing for each individual utility, and, thus, the third Nantahala criterion is violated by the State corporate income tax change. In analyzing the ADIT disagreement in light of the third Nantahala criterion, the Majority is highly critical of the Nantahala decision and suggests that "[c]onsequently, the Commission should proceed with caution in making exceptions to the rule against single-issue ratemaking based upon undue reliance on Nantahala." Majority decision at 21. The Majority suggests that, when determining the appropriate circumstances to make single-issue ratemaking adjustments for tax changes, the Commission should not rely upon the one Supreme Court case that has articulated the necessary circumstances requisite for such an adjustment. The Majority may disagree with the Supreme Court, and, thus find it appropriate to simply ignore its determinations, however, we cannot. The Supreme Court has clearly identified the requisite criteria in Nantahala; the Commission has no authority to disregard the Court's determination of its own criteria.

The ADIT issue referenced by the Joint Movants is an accounting disagreement regarding implementation of the May 13, 2014 Order. This is not an adjudicative fact as established by the Nantahala Court. The Nantahala Court analyzes in depth what an adjudicative fact in dispute under these circumstances is, stating:

> The order by the Commission in the present case did not involve any facts which were in dispute. The corporate tax rate had been lowered by the TRA-86, and, consequently, the ratepayers would be overpaying if their rates were set so that the utilities could recover taxes at the higher rate which was in effect before the reduction. These facts are legislative facts, not adjudicative facts, and are applied uniformly to all of the utilities affected by the order. These facts are the type which are appropriately handled in a rule-making-type proceeding. The facts which Nantahala contends are in dispute, mainly the fact that Nantahala is currently collecting a rate of return which is less than that which it was allowed to collect as a result of its last general rate hearing, pertain to Nantahala alone and not to the other utilities affected by this order. Moreover, the fact

[25] The Majority's decision notes that 152 water and sewer companies alone were affected.

> that Nantahala is currently collecting a rate of return less than that previously authorized by the Commission has nothing to do with the change in the tax laws. Nantahala's failure to realize its allowed rate of return was a problem for Nantahala before the TRA-86 was enacted. Therefore, the facts which Nantahala claims should prevent it from having to follow the Commission's order are adjudicative-type facts which should be decided in an individualized proceeding such as a complaint hearing or a general rate case.

Nantahala at 201-202 (emphasis added). In the current matter, the State corporate income tax rate has been lowered by HB 998, and, consequently, the ratepayers would be overpaying if their rates were set so that the utilities could recover taxes at the higher rate which was in effect before the reduction. As is consistent with the Nantahala Court's determination, we find that these facts are legislative facts, not adjudicative facts, and are applied uniformly to all of the similarly situated utilities affected by the May 13, 2014 Order.

The ADIT issue, similar to Nantahala's rate of return issue, is entirely irrelevant to the issues surrounding the Commission's decision whether to adjust rates via a rulemaking, and, likewise, is better suited to be dealt with in an individualized manner. The Commission recognized this in the May 13, 2014 Order, stating that "[a]ny issues regarding the implementation of the requirements of this Order may be addressed in [the individual company's implementation proposals] and subsequent review." Our determination is also consistent with the only other application of the three Nantahala criteria. As previously discussed, in Docket M-100, Sub 122, the Public Staff noted an accounting dispute with the Company regarding the calculation of the appropriate rate adjustment associated with the State income tax rate change.[26] The Commission in M-100, Sub 122 determined that the third Nantahala criterion had been met.

Finally, were we to accept the Majority's determination, it would supersede the Commission's entire authority to adjust rates for a tax change via rulemaking as prescribed by the Nantahala Court. Any party to a proceeding could simply state that they disagree with another party's mathematical determination regarding the implementation of an Order, and that assertion would negate the Commission's authority to issue the Order. The fact that the Public Staff and DNCP disagree regarding the proper accounting measures to implement the State corporate income tax rate pass through is not a basis by which to strip the Commission of its authority to do so and the North Carolina Supreme Court recognized this in Nantahala.

(3) The Changes Effectuated by HB 998 are Substantial and Material

Having determined that the Mandated Changes and the State corporate income tax changes meet the requisite Nantahala criteria, we now turn to the Commission's own established threshold that the changes be substantial and material. As stated in the 1991 Order, the Commission's authority to adjust rates for a tax change via a

[26] See 1991 Order cited supra note 19.

rulemaking is discretionary, thus, the Commission can prescribe the circumstances in which the exercise of this authority is appropriate. We disagree with the Majority's determination that the substantial and material threshold is a fourth requisite criterion articulated in Nantahala. In addition, we disagree with the Majority's determination that the only relevant consideration in applying the substantial and material threshold is the effect of the changes on cost of service. Finally, we disagree with the Majority's determination that the substantial and material analysis must be applied to the State corporate income tax changes in isolation.

Establishment of the "Substantial and Material" Threshold

The Nantahala Court did not, as the Majority asserts, establish a fourth criterion that the change be "substantial and material" to establish authority for the Commission to adjust for a tax change via a rulemaking. The phrase "substantial and material" never appears in Nantahala and no similar language is listed by the Court when specifically identifying the requisite circumstances to use a rulemaking procedure. The Nantahala Court, as noted above, discussed and examined the three requisite criteria at great length. There is no discussion by the Court of a "substantial and material" criterion and there is no discussion as to what would constitute a significant or substantial change. Had the Court desired to establish a fourth requisite criteria it would have simply listed it in its holding with the other three criteria. Nevertheless, the Majority attempts to write a substantial and material requirement into Nantahala by relying upon the Court's description of possible future tax increases and statements regarding the Commission's rationale for opening the Docket. These descriptions are stated, not in the Court's holding establishing the three requisite criteria, but in the Court's procedural history and in a description of a future scenario that the Nantahala Court asserted was "too speculative and tenuous to require the attention of the Commission in this proceeding." Nantahala at 197. The Majority uses these statements as the sole support for its theory that "[t]he clearly material and substantial test is part of the Nantahala criteria." Majority decision at 17. We note that similar sections of Nantahala mention several times that the tax rate discussed in the Order is federal and was enacted by Congress. By the Majority's logic, one could surmise that yet another Nantahala criterion exists requiring that the change be federal, and so on for any other characteristic discussed by the Court. On its face the Nantahala ruling is simple; it has identified three criteria that must be present for the Commission to adjust rates via a rulemaking. This interpretation is also consistent with the Commission's previous interpretation and application of Nantahala.

In its 1991 Order, the Commission itself established a threshold when the Commission deemed it appropriate to exercise its discretionary authority to adjust rates via a rulemaking. The 1991 Order stated that "[r]ulemaking procedures should only be used to increase or decrease public utility rates when changes are clearly substantial and material." The 1991 Order continued: "[f]urthermore, our decision to deny Nantahala's application is a matter within our sound discretion." (emphasis added) Had the Commission determined that Nantahala established a fourth criteria requiring that the change be "substantial and material," the decision to deny the request to adjust

rates via a rulemaking would not have been within the Commission's "sound discretion," as the Commission would have lacked the authority to adjust for the change, just as would have been the case if any of the three requisite Nantahala criteria had not been met. The Commission's statement that the decision to deny the request to adjust in the M-100, Sub 122 proceeding was within its discretion, clearly indicates that the Commission determined it had the authority to grant the request, had it deemed the circumstances appropriate to do so.

As discussed earlier, to adjust for any of the changes, mandated or unmandated, the Commission must possess the authority to do so under Nantahala. In past proceedings, the Commission has chosen to refrain from the exercise of that authority when the changes are not substantial and material. Were the Commission so inclined, as its authority is discretionary, it could view the unique circumstances in this matter as distinct from the previous Commission proceedings that established the "substantial and material" threshold. However, as the changes effectuated by HB 998 are substantial and material, such a determination is unnecessary.

Application of the "Substantial and Material" Threshold

In the May 13, 2014 Order, the Commission chose to view the changes effectuated by HB 998 in their totality. The Majority has elected to apply the "substantial and material" threshold to the State corporate income tax changes in isolation. A comprehensive view is not only consistent with prior Commission precedent, most notably Nantahala and the 1991 Order, but it is also sound policy that is both fair and in the public interest.

In the M-100, Sub 122 proceedings, the Commission considered a request by Nantahala to adjust rates via rulemaking for changes to the State corporate income tax rate, an income tax surcharge, and the sales and use tax passed by the General Assembly as part of the 1991-93 Appropriations Act (S.L. 1991-689). S.L. 1991-689, effectuated several tax changes across multiple sections of the legislation. In addition, the company requested that the Commission adjust rates, via the same rulemaking proceeding, to include the regulatory fee assessed in 1989 as "its effect upon the Company is the same as that of a tax." In that case, the utility argued in its request that when one change is appropriate, "[j]udicial economy dictates that other legislative changes be recognized at the same time," i.e. viewing the changes in their totality. The Public Staff argued that the Commission should adjust rates for the change to the State corporate income tax, but that the other changes violated the first and third Nantahala criteria. As discussed above, the Commission concluded that the changes met the requisite Nantahala criteria, however, the Commission stated:

> [W]e do not agree that rates should be increased to reflect these tax rate changes and the regulatory fee in the context of a rulemaking proceeding. In our opinion, the tax rate changes and the regulatory fee cited by Nantahala are not substantial or material when considered in the context of the Company's total cost of service. That being the case, they do not justify

> initiation of a rulemaking proceeding for all public utilities subject to our regulation. For instance, Nantahala's [Tax Reform Act of 1986] rate reduction was approximately $762,390 per year versus the $113,459 Nantahala seeks to recover for 1991 in this proceeding. (Emphasis added)

The Commission analyzed the changes effectuated by S.L. 1991-689 as a comprehensive package, concluding that the changes in their totality, including several tax changes and the regulatory fee enacted two years prior to S.L. 1991-689, were not substantial and material, and, thus, it was inappropriate for the Commission to exercise its rulemaking authority to adjust rates. Additionally, the Commission in its 1991 Order also noted that the Commission Orders in Docket M-100, Sub 113, those upheld by the Nantahala Court, permitted the rate reduction ordered to be "partially offset by a change in North Carolina law brought about by House Bill 1155 passed by the 1987 General Assembly that increased the state income tax rate and made minor changes in the sales and use tax laws which also increased costs to the Company."[27] In this matter, HB 998, much like S.L. 1991-697, effectuated several tax changes. Consequently, the Commission, in its May 13, 2014 Order, chose to address the changes in their totality.

The Commission's purpose in employing the "substantial and material" threshold was to confine rate adjustments to account for tax changes via rulemaking to limited circumstances. The determinative factor of the "substantial and material" threshold should be the overall effect of the changes. To apply this threshold individually to each aspect of an omnibus piece of legislation loses sight of both the purpose of the threshold and legislation itself. As was the case in Nantahala, and as is the case in this proceeding, larger changes may be partially offset by smaller changes and the cumulative effect is substantial and material. However, dicing a comprehensive act into single isolated elements may lead not only to an unfair result, but also to the thwarting of the total effect of the General Assembly's omnibus legislation.[28] Additionally, several small changes in one legislative action could have a cumulative effect that is clearly substantial and material, or, conversely, several large increases may be offset by decreases rendering the overall effect immaterial.

When analyzing the changes effectuated by HB 998, the Majority focused its substantial and material analysis solely on the effects of the changes on cost of

[27] See legislation cited supra note 20.

[28] The Commission notes that if changes are to be analyzed in isolation, the Public Staff's chart displayed on page 13 of the May 13, 2014 Order shows that in several instances the changes to the general franchise tax in HB 998 result in a smaller impact to a given utility's revenue requirement than the State corporate income tax changes. The Joint Movants did not object to the general franchise tax adjustment being made via a rulemaking.

service.[29] This approach ignores the Commission precedent establishing the threshold and the purpose of the threshold. Ironically, the changes to a consumer's natural gas bill, which the Majority have deemed immaterial, are most significant when HB 998 is viewed in its totality, increasing an average bill by approximately 3-4%.[30] The Majority's analysis ignores completely the effect of the sales tax on a consumer's bill as the sales tax does not directly affect cost of service.[31] However, for a regulated utility that recovers its costs from its customers, a sales tax and a GRT are indistinguishable. Neither the application of the sales tax nor the GRT will affect a utility's ultimate return as both are collected by the utility and passed from the utility to the State and the consumer will pay the same increase resulting from the tax in either scenario; the General Assembly can achieve identical outcomes by applying either a sales tax or a GRT.[32] While cost of service is certainly a useful indicator, it cannot be relied upon as the sole factor in such an analysis for precisely the reason indicated above—it fails to always capture the full effect of the legislation on a consumer's bill.

In assessing the effects of the changes on the utility and on a customer's bill, there is no justification, mathematical or otherwise, to include the GRT in this this analysis

[29] Were one to accept the Majority's assertion that Nantahala created a fourth substantial and material criterion, it is noteworthy that the statements in Nantahala and the Commission Orders in Docket No. E-100, Sub 113, on which the Majority relies do not refer to cost of service, but, rather, observe a "substantial increase in taxes," a "dramatic decrease in the corporate income tax rates," and that implementation will "significantly reduce the tax rate." Thus, were one to base a substantial and material analysis solely on Nantahala it would appear that the crucial element is the change in the actual rate.

[30] See calculations cited supra note 1.

[31] The May 13, 2014 Order includes a directive that "the electric and natural gas utilities are hereby required to implement the required change to their billing systems coincident with the July 1, 2014 effective date of the increased sales tax rate set forth in HB 998."

[32] For every sales tax rate (s) the General Assembly could have applied an equivalent GRT rate (g) that results in an identical outcome for both the consumer, the utility and the State, and vice versa. A sales tax is paid directly by the consumer and collected by the vendor. A GRT is paid directly by the vendor. For a regulated utility that passes its GRT costs to the consumer in rates, when tax rates are set accordingly, these two taxes are indistinguishable. A bill with a sales tax is calculated multiplying the rate established to satisfy the company's revenue requirement (r) by a customer's usage (u) and assessing the sales tax (s), resulting in a total bill of (r) x (u) x (1+s). A sales tax of 10% increases a bill by 10%. A bill with a GRT (g) is calculated by dividing (r) by (1-g), then multiplying by (u). A 9.09% GRT likewise increases a bill by 10%, i.e. (1-(1/(1-.0909)). The utility, customer, and State are indifferent to a choice between this sales tax or GRT as neither affects utility revenue and the customer pays, and State collects, the same amount either way. When the required rate increase (i) is equal, i.e. as above when (s=(1-(1/(1-g))), the communicative property applies, resulting in an identical outcome for both the customer and the utility. The communicative property requires that the order of the operation for multiplication and addition does not affect an outcome ((a x b) x c = (c x b) x a)). Thus, for a bill applying a GRT, the established rate based on the utility's revenue requirements, etc. (r), is multiplied by one plus the required rate increase (i), (1+i), and then multiplied by the customer's usage (u), the resulting bill equals (r) x (1+i) x (u). For a sales tax, the same rate (r) is first multiplied by (u), and then multiplied by one plus (i), the resulting bill equals (r) x (u) x (1+i). Per the communicative property, (r) x (1+i) x (u) = (r) x (u) x (1+i), therefore, the application of a sales tax when the rates are set accordingly is mathematically identical to, and indistinguishable from, the GRT for both the utility and the consumer.

and exclude the sales tax. Furthermore, the Majority includes the sales tax in its analysis applying the first Nantahala criterion to the totality of HB 998 to argue that the changes violate Nantahala.[33] It is wholly inconsistent to now exclude the sales tax when assessing the materiality of the totality of the HB 998 changes. In addition, the Commission's previous application of the substantial and material threshold considered the percentage change to the tax rate, which in this case for the State corporate income tax rate is greater than the percentage change present in Nantahala.[34] When all of the relevant factors are considered, we find it clear that the changes effectuated by HB 998 are substantial and material for all affected utilities and ratepayers.

Finally, the Majority's reference to Commissioner Tate's dissent to the 1991 Order, to strengthen its determination that the "substantial and material" threshold is an essential part of Nantahala and preserves the doctrine against single issue ratemaking, is particularly vexing. Commissioner Tate dissented to the 1991 Order because the tax changes, not accounted for by the Commission in that case because they were considered insubstantial, were not passed through. Commissioner Tate argued that the State corporate income tax change was substantial and that not adjusting for it was inconsistent with Nantahala and that the Commission should have required an adjustment regardless of the relative materiality of the tax change when compared to the TRA-86 changes.[35]

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[33] The Majority states as part of its rationale that the changes are not uniform that "For sales taxes the natural gas utilities and the electric utilities, while ending at the same rate, start at a different beginning point: 0 to 7% for natural gas utilities, 3% to 7% for electric utilities." Majority decision at 12. As discussed above, the Commission has found in the past that the regulatory fee that started at different points for utilities and ended at the same rate did meet the requisite Nantahala criteria and this analysis ignores the application of the first Nantahala criterion to similarly situated utilities.

[34] The May 13, 2014 Order noted that:

> The change to the State corporate income tax rate effectuated by HB 998 (6.9% to 5.0%) is more than twice as large as the 1991 change. Further, the percentage change in the rate (a factor, as demonstrated above, that was relied heavily upon by the Commission to determine if the 1991 change was substantial and material) in this matter equates to a 27.5% reduction in the rate. This percentage change in the rate is not only significantly greater than the 11% increase found by the Commission to not be substantial and material, but actually exceeds the percentage change in the rate (26.1%) effectuated by the 1986 Tax Reform Act and considered by the Nantahala Court.

[35] Commissioner Tate's M-100, Sub 122 dissent in the 1991 Order states:

> I dissent from this Order because it does not comply with the decision of the Supreme Court in Nantahala. … The Majority states that the TRA reduction was a 26% rate decrease in the federal tax rate; this should be compared to the state income tax rate increase of 11% which also is substantial, and the Public Staff agrees. I am confident the Commission would immediately flow through an 11% tax decrease. … In my dissent to the first Nantahala order, I said the Commission had opened the floodgates to future confusion in dealing with future tax increases or decreases. Now in this proceeding, distinctions are being made between income taxes, surtaxes, sales and use taxes and regulatory fees. It is confusing and will continue to be so. What is clear is that the majority finds it much easier to deal with tax decreases than tax increases. Fundamental fairness and the Nantahala decision require that both should be treated the same way.

Conclusion

The Majority has interpreted Nantahala such that the facts of the very case establishing the requisite criteria would not meet the criteria. The Majority disregards the application of the first uniformity criterion to similarly situated utilities, requiring that all utilities have identical circumstances regardless of type and situation. Additionally, the Majority's interpretation of the third criterion (adjudicative facts in dispute) again disregards the facts present in Nantahala and would allow any party subject to the Commission's authority to strip the Commission of that authority simply by stating it disagrees with an accounting calculation in the implementation stage of an adjustment. The Majority also arbitrarily adds a fourth requisite criteria to its Nantahala analysis other than the three specifically enumerated by the Supreme Court. The Majority goes so far as to suggest that Nantahala cannot be relied upon when determining whether an exception to the rule against single-issue ratemaking is warranted, when the issue at hand, the appropriateness of a single-issue pass through of tax changes, is the precise issue that Nantahala addresses and for which it has established the requisite criteria necessary to affect such a change. The Majority's interpretation effectively negates the Commission's entire authority under Nantahala. Nantahala is the law in North Carolina and we cannot ignore it despite the Majority's apparent disagreement with its holding. Nantahala is the controlling precedent as it established the requisite criteria necessary to authorize the Commission to make an adjustment in this matter.

The Commission has the authority under G.S. 62-31, as enumerated by Nantahala, to adjust for any of the tax changes effectuated by HB 998 via a rulemaking. We conclude further that the Commission has authority to adjust for the totality of the changes effectuated by HB 998. It is also consistent with the Commission precedent to exercise that authority. It follows that the Commission has broad discretion to determine the appropriate circumstances in which to exercise its authority. In the matter at hand, the General Assembly has made comprehensive changes affecting utilities. The overall effect of these changes represents a substantial increase in consumers' bills. Rates will be adjusted, either by rulemaking or via general rate cases. When the Commission has the authority to offset a portion of these increases by including all the changes effectuated by HB 998, including the State corporate income tax rate, the Commission should exercise that authority to yield both a fair and lawful result, rather than create a windfall for utilities as the Majority's decision does. Furthermore, the Majority's decision to allow the utilities to choose in their own discretion whether to pass through the State corporate income tax rate is wholly inconsistent with the Majority's own determination that the Commission lacks the authority to require such a change and is inconsistent

with the Commission's obligation to set fair rates. Chapter 62 of the General Statutes does not allow regulated utilities to choose the rates they want to charge.

For the reasons discussed herein we dissent from the Majority's decision having found that it errs in fairness, procedure, and content.

\s\ Bryan E. Beatty
Commissioner Bryan E. Beatty

\s\ Susan W. Rabon
Commissioner Susan W. Rabon

\s\ ToNola D. Brown-Bland
Commissioner ToNola D. Brown-Bland