STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1103
DOCKET NO. E-7, SUB 1110

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Joint Petition of Duke Energy Progress, LLC And Duke Energy Carolinas, LLC, for an Accounting Order to Defer Environmental Compliance Costs	))))	NC WARN'S INITIAL COMMENTS

NOW COMES the North Carolina Waste Awareness and Reduction Network, Inc. ("NC WARN"), through the undersigned attorney, with its initial comments:

1. NC WARN maintains it is unfair for consumers to pay for decades of indifference or willful negligence by Duke Energy in its unwise decisions that allowed coal ash to proliferate in storage impoundments until an accident occurred. Customers in communities throughout North Carolina already have paid a high price for improper coal ash storage in ways that have harmed the environment and threatened their health and safety.

2. The present controversy over the safe disposal of coal ash[1] stems from Duke Energy's spill of coal ash into the Dan River in February 2014. Over the subsequent three years, there were inspections of all of the other coal ash impoundments and facilities at Duke Energy coal plants, including coal plants that no longer were in operation. These inspections lead to regulatory violations

[1] Also referred to as "coal combustion residue" or "CCR" in some of the rules.

at most of the facilities, a series of law suits against Duke Energy under the Federal Clean Water Act with resulting settlements requiring cleanup, and even Federal criminal convictions with penalties against Duke Energy over its past practices at the Dan River site. Various orders on legal actions and the criminal convictions required Duke Energy to take actions to clean up the leaking coal ash facilities.

3. In part in response to the spill and the other leaking coal ash facilities, the General Assembly enacted the Coal Ash Management Act ("CAMA"), Session Law 2014-122,[2] which among other changes, created Part 2I in G.S. Chapter 130A and directed Duke Energy to close all of the existing coal ash facilities in North Carolina in accordance with a permitting and prioritization schedule. What CAMA did not do was to allow Duke Energy to lump all of the costs into "environmental compliance costs" and then automatically pass on all of its cleanup costs to ratepayers. Although compliance with state and Federal regulatory requirements should be part of the normal operations of an electric company, mandatory requirements to clean up after violations and criminal convictions should not.

4. The issue is whether Duke Energy can recover costs for cleaning up the leaking coal ash impoundments from ratepayers. G.S. 62-131(a) provides the overall guidance to the Commission, "[e]very rate made, demanded or received by any public utility, or by any two or more public utilities jointly, shall be just and

[2] Note that section numbers were changed when codified.

reasonable." Specifically as to the cost recovery for the coal ash impoundments, G.S. 62-133.13 restricts recovery:

> The Commission shall not allow an electric public utility to recover from the retail electric customers of the State costs resulting from an unlawful discharge to the surface waters of the State from a coal combustion residuals surface impoundment, unless the Commission determines the discharge was due to an event of force majeure. For the purposes of this section, "coal combustion residuals surface impoundments" has the same meaning as in G.S. 130A-309.201. For the purposes of this section, "unlawful discharge" means a discharge that results in a violation of State or federal surface water quality standards.

It is clear that there were violations of water quality standards at all of the coal ash impoundments; this is what precipitated the subsequent court orders for cleanup efforts.

5. Albeit for environmental compliance costs under the Clean Smokestacks Act, S.L. 2004-4, North Carolina law provides guidance to the Commission about utility recovery of the costs for compliance. G.S.62-133.6 allows the utilities to recover costs for environmental compliance, but carefully limits those costs.

> (a)(2) "Environmental compliance costs" means only those capital costs incurred by an investor-owned public utility to comply with the emissions limitations [in relevant state and federal laws]. The term "environmental compliance costs" does not include:
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> a. Costs required to comply with a final order or judgment rendered by a state or federal court under which an investor-owned public utility is found liable for a failure to comply with any federal or state law, rule, or regulation for the protection of the environment or public health.
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> b. The net increase in costs, above those proposed by the investor-owned public utility as part of its plan to achieve compliance with the emissions limitations set out in [the relevant statute], that are necessary to comply with a settlement agreement,

consent decree, or similar resolution of litigation arising from any alleged failure to comply with any federal or state law, rule, or regulation for the protection of the environment or public health.

c. Any criminal or civil fine or penalty, including court costs imposed or assessed for a violation by an investor-owned public utility of any federal or state law, rule, or regulation for the protection of the environment or public health.

In reviewing Duke Energy's request to pass on coal ash cleanup costs to ratepayers, the Commission should analyze these exclusions.

6. NC WARN's position is that ratepayers should not be required to pay for any of the costs associated with the coal ash cleanup. Duke Energy (both DEC and DEP) have known for years they were unlawfully polluting adjacent streams and groundwater around the coal ash impoundments, but failed to either disclose those impacts or take any remedial actions. The coal ash should not have been placed in impoundments adjacent to streams and rivers, and communities, in the first place. It was never reasonable or prudent to allow a wet, toxic slurry to sit in impoundments, leaking into the environment. Secondly, if Duke Energy believed the closing of the coal ash basins is part of the life cycle of its coal plants, it should have phased the clean up over the past several decades rather than burden ratepayers with the rate shock of cleaning up all of its failures over a short time. Over the years, Duke Energy could have requested decommissioning costs at its coal plants, as it does for its nuclear plants, to account for the cleanup of coal ash impoundments.

7. It will be up to the Commission whether the company is allowed to defer some or all of its coal ash costs in order to pass them along to customers in higher rates. For each dollar spent on coal ash cleanup, Duke Energy's burden

should be to show that particular cost was not required to remedy a violation and did not arise from Court orders on law suit settlements or Federal convictions. (See exclusions in G.S. 62-133.6 cited above). Duke Energy should be required to show what reasonable and prudent actions it could have taken over the life of the coal ash facilities so that the environmental impacts would have been lessened, i.e., avoiding the high costs of cleanup now. Duke Energy should then show what costs it did not incur in the past while inadequately maintaining its coal ash impoundments and the present value of the "financial savings" passed on to shareholders as dividends.

8. Because of the complexity of the issues relating to who bears the burden of the cleanup costs and the potential multi-billion dollar cost for cleanup, NC WARN believes the Commission should address the coal ash cleanup in a separate proceeding rather than in a rate case. If coal ash cleanup comes into a broader rate case, the issues related to coal ash may be given short shrift without full consideration by the Commission.

THEREFORE, NC WARN urges the Commission to require a full showing by Duke Energy on the costs of the coal ash cleanup and hold a separate proceeding, with an evidentiary hearing, on those costs.

Respectfully submitted, this the 7th day of March 2017.

/s/ John D. Runkle

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing NC WARN'S INITIAL COMMENTS (E-2 SUB 1103 and E-7 Sub 1110) upon each of the parties of record in this proceeding or their attorneys of record by deposit in the U.S. Mail, postage prepaid, or by email transmission.

This is the 7th day of March 2017.

/s/ John D. Runkle

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