BEFORE THE NORTH CAROLINA UTILITIES COMMISSION
DOCKET NO. DOCKET NO. E-7, SUB 1214

In the Matter of:	**)**	**POST-HEARING BRIEF OF CENTER FOR BIOLOGICAL DIVERSITY AND APPALACHIAN VOICES**
Application of Duke Energy Carolinas, LLC For Adjustment of Rates And Charges Applicable To Electric Service In North Carolina	**)**	

Introduction

Intervenors Center for Biological Diversity and Appalachian Voices (hereafter "Intervenors") respectfully submit this post-hearing brief in support of several modifications to the Duke Energy Carolinas ("Duke Energy") rate proposal presently pending before the Commission. As detailed below, based on the record in this case, including the testimony of Intervenors' witnesses, Intervenors urge the Commission to: (1) (a) limit Duke Energy's return on equity ("ROE") to a maximum of 9%, and consider a lower ROE, in light of the undue energy burdens Duke Energy's proposed rate increase will have on North Carolina households and (b) include energy burden as an essential measurement of changing economic conditions on customers to determine retail rates; and (2) reject Duke Energy's request to charge ratepayers for Duke Energy's payments to outside groups that indisputably engage in lobbying activities, regardless of how the specific payments are used, in light of the Supreme Court's ruling in *Janus v. AFSCME, Council 21*.[1]

[1] 138 S. Ct. 2448 (2018).

I. The Commission Should Reject Duke Energy's Requested ROE In Light Of Its Undue Impact On Energy Burdens For Duke Energy's Customers.

Duke Energy's settlement with Public Staff and other intervenors for a ROE of 9.75% should be rejected and decreased to 9.0% or less, due to the damaging impacts the proposed ROE would have on the energy burdens of North Carolinian households, rendering the requested rate unjust and unreasonable. Further, the Commission should incorporate energy burdens as a keystone indicator of "changing economic conditions" on customers in this docket because of the metric's quantitative and direct precision in measuring a proposed rate increase and ROE's impact on customers' economic conditions and their ability to afford the proposed rate. By requiring energy burden as a keystone indicator for this rate case, Duke Energy should be on notice to provide energy burden analysis for future cases as part of fulfilling its burden of proof to provide data evidencing fair and just rates.

A. The Commission Is Legally Mandated To Consider Changing Economic Conditions On Ratepayers When Determining The Proper Return On Equity For Duke Energy.

The North Carolina Public Utilities Act ("the Act") requires that all rates "shall be just and reasonable."[2] Moreover, the Commission "shall fix such rates as shall be fair both to the public utilities and *to the consumer*" and is required to consider "all other material facts of record that will enable it to determine reasonable and just rates."[3] Specifically, the Act mandates, and the North Carolina Supreme Court affirmed, that the Commission must consider the "changing economic conditions *on customers* when determining return on common equity."[4] Critically, the Supreme Court emphasized the legislative intent undergirding the consideration of the "changing

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2 N.C. Gen. Stat. § 62-131(a).

3 N.C. Gen. Stat. § 62-133(a), (d) (emphasis added).

4 *State ex rel. Utils. Comm'n v. Attorney Gen. Roy Cooper*, 366 N.C. 484, 494 (2013) ("*Cooper I*") (referencing N.C. Gen. Stat. § 62-133(b)(4)) (emphasis added).

economic conditions" requirement: "that customer interests cannot be measured only indirectly or treated as mere afterthoughts and that Chapter 62's ROE provisions cannot be read in isolation as only protecting public utilities and their shareholders."[5]

The goal in setting the rates is to "fix [it] as low as may be reasonably consistent" with due process constitutional considerations.[6] The burden of proof is on Duke Energy to show that its proposed rates are just and reasonable.[7]

B. Energy Burden Is A Keystone Indicator Of Ratepayers' Changing Economic Conditions And Thus Must Be Integral To The Commission's Rate-Setting Here And In The Future.

Although the consideration of changing economic conditions on customers is not new to the Commission, the Commission has yet to adopt direct metrics to ascertain both (1) customers' changing economic conditions since the last rate increase; and (2) the newly proposed rate's impacts on customers in light of those now-existing conditions. Such a robust consideration fulfills the legislative intent to guard against customers' interests being "indirectly" "measured" or "treated as mere afterthoughts."[8] Energy burden as a metric fulfills this factual gap in analyses presented by Duke Energy.

1. Incorporating energy burden fills a substantial gap in addressing the impacts of a new rate on customers in light of changing economic conditions, a critical issue where previously-used metrics fall woefully short.

Duke Energy has failed its burden to provide analyses, and past Commission orders have failed to employ precise measures, to directly address the impacts of changing economic conditions on customers. Since the Supreme Court's 2013 *Cooper I* decision clarifying that the

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5 *Id.* at 495.

6 *State of NC ex rel. Utilities Commission, et al. v. Duke Power Co.*, 285 N.C. 377, 388 (1974).

7 N.C. Gen. Stat. § 62-75.

8 *Cooper I*, 366 N.C. at 494.

statutory requirement applies to changing economic conditions *on customers* specifically, the Commission has considered various factors—proffered by Duke Energy—to gauge changing economic conditions, including "unemployment rates, home foreclosures, and other economic stress on [] customers."[9] While these factors are useful to describe customers' general economic conditions and how these conditions may have changed since the past rate increase, they fall woefully short in directly measuring a customer's particular economic condition as it relates to a proposed rate change.

Moreover, the Commission has clearly stated the importance of gauging customer affordability as part of their consideration of changing economic circumstances, but prior rate cases have failed to directly measure customer affordability. Specifically, in 2017, the Commission held that a rate's impact on customer affordability should be explicitly considered:

> Changing economic circumstances as they impact DEP's customers *may affect those customers' ability to afford rate increases*. For this reason, *customer impact* weighs heavily in the overall rate setting process, including, as set out in detail elsewhere in this Order, the Commission's own decision of an appropriate authorized rate of return on equity.[10]

Despite this articulated need, the Commission was not offered any meaningful measurement to gauge affordability. Instead, the Commission was left in the position of only considering Duke Energy's and Public Staff's testimonies regarding unemployment rates and GDP, as well as public testimonies that generally described the rate's impact on discouraging energy conservation and renewable energy measures.[11] Unfortunately, none of these metrics succeed in meaningfully and directly measuring the impacts of a proposed rate on customers' ability to

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9 *State ex rel. Utils. Comm'n v. Cooper*, 367 N.C. 444, 451 (2014) ("*Cooper II*") (citing the Commission's 2013 order in Duke Energy Progress rate case, Docket No. E-2, Sub 1023).

10 *In the Matter of Application by Duke Energy Progress, LLC, for Accounting Order to Defer Incremental Storm Damage Expenses*, "Order Accepting Stipulation, Deciding Contested Issues and Granting Partial Rate Increase," Docket No. E-2, Sub 1131, Sub 1142, Sub 1103, Sub 1153 (May 2, 2017), at 59 (emphasis added).

11 *Id*. at 74-77.

afford the proposed rate increase.

While the Commission in the past has faced a gap in its ability to measure an ROE's impact on customer affordability, in this rate case Intervenors have offered energy burden as a precise measure to answer this important data shortfall. Energy burden is defined as the percentage of gross annual household income spent on household energy costs, including electricity and non-electric heating fuels.[12] As Intervenors' witness testified, a household's energy burden "serves as the most accurate descriptor of a customer's ability to (a) pay their electric bill, and (b) afford a rate increase, and [ ] trends in energy burden over time provide a more accurate representation of 'changing economic conditions' than do changes in unemployment rates, median incomes or county economic indicators."[13]

Indeed, recognizing the vital importance of considering energy burden, other utility commissions around the country have incorporated consideration of energy burden into their rate-fixing analyses to gauge affordability, including in California, New York, and Pennsylvania. The California Public Utilities Commission, for instance, stated that energy burden is "one of the simplest metrics used to evaluate affordability today" and that it "continue[s] to employ the energy burden metric as an assessment of the general affordability of the rate design reforms."[14] Further, New York has adopted measures that aim to limit increasing energy burdens above 6%, the threshold widely accepted by researchers as crossing the line of energy cost affordability by putting too many families into a category of high energy burdens.[15]

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12 T. 16, p. 546.

13 *Id.* at 521-22.

14 *Id.* at 581.

15 *Id*. While the North Carolina Supreme Court has not mandated the quantification of the factor of "changing economic conditions" on customers, *Cooper II*, 367 N.C. at 451, the Commission nevertheless should employ meaningful metrics of changing economic conditions on customers in order to meet its statutory duty of considering

Accordingly, Intervenors request the Commission to utilize energy burden here as a meaningful and quantitative measure of the changing economic circumstances on customers.

2. Failing to adequately consider energy burden would contravene the legislative intent for the Commission to treat customer impacts on the same footing as shareholder impacts in determining just and reasonable rates for customers and the utility.

The Commission is charged with setting rates that are just and reasonable to both customers and utilities.[16] Moreover, Duke Energy bears the burden of proof of showing its rates meet this standard.[17] Here, Duke Energy has failed its burden by using grossly disparate metrics in gauging the proposed ROE's impacts on customers and the utility. Grossly disparate analytical treatments lead to grossly disparate results. Should the Commission accept Duke Energy's analyses without incorporating energy burden as a meaningful and rigorous measurement of changing economic conditions on customers, the Commission risks utilizing vastly different metrics to gauge both customer and utility impacts from the ROE—and thus impacts the Commission's capability of setting just and reasonable rates for both customers and the utility in a fair manner.

In particular, with respect to impacts on the utility itself, Duke Energy has employed extensive quantitative modeling to show changing market conditions and the Company's ability to attract investment, as well as the impact of different rates of return on shareholder investments. The Company used three robust investor-centric approaches to develop its ROE recommendation: (1) The Constant Growth Discounted Cash Flow model; (2) the traditional and empirical forms of the Capital Asset Pricing Model; and (3) the Bond Yield Plus Risk Premium

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such a requirement meaningfully and systematically. Energy burden properly fulfills the Commission's legal mandate.

16 N.C. Gen. Stat. § 62-131(a).

17 Gen. Stat. § 62-75.

approach. The Company further supported its conclusion with the Expected Earnings approach. These analyses are direct, precise, and quantitative.[18] The Company also considered its generation portfolio risks, its capital expenditure plan, costs of issuing common stock (e.g., "flotation" costs), and evolving capital market and business conditions. *Id*. at 4.

In stark contrast, Duke Energy has conducted no similarly rigorous analysis with respect to changing economic conditions on customers. Instead, Duke Energy has put forth testimony regarding only statewide and national unadjusted and adjusted unemployment rates, GDP, and median household income.[19] None of these factors and associated discussion capture the impacts of proposed ROE on customer affordability and economic health, as captured in the requirement of changing economic conditions. None of Duke Energy's discussion of these factors employs any rigorous quantitative modeling and direct analyses that are present in the Company's treatment of utility returns and shareholder investments.

Such disparate treatment between how Duke Energy considers economic impacts to itself, as distinguished from the changing economic considerations on customers, leaves the Commission at risk of treating such economic conditions on customers as "indirect" and an "afterthought[]"—in direct contravention of the legislative intent for the Commission to set just and reasonable rates that meaningfully consider both customer and utility interests.[20] In short, energy burden is a mirror metric of the quantitative analyses demonstrating the impacts of a proposed ROE on shareholder interests and the Company's revenue, and thus refusing to consider energy burden would afford disparate and unfair treatment toward the customer class.

It is true that "[g]iven th[e] subjectivity ordinarily inherent in the determination of a

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[18] *See*, *e.g*., T 11, pp.273-300; 310-19; *see also id.* at 324-46.

[19] *Id*. at 300-09.

[20] *Cooper I*, 366 N.C. at 495.

proper rate of return on common equity, there are inevitably pertinent factors which are properly taken into account but which cannot be quantified with the kind of specificity here demanded by [the appellant]."[21] But energy burden offers the specificity, directness, and transparency that can fulfill the Commission's legal duty to properly consider the changing economic conditions on customers in a manner that is quantitative and thus far more accurate and fair in measurement, comparable to the Commission's analysis of economic conditions on shareholders. The Commission should therefore exercise its authority to fully utilize the energy burden measurement. Moreover, the Commission's incorporation of energy burden into its analysis here will yield the added benefit of making clear that Duke Energy must fulfill its statutory burden of proof to provide energy burden analysis in future rate cases to accurately measure changing economic circumstances on customers.

C. In Light Of The High Energy Burdens At Issue, The Commission Must Reject The Requested Rate Of Return And Lower It To No Greater Than 9%.

"What constitutes a fair rate of return on common equity is a conclusion of law that must be predicated on adequate factual findings."[22] Thus, the Supreme Court has explained that the Commission "must make findings of fact regarding the impact of changing economic conditions on customers when determining the proper ROE for a public utility."[23]

Intervenor Witness McIlmoil's testimony provided the factual predicate for establishing that Duke's proposed ROE--and, accordingly, rate increase--would impose undue energy burdens on ratepayers. First, Witness McIlmoil established the grave baseline conditions of energy burdens in the state reflecting economic conditions as of 2019. In particular, 332,000

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[21] *Cooper II*, 367 N.C. at 450.

[22] *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 348 N.C. 452, 460 (1998) ("*CUCA*").

[23] *Cooper*, 366 N.C. at 495.

households were experiencing unaffordable annual energy burdens in excess of 6 percent of their gross household income, and 40%—or *one of every 12 households*—were experiencing a "high energy burden" of 10.9% or higher in 2019.[24] It is also critical to note that since that time the novel coronavirus and concomitant economic crisis has only further exacerbated these economic conditions.

Second, Witness McIlmoil found that DEC's originally proposed rate increase, proposing a 10.3% ROE, would significantly exacerbate the energy burden experienced by the 332,000 low-income households that already crossed the unaffordable energy burden of 6%. Specifically, a 10.3% ROE would increase the number of households experiencing high energy burden of 10.9% or higher to *one out of every 9 households served by DEC* by 2021 and *one out of every 8 households* by 2025—shifting nearly 70,000 low-income households from experiencing merely "unaffordable" energy costs into the "high" energy burden category.[25] Moreover, Witness McIlmoil calculated that lowering ROE to 9.2 percent, while maintaining DEC's current 52/48 capital structure, would save residential customers over $50.8 million, or $29 a year, thus reducing the first-year bill impact of the proposed rate increase for the average customer using 1,000 kWh a month by 30%.[26] In light of the Public Staff's original recommendation that the ROE should be capped at 9%, Intervenors urge the Commission to approve a ROE no greater than 9% in order to prevent exacerbated energy burdens.[27]

In conclusion, the Commission's determination of an appropriate ROE must take into account the rate's impact on energy burdens. Here, Intervenors urge the Commission to cap ROE

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24 T. 16, p. 584.

25 *Id*. at 576.

26 *Id.* at 576-77.

27 *Id.*

at 9% to stop the substantial increase of families crossing high—and inherently unbearable—energy burden thresholds.[28]

II. The Commission Should Disallow Recovery For Payments To Groups Engaged In Lobbying And Other Advocacy Activities

DEC seeks cost recovery based on payments made to three organizations that engage in political activities: Edison Electric Institute, the Nuclear Energy Institute, and the Institute for Nuclear Power Operations. To safeguard ratepayers' First Amendment rights—and consistent with the Supreme Court's recent ruling in *Janus v. AFSCME, Council 21*,[29] which reversed the Court's earlier holding in *Abood v. Detroit Board of Educ.*,[30] —the Commission should disallow these expenses.[31]

A. Duke Ratepayers May Not Be Compelled To Financially Support Political Activities.

It is well established that utility ratepayers may not be directly charged for a utility's political or charitable activities.[32] As the Supreme Court has explained, quoting Thomas Jefferson, "'to compel a man to furnish contributions of money for the propagation of opinions

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[28] Duke Energy entered into a proposed settlement with some intervenors to design a low-income EE/DSM pilot program. In the matter of Application of Duke Energy Carolinas, LLC For Adjustment of Rates and Charges Applicable to Electric Service in North Carolina, Agreement and Stipulation of Settlement, Docket No. E-7, Sub 1214 (July 23, 2020), 5. However, the pilot program does not itself address the concern of incorporating energy burden into the decision as to the appropriate ROE in this case.

[29] 138 S. Ct. 2448 (2018).

[30] 431 U.S. 209 (1977).

[31] Intervenors also raised concerns regarding rate recovery related to Chambers of Commerce, but DEC's proposed settlement with Public Staff removes those expenses. *See* March 25, 2020 Agreement and Stipulation of Partial Settlement.

[32] *In re Southern Bell Telephone and Telegraph Co*., 42 P.U.R.4th 18 (N.C.U.C. 1981) ("it is the opinion of the commission that the expense of lobbying activities should not be borne by the ratepayers" and that a "lobbying expense is not a proper cost for inclusion in the rate-making process"); *In re North Carolina Natural Gas Corporation*, 128 P.U.R.4th 321 (N.C.U.S. 1990) ("The Commission concludes that charitable contributions should not be included in the cost of service [for] [i]t has been a long-standing policy of this Commission to exclude contributions from operating expenses.").

which he disbelieves and abhor(s) is sinful and tyrannical.'"[33]

Permitting recovery of such payments would impinge ratepayers' First Amendment rights.[34] As the New York Court of Appeals explained in *Cahill v. NY Public Svc. Commn*, the First Amendment does not permit utilities to "exert monolithic or majoritarian power through a mini-taxing authorization certainly against the interests and beliefs of some ratepayers," which would "convert the free marketplace of ideas to the consumer-subsidized preserve of corporate utility ideas."[35] Many other states have similar restrictions.[36]

In considering the First Amendment implications of requiring ratepayers to subsidize utility political activities, the New York Court of Appeals and the U.S. Supreme Court have compared such payments to other kinds of payments, such as compelled union dues. Understanding the appropriate treatment of union dues is thus critical to addressing how the Commission should treat DEC's proposed recovery for payments to groups engaged in political activities.

The Supreme Court set forth its original test for union dues in *Abood v. Detroit Board of Educ.*, concerning the First Amendment objections of employees required by state law to pay union dues, regardless of union membership or agreement with the union's political activities. Concluding that the First Amendment prohibits "compulsory subsidization of ideological

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33 *Janus*, 138 S. Ct. at 2464.

34 *Cahill v. NY Public Svc. Commn*, 556 N.E.2d 133, 134-35 (N.Y. 1990), *cert. denied New York Tel. Co. v. Cahill*, 498 U.S. 939 (1990).

35 *Id.* at 138.

36 *See, e.g.*, R. Paul Gee, *Who Pays for Charitable Contributions Made By Utility Companies?*, 12 Energy Law Journal 363 (1991); Richard P. Johnson, *Power to the People: The First Amendment and Utility Operating Expenses*, 69 Wash. U.L.Q. 945 (Fall 1991) (detailing other similar regulations in other states) (articles available at: https://www.eba-net.org/assets/1/6/30_12EnergyLJ363(1991).pdf. and https://openscholarship.wustl.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1912&context=law_lawreview

activity," the Court found that employees may not be forced to pay fees used by unions "to express political views unrelated to its duties as exclusive bargaining representative."[37] To resolve that concern, the Court concluded that unions could only charge objecting members a lower amount—called an "agency fee" —to pay for the union's work on behalf of the employees unrelated to the union's political activities.[38]

Three years later, in *Consolidated Edison Co. v. Public Svc. Comm'n*, the Supreme Court considered whether the New York Public Service Commission had the authority to prohibit a regulated utility from sending customers electric bill inserts discussing "controversial issues of public policy."[39] While the Court found that the Commission had not demonstrated that the prohibition safeguarded the *utility's* First Amendment rights to spend its *shareholder* funds as it chooses, the Court specifically noted that, under *Abood*, it may be appropriate to "exclude the cost of these bill inserts [discussing controversial public policy issues] *from the utility's rate base*"[40] —as that same New York Commission did a few years later in the regulation at issue in *Cahill*, over which the U.S. Supreme Court denied further review.[41]

Following this *Abood* standard, which allows compelled payment only for non-political activities, in this rate case DEC has endeavored to distinguish between the political and non-

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37 431 U.S. 209, 234 (1977).

38 *Id.*

39 447 U.S. 530, 543 (1980).

40 *Id.* at 543 and n.13.

41 Similarly, in *Cahill* itself, New York's highest court relied heavily on *Abood*, noting that "ratepayers are powerless against governmentally-regulated monopolies and have no place else to seek indispensable public utilities services (like electricity)," and on that basis finding that ratepayers "are *more seriously burdened and disadvantaged* than the contributing nonunion members in *Abood*." 556 N.E.2d at 136 (emphasis added). Indeed, as former Chief Justice Rehnquist similarly explained, "the extensive regulations governing decision-making by public utilities suggest that for purposes of First Amendment analysis, a utility is far closer to a state-controlled enterprise than is an ordinary corporation." *Central Hudson Gas and Elec. v. Pub. Svc. Commn*, 447 U.S. 557, 587 (1980) (Rehnquist, C.J., dissenting).

political activities of the Edison Electric Institute, Nuclear Energy Institute, and the Institute for Nuclear Power Operations. However, as discussed next, the Supreme Court's *Janus* decision overturning *Abood* makes the distinction between recoverable and unrecoverable expenses insufficient to allow *any* cost recovery from these groups.

B. In Light of *Janus*, Ratepayers May No Longer Be Charged Via Electricity Rates For Any Portion Of The Payments To Organizations Engaged In Political Activities, Regardless Of How The Funds Are Spent.

Janus, like *Abood*, concerned a challenge to union dues requirements. Explaining that through compelled speech, "individuals are coerced into betraying their convictions," and emphasizing that "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning," the Court explained that compelled speech is of even more concern than speech prohibitions, and that "[c]ompelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns."[42]

The specific question in *Janus* was whether a public sector employee could be compelled to pay even the "agency fee" to a union—*i.e.*, the amount that, under *Abood*, represented the permissible charge for the union's work on behalf of its employees that is *unrelated* to political activities. Rejecting *Abood*, the Supreme Court found that because the employee opposed the union's public policy positions, he could not be compelled to pay union dues *at all*.[43]

In particular, the Court concluded that an individual may only be compelled to fund a group engaged in objectionable political activities where necessary to serve an interest that cannot be achieved without infringing First Amendment rights. Applying that principle, the Court concluded the unions had failed to demonstrate that their ability to carry out their functions

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42 *Janus*, 138 S. Ct. at 2464 (emphasis in original).

43 *Id.* at 2486.

would be impaired from no longer collecting agency fees.[44] Other recent Supreme Court precedents have reached similar results.[45]

Moreover, the Court in *Janus* also emphasized the "substantial judgement call" involved in determining precisely which fees should be disallowed from the agency fee, noting that unions are often permitted to charge for items that are arguably political in nature[46], and the numerous "controversial subjects" on which unions are active, "such as climate change . . . ."[47] Noting that speech and other activities on such "sensitive political topics," of "profound value and concern to the public," sit at "the highest rung of the hierarchy of First Amendment values and merit special protection,"[48] the Court emphasized that there must be a particularly compelling reason to force objecting employees to fund organizations engaged in such activities.

Given *Janus* and related precedents, the Commission should not permit DEC recovery for any portion of payments to organizations engaged in political activities via the rates charged in the immediate case.

C. The Commission Should Disallow DEC's Request For Above-The-Line Recovery For Payments To Edison Electric Institute, the Nuclear Energy Institute, and the Institute for Nuclear Power Operations.

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44 *Id.* at 2467-69.

45 *Harris v. Quinn*, 134 S. Ct. 2618 (2014) (state may not compel any "agency fee" to support a union, where the employees are not full-fledged public employees); *United States v. United Foods*, 533 U.S. 405, 410 (2001) (rejecting a government program compelling mushroom producers to pay for advertising they do not support, finding that, "[j]ust as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views"); s*ee also, e.g., Ranchers-Cattlemen Action Legal Fund v. Perdue*, No. 16-41-GF, 2017 WL 2671072 (D. Mont. Jun. 21, 2017), aff'd 718 Fed. Appx. 541 (2018) (enjoining USDA "from continuing to allow the Montana Beef Council to use the assessments that it collects under the Beef Checkoff Program to fund its advertising campaigns, absent prior affirmative consent from the payer").

46 *Janus*, 138 S. Ct. at 2481-82.

47 *Id.* at 2476.

48 *Id.* (other citations omitted).

As detailed by Intervenor witness Greer Ryan, the Edison Electric Institute ("EEI") engages in political activities for which there is no dispute that it is not entitled to rate recovery.[49] As reflected in EEI's Form 990 filing with the Internal Revenue Service, this includes funding Republican and Democratic associations, as well as other directly political activities.[50]

Accordingly, DEC is not seeking to charge ratepayers for *all* of its expenses to EEI. Rather, following the same kind of "agency fee" approach allowed under *Abood*, DEC has reported more than $260,000 in payments related to lobbying for which DEC is *not seeking to recover*.[51] Thus, as DEC witness Nicholas Speros testified, DEC records EEI lobbying expenses in Account 426.4, which is below-the-line and thus "are not included or recoverable for ratemaking purposes.[52]

However, DEC seeks recovery of $1,037,568 in EEI payments that represent DEC's non-lobbying membership dues paid to EEI.[53]

DEC similarly seeks recovery for payments to Nuclear Energy Institute and the Institute for Nuclear Power Operations that it asserts are for non-lobbying activities, while acknowledging these organizations also engage in lobbying:

- The Nuclear Energy Institute ("NEI") spends millions on lobbying[54], and advocates for nuclear power, which the Supreme Court has called a "controversial issue."[55] While DEC acknowledges that NEI engages in some lobbying activities,

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49 T 17, pp. 489-92. As Ms. Ryan details, EEI has fought against improving air pollution and toxic standards, and financially supports other groups that engage in these and similar activities. *Id.*

50 *Id.* at p. 491.

51 *Id.* at 492; DEC E-1 at pp. 604-06. The Commission entered the E-1s into the record on August 24, 2020. See T 1, pp. 31-32.

52 T 15, pp. 107-09.

53 T 17, p. 492.

54 *Id*. at 493.

55 *Consolidated Edison Co*., 447 U.S. at 543.

it seeks recovery of amounts it claims that NEI has confirmed "is not related to lobbying."[56]

- DEC acknowledges that the Institute of Nuclear Power operations "engage[s] in some lobbying activities," but claims that "the Company has confirmed that" the amounts for which it seeks recovery are "not related to lobbying activities."[57]

Given the fact that each of these groups engage in lobbying activities for which ratepayers may not be charged, in light of the Supreme Court's ruling in *Janus*, the Commission should not permit DEC to charge ratepayers for *any* portion of payments to these organizations, including the more than $1 million that DEC seeks to charge ratepayers due to payments to EEI. Like the employees paying unions in *Janus*, ratepayers may not be forced to subsidize these groups that engage in political activities, regardless of how the funds paid are used.

The concerns that animated *Janus* fully apply to DEC's request for rate recovery here. As in *Janus*, ratepayers are being compelled to support groups engaged in political activities. And as in *Janus*, there is inevitably a "substantial judgement call" involved in determining which trade association activities are appropriate for recovery.[58] Given that, as the Supreme Court emphasized, political advocacy on "sensitive political topics" is of "profound value and concern to the public," and thus sits at "the highest rung of the hierarchy of First Amendment values and merit special protection,"[59] there is no compelling reason to allow DEC to charge customers directly for the payments it makes to these groups.

Accordingly, Intervenors respectfully urge the Commission to reject DEC's request to recover any of its payments to Edison Electric Institute, the Nuclear Energy Institute, and the

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56 T 17, p. 488.

57 *Id.*

58 *Janus*, 138 S. Ct. at 2476.

59 *Id.*

Institute for Nuclear Power Operations as above-the-line expenses.

III. Proposed Findings and Conclusions

Based on the information presented, Intervenors Center for Biological Diversity and Appalachian Voices request the Commission make the following findings and conclusions:

Findings and Conclusions as to ROE and Energy Burden:

1. Energy burden is the percentage of gross annual household income spent on household energy costs, including electricity and non-electric heating fuels.
2. Energy burden is a keystone indicator of the changing economic conditions on ratepayers that must be taken into account in considering an appropriate return on equity rate.
3. Other utility commissions around the country have incorporated consideration of energy burden into their rate-fixing analyses to gauge affordability, including in California, New York, and Pennsylvania.
4. The Commission is charged with setting rates that are just and reasonable to both customers and utilities. N.C. Gen. Stat. § 62-131(a).
5. The energy burdens that would be faced by North Carolina households based on the ROE currently proposed in this proceeding would not be just and reasonable.
6. In light of the whole record in this proceeding, the Commission concludes that Duke Energy's ROE shall be limited to 9%.
7. In light of the Commission's statutory obligations, and the importance of energy burden in evaluating rate proposals, the Commission hereby determines to incorporate energy burden considerations into all rate proceedings.
8. In light of Duke Energy's burden of proof obligations, the Commission directs that the Company present data on energy burden in all rate proceedings as an accurate and

meaningful measure of changing economic conditions on customers.

Findings and Conclusions as to Payments to Groups Engaged in Lobbying:

9. The Edison Electric Institute, the Nuclear Energy Institute, and the Institute for Nuclear Power Operations each engage in lobbying activities.

10. Ratepayers may not be directly charged for a utility's lobbying activities, including its payments to outside groups for lobbying.

11. Prior to the Supreme Court's ruling in *Janus v. AFSCME, Council 21,* 138 S. Ct. 2448 (2018), it was arguably consistent with the Supreme Court's First Amendment jurisprudence for Duke Energy to segregate its payments to outside groups between lobbying and non-lobbying activities, and to charge customers directly only for the non-lobbying activities. This is the approach Duke Energy has proposed in this proceeding.

12. However, in *Janus* the Supreme Court determined that it is inconsistent with the First Amendment to force payments to a group engaged in political activities, regardless of how those specific funds are spent.

13. In light of this ruling, the Commission hereby disallows recovery for any of Duke Energy's payments to Edison Electric Institute, the Nuclear Energy Institute, and the Institute for Nuclear Power Operations.

Respectfully submitted this 4th day of November, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Post-Trial Brief submitted by Intervenors Center for Biological Diversity and Appalachian Voices has been served this day upon each of the parties of record in this proceeding through their attorneys by email transmission.

This 4th day of November, 2020.

Electronically submitted
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