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January 29, 2021

Ms. Kimberly A. Campbell  
Chief Clerk  
North Carolina Utilities Commission  
4325 Mail Service Center  
Raleigh, North Carolina 27699-4300

**RE: Joint Motion to Reopen Record, Consolidate Consideration of CCR Settlement Agreement, and for Approval of CCR Settlement Agreement**  
**Docket No. E-7, Sub 1213**  
**Docket No. E-7, Sub 1214**  
**Docket No. E-7, Sub 1187**  
**Docket No. E-2, Sub 1219**  
**Docket No. E-2, Sub 1193**

Dear Ms. Campbell:

Enclosed for filing in the above-referenced dockets on behalf of the Public Staff – North Carolina Utilities Commission, Duke Energy Carolinas LLC, Duke Energy Progress LLC, the North Carolina Office of the Attorney General, and Sierra Club is a Joint Motion to Reopen Record, Consolidate Consideration of CCR Settlement Agreement, and for Approval of CCR Settlement Agreement.

If you have any questions, please let me know.

Sincerely,

/s/ Camal O. Robinson  
Camal O. Robinson

Enclosures

cc: Parties of Record

OFFICIAL COPY

Jan 29 2021

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-7, SUB 1213  
DOCKET NO. E-7, SUB 1214  
DOCKET NO. E-7, SUB 1187  
DOCKET NO. E-2, SUB 1219  
DOCKET NO. E-2, SUB 1193

DOCKET NO. E-7, SUB 1213 )  
)  
In the Matter of )  
Application for Approval of Proposed Prepaid )  
Advantage Program )  
)  
DOCKET NO. E-7, SUB 1214 )  
)  
In the Matter of )  
Application of Duke Energy Carolinas, LLC for )  
Adjustment of Rates and Charges Applicable to )  
Electric Utility Service in North Carolina )  
)  
DOCKET NO. E-7, SUB 1187 )  
)  
In the Matter of )  
Application of Duke Energy Carolinas, LLC for )  
an Accounting Order to Defer Incremental )  
Storm Damage Expenses Incurred as a Result )  
of Hurricanes Florence and Michael and Winter )  
Storm Diego )  
)  
DOCKET NO. E-2, SUB 1219 )  
)  
In the Matter of )  
Application of Duke Energy Progress, LLC )  
For Adjustment of Rates and Charges )  
Applicable to Electric Service in North )  
Carolina )  
)  
DOCKET NO E-2, SUB 1193 )  
)  
In the Matter of )  
Application by Duke Energy Progress, LLC, for )  
an Accounting Order to Defer Incremental )  
Storm Damage Expenses Incurred as a Result )  
of Hurricanes Florence and Michael and Winter )  
Storm Diego )

**JOINT MOTION TO REOPEN  
RECORD, CONSOLIDATE  
CONSIDERATION OF CCR  
SETTLEMENT AGREEMENT, AND  
FOR APPROVAL OF CCR  
SETTLEMENT AGREEMENT**



NOW COME the Public Staff-North Carolina Utilities Commission (“Public Staff”), by and through its Executive Director, Christopher J. Ayers; the North Carolina Office of the Attorney General (“AGO”); Sierra Club; Duke Energy Progress, LLC (“DEP”); and Duke Energy Carolinas, LLC (“DEC”) (DEP and DEP, each a “Company” and collectively the “Companies”); (Public Staff, AGO, Sierra Club, and the Companies, collectively, “Joint Movants”), by and through their legal counsel, and hereby jointly move as follows:

First, that the Commission reopen the record in the above-referenced dockets to admit the Coal Combustion Residuals Settlement Agreement executed by Joint Movants on January 22, 2021 and filed in these dockets on January 25, 2021 (the “CCR Settlement Agreement” or “Settlement”), along with testimony supporting the CCR Settlement Agreement (“Settlement Supporting Testimony”),<sup>1</sup> into evidence;

Second, that the Commission consolidate consideration of the CCR Settlement Agreement in these dockets with its further consideration of issues remanded to the Commission by the North Carolina Supreme Court in *State ex rel. Utils. Comm’n v. Stein* (“*Stein*”), Nos. 271A18 and 401A18, 2020 WL 7294770 (N.C. Dec. 11, 2020); and

Third, that the Commission approve the Settlement and reflect that approval in its decisions in these dockets as well as upon the remand ordered by *Stein*.

In support of these requests, Joint Movants show the Commission as follows:

1. On September 30, 2019, DEC filed its rate case Application in Docket No. E-7, Sub 1214 (the “2019 NC DEC Rate Case”). The expert witness hearing in this case began on August 24, 2020 and was re-convened on September 3, 2020. The record in

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<sup>1</sup> Contemporaneously with the filing of this Joint Motion, DEC and DEP each submit CCR Settlement Agreement Supporting Testimony of Stephen G. De May, DEC submits Settlement Supporting Testimony of Jane L. McManeus, and DEP submits Supporting Testimony of Kim H. Smith. Public Staff will submit testimony of Michael C. Maness by February 5, 2021.

the 2019 NC DEC Rate Case was closed as of November 10, 2020, with all late-filed exhibits, post-hearing briefs, and proposed orders completed and filed as of that date. The Commission has not as yet issued an Order deciding the 2019 NC DEC Rate Case.

2. On October 30, 2019, DEP filed its rate case Application in Docket No. E-2, Sub 1219 (the “2019 NC DEP Rate Case,” and, collectively with the 2019 NC DEC Rate Case, the “2019 NC Rate Cases”). The expert witness hearing in this case began on August 24, 2020 and was re-convened on September 29, 2020. The record in the 2019 NC DEP Rate Case was closed as of December 4, 2020, with all late-filed exhibits, post-hearing briefs, and proposed orders completed and filed as of that date. The Commission has not as yet issued an Order deciding the 2019 NC DEP Rate Case.

3. Also pending before the Commission are the remand proceedings pursuant to *Stein* in the Companies’ rate cases filed in 2017: for DEC, Docket No. E-7, Sub 1146 and consolidated dockets (“2017 NC DEC Rate Case”); and for DEP, Docket No. E-2, Sub 1142 and consolidated dockets (“2017 NC DEP Rate Case,” and, collectively with the 2017 NC DEC Rate Case, the “2017 NC Rate Cases”). The Commission’s Orders deciding the 2017 NC Rate Cases were appealed to the North Carolina Supreme Court. In *Stein*, the Supreme Court reversed and remanded for additional findings and conclusions the portions of those Orders related to the Commission's consideration of the Public Staff’s equitable sharing proposal in the 2017 NC Rate Cases. (The 2017 and 2019 NC Rate Cases are collectively referred to as the “NC Rate Cases”).

4. A major issue in each of the NC Rate Cases concerns the extent to which, and the manner in which, the Companies may recover from their North Carolina retail customers (“Customers”) the costs incurred by the Companies from January 1, 2015

forward in connection with their management, handling, and remediation of coal combustion residuals (“CCR” or “coal ash”), a by-product of coal-fired electricity generation. Each of the NC Rate Cases involves the appropriate ratemaking treatment the Companies may be allowed for the recovery of such costs (“CCR Costs”), all of which have been deferred by orders of the Commission entered in the 2017 NC Rate Cases, including the issue of an appropriate recovery (if any) by each Company of financing costs (“Financing Costs”) incurred by each Company in connection with the deferral of CCR Costs while deferred (the “Deferral Period”) and as they are recovered from Customers over time (the “Amortization Period”) once included in rates.

5. The parties to the NC Rate Cases have extensively argued and debated these contested issues since at least the filing of the 2017 NC Rate Cases. The CCR Settlement Agreement comprehensively resolves certain issues for CCR Costs incurred by DEC from January 1, 2015 through January 31, 2030, and for CCR Costs incurred by DEP from January 1, 2015 through February 28, 2030.

6. If approved by the Commission, the Settlement<sup>2</sup> would:

a. Leave in place the Commission decision in the 2017 NC Rate Cases and remanded to the Commission by the Supreme Court in *Stein*, including the \$30 million (for DEP) and \$70 million (for DEC) cost of service penalties ordered in those cases.

b. Reduce the amount of CCR Costs and Financing Costs sought for recovery in the 2019 NC Rate Cases by \$224 million (DEC) and \$261 million (DEP), but allowing recovery of the remaining balance of CCR Costs and

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<sup>2</sup> The description of the Settlement in this Joint Motion is intended only to be a summary of the applicable provisions of the CCR Settlement Agreement, which is in writing and speaks for itself.

Financing Costs sought for recovery in those cases over a five-year Amortization Period, with a return based upon (i) the Companies' respective cost of debt as previously stipulated by the Companies and the Public Staff in each Company's Second Partial Stipulation with the Public Staff, adjusted as appropriate to reflect the deductibility of interest expense, (ii) a cost of equity 150 basis points below the 9.6% stipulated to in the Second Partial Stipulation, and (iii) a 48% debt and 52% equity capital structure.

c. Reduce the amount of CCR Costs incurred by DEC from February 1, 2020 through January 31, 2030 and by DEP from March 1, 2020 through February 28, 2030 ("Future CCR Costs"), along with associated Deferral Period Financing Costs, by \$108 million (DEC) and \$162 million (DEP), but permit recovery of the remaining CCR Costs, subject to determination by the Commission that such costs were reasonably and prudently incurred, and permit recovery of applicable Deferral Period and Amortization Period Financing Costs, with a return again calculated using a reduced cost of equity, as described in more detail in the Settlement.

In sum, recovery of CCR Costs and associated Financing Costs agreed to be forgone by the Companies amounts to in excess of \$900 million (combined DEC and DEP), on a present value basis, over the period from January 1, 2015 through January 31, 2030 (DEC) and February 28, 2030 (DEP).

7. The CCR Settlement Agreement also contains waivers to assert certain challenges to CCR Costs and Financing Costs incurred by DEC through January 31,

2030, or by DEP through February 28, 2030, and contains reservations with respect to challenges to such costs, all as more fully described in the Agreement.

8. In addition, the CCR Settlement Agreement describes the Companies' settlement with the North Carolina Department of Environmental Quality ("DEQ Settlement") and, for purposes of CCR Cost recovery in Commission proceedings, and any appeals therefrom, reflects the settling parties' agreement that coal ash basin closure as required by the DEQ Settlement and the closure plans and corrective action plans approved by DEQ (as may be amended by DEQ) are reasonable, prudent, in the public interest, and consistent with law.

9. Finally, the CCR Settlement Agreement memorializes a sharing arrangement between the Companies and their Customers of any proceeds recovered by the Companies in connection with litigation with insurance carriers related to CCR Costs.

10. The CCR Settlement Agreement is an agreement of fewer than all parties to the 2019 NC Rate Cases. Accordingly, its acceptance by the Commission is governed by the standards set out by the North Carolina Supreme Court in *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, Inc.*, 348 N.C. 452 (1998) ("*CUCA I*"), and *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, Inc.*, 351 N.C. 223 (2000) ("*CUCA II*"). In *CUCA I*, the Supreme Court held that:

[A] stipulation entered into by less than all of the parties as to any facts or issues in a contested case proceeding under Chapter 62 should be accorded full consideration and weighed by the Commission with all other evidence presented by any of the parties in the proceeding. The Commission must consider the nonunanimous stipulation along with all the evidence presented and any other facts the Commission finds relevant to the fair and just determination of the proceeding. The Commission may even adopt the recommendations or provisions of the nonunanimous stipulation as long as the Commission sets forth its reasoning and makes "its own independent conclusion" supported by substantial evidence on the

record that the proposal is just and reasonable to all parties in light of all the evidence presented.

348 N.C. at 466. However, as the Court made clear in *CUCA II*, the fact that fewer than all of the parties have adopted a settlement does not permit the Court to subject the Commission's order adopting the provisions of a nonunanimous stipulation to a "heightened standard" of review. 351 N.C. at 231. Rather, the Court said that Commission approval of the provisions of a nonunanimous stipulation "requires only that the Commission ma[k]e an independent determination supported by substantial evidence on the record [and] ... satisf[y] the requirements of chapter 62 by independently considering and analyzing all the evidence and any other facts relevant to a determination that the proposal is just and reasonable to all parties." *Id.* at 231-32.

11. In order to consider the CCR Settlement Agreement in connection with its decisions in the 2019 NC Rate Cases, the Joint Movants propose that the Commission first re-open the records in those cases and admit the CCR Settlement Agreement into evidence. Because the Settlement comprehensively resolves coal ash cost recovery issues in those cases, it is a key piece of evidence that the Commission should consider, along with all other available evidence, so as to fulfill its duties under *CUCA I* and *CUCA II*. Accordingly, upon re-opening the records, the Joint Movants request that the Commission admit the CCR Settlement Agreement into evidence in the 2019 NC Rate Cases, and, for the same reason, allow the Settlement Supporting Testimony to be admitted into evidence in those cases as well.

12. Further, as shown in this Joint Motion, the CCR Settlement Agreement resolves on a comprehensive basis multiple issues related to recovery of CCR Costs that are present in each of the NC Rate Cases. Indeed, there is substantial overlap in the



evidence introduced in all four cases.<sup>3</sup> For this reason, hearing and determining issues related to the CCR Settlement Agreement, and potential approval and acceptance of the Agreement, on a consolidated basis will ease the administrative burden upon the Commission and all parties by eliminating duplicative processes, briefs, and proposed orders. Consolidation is therefore in the public interest and should be ordered.

13. The Settlement itself is in the public interest, for the reasons set forth in this Joint Motion and in the Settlement Supporting Testimony.

14. The CCR Settlement Agreement (see Section III.H) notes that in recognition of the timing constraints associated with DEC's planned deployment of Customer Connect in early April 2021, the Settling Parties agreed to use their best efforts to support the implementation of DEC's new rates by no later than April 1, 2021. Section III.H also provides that if DEC is required to refund to customers any amount collected pursuant to temporary rates, the Settling Parties would not oppose a delay in the issuance of refunds until after DEC's deployment of Customer Connect is completed, subject to the condition that any refunds continue to accrue interest as ordered by the Commission. Since execution of the CCR Settlement Agreement, however, DEC has determined that even if the Commission were to issue an order on an expedited basis by mid-February, due to Information technology constraints with the Customer Connect deployment, DEC would

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<sup>3</sup> On January 11, 2021 Joint Movants filed in the 2017 NC Rate Cases (along with Carolina Industrial Group for Fair Utility Rates II ("CIGFUR II") and Carolina Industrial Group for Fair Utility Rates III ("CIGFUR III")) a Joint Submission Regarding Procedure on Remand ("Joint Submission") which also pointed out the similarity and overlapping quality of the evidence in those cases as well as the 2019 NC Rate Cases, and advocated that the issues on remand be dealt with by the Commission on a consolidated basis. The Joint Movants, CIGFUR II, and CIGFUR III are submitting contemporaneously with this Joint Motion modified comments regarding remand procedure so as to take into account the CCR Settlement Agreement and the need to permit introduction of the CCR Settlement Agreement, along with supporting testimony, into evidence in the 2017 NC Rate Cases for further consideration upon remand.

not be able to implement new rates or any refund as may be ordered by the Commission until June 2021, when Customer Connect has been fully deployed and testing completed.

15. Nevertheless, the fact remains that due to unforeseen delays in the timing of the Commission's consideration of the 2019 NC Rate Cases, primarily due to the COVID-19 pandemic, and also more recently due to the timing of the CCR Settlement, the applications filed by DEC and DEP in the 2019 NC Rate Cases have now been pending for approximately 16 months and 15 months, respectively. In addition, the timing constraints resulting from DEC's implementation of Customer Connect apply only to DEC – DEP is not similarly constrained and will be prepared to implement new rates when approved by the Commission.<sup>4</sup> Joint Movants therefore request that the Commission set a reasonably expeditious schedule with respect to its consideration of the CCR Settlement Agreement, and the Companies respectfully request that the Commission issue orders in the 2019 NC Rate Cases as soon as is reasonably possible.

16. Joint Movants have consulted with all other parties to these dockets concerning this Joint Motion and are authorized to represent as follows:

The following parties do not object to the CCR Settlement Agreement:

- Intervenors in both 2019 NC Rate Cases: Vote Solar, North Carolina Sustainable Energy Association, North Carolina League of Municipalities, The Commercial Group, Carolina Utility Customers Association, Inc., North

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<sup>4</sup> DEP has also filed today with the Commission in Docket No. E-2, Sub 1219, a Motion for an Order Accepting the Company's Notice of its Second Extension of its Waiver of its Right to Implement its Original Proposed Rates per N.C.G.S. § 62-134(b), whereby DEP proposes to extend its waiver to implement its original proposed rates through April 1, 2021, to allow the Commission additional flexibility and time to consider the CCR Settlement Agreement and Settlement Supporting Testimony, in issuing a written order detailing its findings of facts and conclusions of law in the 2019 DEP Rate Case.

- Carolina Justice Center, North Carolina Housing Coalition, Natural Resources Defense Council, Southern Alliance for Clean Energy, and Harris Teeter LLC;
- Intervenors in the 2019 NC DEP Rate Case only: CIGFUR II, Hornwood, United States Department of Defense and Federal Executive Agencies; and
  - Intervenors in the 2019 NC DEC Rate Case only: CIGFUR III, Center for Biological Diversity, and Appalachian Voices.

The following parties take no position with respect to the CCR Settlement Agreement:

- Intervenors in both 2019 NC Rate Cases: NC WARN, the North Carolina Clean Energy Business Alliance; and
- Intervenor in the 2019 NC DEC Rate Case only: Tech Customers.

Finally, Fayetteville Public Works Commission, an intervenor in the 2019 NC DEP Rate Case, supports the Settlement.

### **CONCLUSION**

For the foregoing reasons, the Joint Movants respectfully request that the Commission reopen the record in the 2019 NC Rate Cases and admit into evidence in those cases the CCR Settlement Agreement and Settlement Supporting Testimony for the Commission's consideration, that the Commission address the CCR Settlement Agreement on a consolidated basis in all four NC Rate Cases, that the CCR Settlement Agreement be approved on a reasonably expedited basis, and for such other and further relief as the Commission determines is just and appropriate.

Respectfully submitted this 29<sup>th</sup> day of January, 2021.

#### **PUBLIC STAFF**

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Executive Director

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## **SIERRA CLUB**

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**CERTIFICATE OF SERVICE**

**DOCKET NO. E-7, SUB 1213**  
**DOCKET NO. E-7, SUB 1214**  
**DOCKET NO. E-7, SUB 1187**  
**DOCKET NO. E-2, SUB 1219**  
**DOCKET NO. E-2, SUB 1193**

I hereby certify that a copy of the foregoing **JOINT MOTION TO REOPEN RECORD, CONSOLIDATE CONSIDERATION OF CCR SETTLEMENT AGREEMENT, AND FOR APPROVAL OF CCR SETTLEMENT AGREEMENT** was served electronically or by depositing a copy in United States Mail, first class postage prepaid, properly addressed to the parties of record.

This the 29<sup>th</sup> day of January 2021.

/s/ Camal O. Robinson  
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