No. 477A20

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA ex rel. UTILITIES COMMISSION, Appellee, v. VIRGINIA ELECTRIC AND POWER COMPANY D/B/A DOMINION ENERGY NORTH CAROLINA, Appellant, ATTORNEY GENERAL JOSHUA H. STEIN, Cross-Appellant.	)	From the North Carolina Utilities Commission Docket No. E-22, Sub 562

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BRIEF OF APPELLANT VIRGINIA ELECTRIC AND POWER COMPANY D/B/A DOMINION ENERGY NORTH CAROLINA

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BRIEF OF APPELLANT VIRGINIA ELECTRIC AND POWER COMPANY D/B/A DOMINION ENERGY NORTH CAROLINA

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ISSUES PRESENTED

I. DID THE NORTH CAROLINA UTILITIES COMMISSION COMMIT REVERSIBLE ERROR IN DETERMINING THAT THE COMPANY CANNOT EARN A RETURN ON THE UNAMORTIZED BALANCE OF ITS COAL COMBUSTION RESIDUALS COSTS OVER THE AMORTIZATION PERIOD?

II. DID THE NORTH CAROLINA UTILITIES COMMISSION COMMIT REVERSIBLE ERROR IN DETERMINING THAT THE COMPANY MUST AMORTIZE RECOVERY OF COAL COMBUSTION RESIDUALS COSTS OVER TEN YEARS?

INTRODUCTION

"*Of course, the Commission is mindful of the need for regulatory certainty and endeavors to achieve regulatory certainty through compliance with and application of the provisions of the [Public Utilities] Act to the facts in evidence.*"
- North Carolina Utilities Commission (R p 288).

In this general rate case, the North Carolina Utilities Commission (the "Commission") breached the regulatory compact with Dominion Energy North Carolina ("DENC" or the "Company") by disallowing prudent and reasonable costs in direct contradiction to its prior decisions. The regulatory compact, enshrined in North Carolina law, is built on a foundation of trust between a public utility and the State. A public utility must provide adequate, reliable and reasonably priced service to all customers; in return, the utility is entitled to recover its prudent and reasonable costs of providing that electric service and earn a fair return on its investment. When followed, the compact ensures regulatory stability and certainty.[1]

From 1 July 2016 through 30 June 2019, DENC incurred remediation costs to comply with new environmental laws that regulate the storage and disposal of coal combustion residuals, or coal ash.[2] During this period, the Company incurred coal ash costs amounting to $21.8 million on a North Carolina retail jurisdictional basis. DENC's investors are entitled by law to recover these prudently incurred costs in rates from its North Carolina customers. DENC's coal ash costs were not driven by market forces; these costs were mandated by governmental regulations establishing

[1] Commissioners are appointees of the Governor, confirmed by the General Assembly, and serve six year terms. N.C.G.S. § 62-10.

[2] The term "coal ash" is used throughout the remainder of this brief to refer to coal combustion residuals, which are the byproducts resulting from the combustion of coal in electric generating facilities.

environmental requirements with which DENC must, by law, comply. Incurring these costs was not optional or discretionary. Accordingly, in its final order, the Commission found that DENC's coal ash costs were indeed prudently incurred and recoverable from ratepayers.

Yet, despite finding that these costs were prudently incurred, the Commission chipped away at the Company's cost recovery so that it will only be allowed to recover a fraction of their prudently incurred costs. First, it determined that DENC's investors should not be allowed to earn a return on their coal ash costs. Second, the Commission amortized DENC's recovery of its costs over a ten-year period, in contrast to the five-year period that has been the standard for coal ash rate case orders. As a result of the Commission's accounting treatment of DENC's recoverable costs, the Company will be deprived recovery of 26 percent of its investor-supplied and prudently-incurred coal ash costs. The Commission's decision to disallow DENC's prudently incurred costs, including the cost of equity capital, violates the Commission's mandate to fix "just and reasonable rates," is contrary to this Court's and the Commission's precedent, and is unconstitutional. More fundamentally, though, the Commission's decision has eroded the trust[3] and certainty that are the hallmarks of the regulatory compact. DENC appeals to this Court to reaffirm the

[3] "[O]penness and trust between the Commission" and regulated utilities underpins "the regulatory compact and continued public confidence in the integrity of utility regulation" and allows a public utility to "focus on its mission to provide affordable, reliable electric service to North Carolina consumers." Order Approving Settlement Agreement and Closing Investigation, *In the Matter of Investigation Regarding the Approval and Closing of the Business Combination of Duke Energy Corp. and Progress Energy, Inc.*, Docket No. E-7, Sub 1017 (N.C.U.C. Dec. 12, 2012).

regulatory compact and restore confidence in the integrity of utility regulation in this State.

STATEMENT OF THE CASE[4]

Virginia Electric and Power Company, d/b/a DENC filed an application with the Commission for a general rate increase on 29 March 2019, pursuant to N.C.G.S. §§ 62-133 and 62-134 and Commission Rule R1-17. (R p 83). On 23 January 2020 the Commission issued a Notice of Decision. (R pp 72-80). On 24 February 2020, the Commission issued its Order Accepting Public Staff Stipulation in Part, Accepting CIGFUR Stipulation, Deciding Contested Issues, and Granting Partial Rate Increase. (R pp 81-238).

On 24 April 2020, DENC filed a Motion for Reconsideration and Clarification. (R pp 265-80). On 28 July 2020, the Commission issued its Order Deciding Motions for Reconsideration and Clarification, and Requiring Implementation of New Rates ("Reconsideration Order"). (R pp 281-92).

On 29 July 2020, DENC timely filed its Notice of Appeal and Exceptions. (R pp 294-304). On 1 September 2020 DENC filed a Motion for Extension of Time to Serve the Proposed Record on Appeal. (R pp 319-22). The Commission granted this motion on 2 September 2020. (R pp 323-24). On 4 September 2020, the AGO timely filed its Notice of Cross Appeal. (R pp 325-30). The AGO filed its Motion to Dismiss Cross-Appeal on 14 January 2021, which motion was allowed by this Court on 15 January 2021. (Dkt. No. 6).

[4] A complete recitation of the procedural history is available in the State of Organization of North Carolina Utilities Commission section of the Record on Appeal. (R pp 1-6).

The record on appeal was filed in the Supreme Court on 16 November 2020 and the Exhibit Record under N.C. R. App. P. 9(d) was filed on 17 November 2020. (Dkt. Nos. 1-3). The appeals were docketed on 16 November 2020. DENC filed its Motion for Extension of Time to File Brief on 2 December 2020, which motion was allowed by the Court on 7 December 2020. (Dkt. No. 4).

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The Commission's 24 February 2020 order (the "Order") constitutes a final order of the Commission in a general rate case. Appeal to the North Carolina Supreme Court is proper pursuant to N.C.G.S. §§ 7A-29(b) and 62-90 and N.C. R. App. P. 18.

STATEMENT OF THE FACTS

I. BACKGROUND

DENC applied for a rate increase 2019 because its rates were insufficient to meet the Company's revenue requirements. (R p 166). DENC incurs significant costs to construct and operate its power plants, as well as the costs to comply with environmental regulations. (Doc. Ex. 6096). This appeal concerns costs incurred to comply with federal environmental regulations at DENC's coal-fired plants located in Virginia and West Virginia. (R pp 170-73). [5]

[5] DENC's Virginia plants are Bremo Power Station ("Bremo"), Chesapeake Power Station ("Chesapeake"), Chesterfield Power Station ("Chesterfield"), Clover Power Station ("Clover"), Possum Point Power Station ("Possum Point"), Virginia City Hybrid Energy Center ("Virginia City"), and Yorktown Power Station ("Yorktown"); DENC's West Virginia is Mount Storm Power Station ("Mt. Storm"). (R pp 169-73).

A. DENC's Coal Plants

DENC's customers have benefitted from coal-fired generation for nearly a century. (R pp 170-73). Like other public utilities around the country, DENC has burned coal to generate cost-effective, reliable electricity. (R p 167); *see* N.C.G.S. § 62-2(a)(3a) (2019) (It is the policy of the State "to promote adequate, reliable and economical utility service to all of the citizens and residents of the State.").

In addition to electricity, every coal plant – whether built in 1931 (Bremo) or 2012 (Virginia City) – generates an unavoidable byproduct: coal ash, or coal combustion residuals ("CCR"). (R p 167). In that sense, managing coal ash is as integral to electricity generation as the coal plants themselves. A single coal plant may generate millions of tons of coal ash over its operational life. Managing such large volumes of coal ash in a lawful and efficient manner, as DENC has done, is not a trivial undertaking. It has required vast expanses of land and infrastructure resources to transport, store, and dispose of the coal ash. (R pp 167-8).

The means by which utilities have historically managed coal ash have varied and evolved over time, depending on the coal plant's location, land availability, beneficial use opportunities, and applicable state and federal environmental regulations. The evolution of coal ash management methods and regulations was discussed in some depth by this Court in *State ex rel. Utils. Comm'n v. Stein*, 851 S.E.2d 237, 240-42 (N.C. 2020).

While *Stein* involved Duke Energy's coal plants in North Carolina and South Carolina, [6] the ash storage methods and practices described are applicable to DENC's coal plants and other coal-burning utilities in the Southeast and Mid-Atlantic regions.

B. EPA Promulgates New Federal Standards for CCR Disposal in 2015.

On 17 April 2015, the EPA promulgated the Hazardous and Solid Waste Management System—Disposal of Coal Combustion Residuals from Electric Utilities (CCR Rule), *see* 80 Fed. Reg. 21301 (April 17, 2015). The CCR Rule requires DENC to close its coal ash ponds and landfills at its coal plants in Virginia and West Virginia. (R p 167). Under the CCR Rule, DENC had the option to either close its ash ponds (1) in place, by capping them with an impervious cover, or (2) by excavating the ash and placing it in a permitted landfill. (R pp 167-68). The Company's original closure plans developed in response to the 2010 draft CCR Rule and final CCR Rule called for its ash ponds at Bremo, Chesapeake, Chesterfield, and Possum Point to be closed in place. (R p 168). However, Virginia passed legislation in 2019 requiring that DENC excavate its coal ash ponds. *See* 2019 Virginia Laws Ch. 651 (S.B. 1355). Virginia's decision to require excavation of coal ash ponds in the Commonwealth is consistent with similar requirements imposed by the Coal Ash Management Act ("CAMA") in North Carolina and by other states, including South Carolina, Georgia, and Alabama. (R p 168). Importantly, the costs at issue in this case were not affected by S.B. 1355, as no costs to excavate DENC's basins were incurred between 1 July

[6] "Duke Energy" as used throughout this brief refers to Duke Energy Progress, LLC and Duke Energy Carolinas, LLC, unless otherwise noted.

2016 and 30 June 2019. (*Id.*) No party to this case challenged or even expressed an opinion about the reasonableness or prudence of DENC's costs. (R p 205).

II. PRIOR COAL ASH RATE CASES

Following the EPA's promulgation of the CCR Rule and the later passage of CAMA, which does not apply to DENC's coal plants, DENC and Duke Energy filed general rate cases in 2016 and 2017, respectively, seeking recovery of their costs to comply with the new coal ash disposal laws and regulations. In each of those cases, the Commission (1) found that these coal ash costs were prudently incurred; (2) allowed the utilities to earn a return on the unamortized balance of their coal ash costs, and (3) amortized coal ash costs over a period of five years.

A. DENC's 2016 Rate Case

In 2016, DENC applied to the Commission for a rate increase in order to recover, among other things, its coal ash costs incurred through 30 June 2016. *In re Application of Va. Elec. & Power Co.*, *Order Approving Rate Increase and Cost Deferrals and Revising PJM Regulatory Conditions*, Docket No. E-22, Sub 532, at 3 (N.C.U.C. Dec. 22, 2016) ("2016 DENC Rate Order").[7] DENC proposed that its coal ash costs be amortized over a three-year period and that it be allowed to earn a return on the unamortized balance. *Id.* at 52-59. The Public Staff proposed that the amortization period be extended to ten years. *Id.* at 53-54. Ultimately, DENC and the Public Staff agreed to a stipulation, whereby DENC's coal ash costs would be amortized over five years, and the Company would be allowed to earn a return on the

[7] The Commission took judicial notice of the 2016 DENC Rate Order in this docket. (T vol. 4 pp 350-51).

unamortized balance. *Id.* at 57-58. The Attorney General's Office ("AGO") challenged the stipulation, arguing against DENC's ability to recover its coal ash costs from customers and to earn a return on those costs. *Id.* at 59. Thus, both the proper amortization period for DENC's coal ash costs, as well as the Company's ability to earn a return on the unamortized balance, became contested issues before the Commission.

The Commission disagreed with the AGO and approved the proposed five-year amortization period and DENC's ability to earn a return on the unamortized balance. *Id.* at 62. The Commission concluded that a five-year amortization period and allowing DENC to earn a return on the unamortized balance was fair to both the Company and ratepayers. *Id.* at 62. No party appealed the Commission's 2016 DENC Rate Order.

B. Duke Energy's Rate Cases

On 1 June 2017 and 25 August 2017, Duke Energy Progress ("DEP") and Duke Energy Carolinas ("DEC") (collectively, "Duke Energy") filed general rate case applications to increase their retail rates. *Stein*, 851 S.E.2d at 244-45.[8] A central issue in both cases was whether and to what extent Duke Energy could recover coal ash costs that were incurred to comply with the CCR Rule and CAMA. Relying on its

[8] The Commission's Order acknowledges the prior Duke Energy rate case orders. (R p 89) (citing Order Accepting Stipulations, Deciding Contested Issues and Granting Partial Rate Increase, *Application by Duke Energy Progress, LLC, For Adjustment of Rates and Charges Applicable to Electric Utility Service in North Carolina*, No. E-2, Sub 1142 (N.C.U.C. Feb. 23, 2018) ("2018 DEP Rate Order"); and Order Accepting Stipulation, Deciding Contested Issues, and Requiring Revenue Reduction, *Application of Duke Energy Carolinas, LLC, for Adjustment of Rates and Charges Applicable to Electric Utility Service in North Carolina*, No. E-7, Sub 1146 (N.C.U.C. June 22, 2018) ("2018 DEC Rate Order")).

2016 DENC Rate Order, the Commission allowed Duke Energy to recover its coal ash costs over five years and the ability to earn a return on the unamortized balance. *Id.* at 245-56. The Commission's only deviation from the 2016 DENC Rate Order was the imposition of separate mismanagement penalties to DEP and DEC that were attributable to their guilty pleas to environmental crimes. *Id.*

In concluding that a return and five-year amortization period were "reasonable and appropriate" for Duke Energy's coal ash costs, the Commission relied on the precedent it set forth in DENC's 2016 rate case. By the time of its 2018 DEC Rate Order, the Commission was relying on two layers of precedent to reach its decision:

> No witness argues that the Commission lacks the discretion to follow the precedent it established in the two previous cases, [DENC] and [DEP], where it addressed the issue of amortizing deferred ARO CCR remediation costs over five years and a return on the unamortized balance. No witness argues that the law forbids the Commission to authorize a return on the unamortized balance. The Commission chooses to exercise its discretion and authority under [N.C.G.S.] § 62-133(d) and follow its precedent here – amortize the ARO costs over five years and authorize a return on the unamortized balance.

2018 DEC Rate Order, at 275-76. Parties to Duke Energy's rate cases appealed the Commission's decisions, challenging the Commission's decision to allow Duke Energy to earn a return on the unamortized balance of its coal ash costs. No party appealed the Commission's decision to amortize Duke Energy's coal ash costs over five years.

This Court affirmed the Commission's decision to allow a return. *Stein*, 851 S.E.2d at 273. However, this Court held that the Commission erred by rejecting the Public Staff "equitable sharing" proposal without making sufficient findings and conclusions and remanded the case to resolve that single issue. *Id.* at 273-77. The "equitable sharing" proposal called for a predetermined allocation of costs between

shareholders and ratepayers (50/50 for DEP and 51/49 for DEC) based on Duke Energy's purported culpability for alleged environmental violations.

III. DENC'S 2019 RATE CASE

After issuing the 2016 DENC Rate Order, and then conferring it precedential value in Duke Energy's rate cases, the Commission issued the Order on 24 February 2020.

As it did in the 2016 DENC Rate Order and the 2017 Duke Energy rate cases, the Commission determined that DENC's coal ash costs were prudently incurred. (R p 205), and rejected the "equitable sharing" proposal put forth by the Public Staff. (R p 214). Importantly – and unlike its treatment of Duke Energy – the Commission did not find facts to support any mismanagement penalty against DENC. Yet, the Commission's ratemaking treatment here denies DENC the ability to fully recover its coal ash costs. The Commission chose to amortize DENC's prudently incurred costs over ten years – as opposed to five – and denied DENC's ability to earn a return on the unamortized balance. (R pp 210-15). The effect of this ratemaking treatment is a disallowance, by a different name, of 26 percent of DENC's prudently incurred coal ash costs. (R p 275). The Commission failed to provide any reasoned basis for treating DENC's coal ash costs differently in 2020 than it had in 2016, or differently than Duke Energy's coal ash costs in 2018. DENC promptly noticed its appeal of the Commission's arbitrary and unconstitutional Order. (R p 294). No party appealed the Commission's rejection of its "equitable sharing" proposal in this case, so that issue is not before this Court.

STANDARD OF REVIEW

The Commission must "fix such rate of return on the cost of property . . . as will enable the public utility by sound management to produce a fair return for its shareholders[.]" N.C.G.S. § 62-133(b)(4). In an appeal taken from an order entered by the Commission, "the rates fixed or any . . . order made by the Commission under the provisions of [Chapter 62] shall be *prima facie* just and reasonable." N.C.G.S. § 62-94(e). This Court is charged with "decid[ing] all relevant questions of law, interpret[ing] constitutional and statutory provisions, and determin[ing] the meaning and applicability of the terms of any Commission action." N.C.G.S. § 62-94(b). The Court "may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are: (1) [i]n violation of constitutional provisions," "(2) [i]n excess of statutory authority or jurisdiction of the Commission," "(3) [m]ade upon unlawful proceedings," "(4) [a]ffected by other errors of law," "(5) [u]nsupported by competent, material and substantial evidence in view of the entire record as submitted, or (6) [a]rbitrary or capricious," *id.*, with "due account [to] be taken of the rule of prejudicial error." N.C.G.S. § 62-94(c).

The Commission is responsible for determining the weight and credibility to be afforded to the testimony of any witness, including any expert opinion testimony, *State ex rel. Utils. Comm'n v. Edmisten*, 291 N.C. 575, 584, 232 S.E.2d 177, 182 (1977), with the Commission's decision being entitled to great deference. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48, 103 S. Ct.

2856, 2869, 771 L. Ed. 2d 443, 461 (1983) (stating that "[e]xpert discretion is the lifeblood of the administrative process"). "Assuming adequate findings of fact, supported by competent, substantial evidence," "[t]he Commission's determination, reached pursuant to the mandate of [N.C.G.S. §] 62-133 and to the statutory procedural requirements, may not be reversed" even if "we would have reached a different conclusion upon the evidence." *State ex rel. Utils. Comm'n v. Morgan*, 277 N.C. 255, 266–67, 177 S.E.2d 405, 412–13 (1970). The Commission's conclusions of law, on the other hand, are reviewed *de novo*. *State ex rel. Utils. Comm'n v. N.C. Waste Awareness & Reduction Network*, 255 N.C. App. 613, 615, 805 S.E.2d 712, 714 (2017), *aff'd per curiam*, 371 N.C. 109, 812 S.E.2d 804 (2018).

ARGUMENT

I. THE COMMISSION COMMITTED REVERSIBLE ERROR BY ORDERING DENC TO AMORTIZE COAL ASH COSTS OVER TEN YEARS AND BY DENYING A RETURN ON THE UNAMORTIZED BALANCE.

DENC's coal ash costs "do not readily fit within the confines of the traditional ratemaking principles enunciated in N.C.G.S. § 62-133." *Stein*, 851 S.E.2d at 270 n. 19. Therefore, this Court has recently held that, where "unusual, extraordinary, or complex circumstances" exist, the Commission may consider "other facts" to fix rates that are "just and reasonable." *Id.* at 272-73. In doing so, the Commission must make "sufficient findings of fact and conclusions of law supported by substantial evidence in light of the whole record explaining why a divergence from the usual ratemaking standards would be appropriate and why the approach that the Commission has adopted would be just and reasonable to both utilities and their customers." *Id.*

But the Commission's discretion to consider "other facts" is not unbridled. *Id.* at 288-89 (Newby, J., concurring in part, dissenting in part). The Commission must set forth the factors considered "so that the reviewing court may see what these elements are and determine the authority of the Commission to consider them . . . The statute does not contemplate that the Commission can 'roam at large in an unfenced field' in the selection of such 'other facts.'" *Gen. Tel. Co. of Se.*, 281 N.C. 318, 340, 189 S.E.2d 705, 719 (1972) (quoting *State ex rel. Utils. Comm'n v. Pub. Serv. Co.*, 257 N.C. 233, 237, 125 S.E.2d 457, 460 (1962)). Nor can the Commission's reliance on "other facts" be arbitrary and capricious. N.C.G.S. § 62-94(c). Here, as detailed below, the Commission failed to set forth *any* facts to support its break with its own precedent concerning coal ash costs when it lengthened the amortization period to ten years and denied DENC a return on its prudently incurred costs. As such, the Commission's Order exacts an arbitrary and capricious rate treatment on DENC that amounts to a violation of the North Carolina and United States Constitutions.

A. North Carolina Law Allows A Five-Year Amortization Period And A Return On The Unamortized Balance Of Coal Ash Costs.

Following the promulgation of the CCR Rule and similar state regulations, coal ash remediation costs are now a distinct category of costs that electric utilities must now incur in order to do business in the United States. While the costs themselves may differ from utility to utility depending on the selected compliance solutions, the costs are nevertheless incurred for the same purpose. The Commission recognized the similar nature of these costs, when it found that Duke Energy's coal ash costs

"had been incurred for the 'identical purpose'" as DENC's coal ash costs in 2016. *Stein*, 851 S.E.2d at 248. The coal ash costs at issue in this case are the same. As the Commission found in this case, DENC's incurred its coal ash costs "to comply with federal and state environmental regulations associated with managing CCRs and converting or closing waste ash management facilities." (R p 94). Therefore, DENC coal ash costs were incurred for the "identical purpose" as the costs at issue in Duke Energy's rate cases, as well as DENC's 2016 rate case.

As for the ratemaking treatment that can be afforded to this category of utility costs, there is no dispute that the Commission has the authority and discretion to defer DENC's coal ash costs, amortize them in rates over five years, and allow DENC to earn a return on the unamortized balance. This Court put that issue to rest in *Stein*. *Id.* at 270 ("[W]e have been unable to find anything that precludes the Commission from deferring certain extraordinary costs, amortizing them to rates, and allowing the utility, in the exercise of the Commission's discretion, to earn a return upon the unamortized balance in reliance upon N.C.G.S. § 62-133(d) in circumstances like those revealed by the present record."). This Court held that the Commission "did not err . . . by allowing the amortization of deferred coal ash costs to rates and to allow the [Duke Energy] utilities to earn a return on the unamortized balance." *Id.* at *32. The Court then held that the factors articulated by the Commission in support of a return for the Duke Energy utilities were supported by adequate evidence in the record:

> The Commission's findings, which have adequate evidentiary support, establish that the enactment of CAMA forced the utilities to confront an

> "extraordinary and unprecedented" issue involving the potential expenditure of billions of dollars in order to address a significant environmental problem. In light of the "magnitude, scope, duration and complexity" of the anticipated costs, the Commission determined that deferral of the necessary compliance costs would be appropriate and that these costs, including a return on the unamortized balance, should be amortized to rates over a period that the Commission deemed to be reasonable.

Id. The question before this Court is whether the Commission erred by exercising its discretion differently and to the detriment of DENC in this case *after* exercising it to the benefit of Duke Energy and previously to DENC when faced with similar facts.

B. The Commission's Decision Was Arbitrary And Capricious, And Not Supported By Competent Or Substantial Evidence In The Record.

In DENC's 2016 rate case, the Commission determined that a five-year amortization period and return on the unamortized balance was "just and reasonable." 2016 DENC Rate Order, at 10. The Commission then twice followed its 2016 precedent when it determined that a five-year amortization period and return were also "just and reasonable" as applied to Duke Energy's coal ash costs. *See* 2018 DEP Rate Order, at 188; 2018 DEC Rate Order, at 275-76. In this case, considering similar facts to those that were present in DENC's 2016 rate case and in Duke Energy's 2018 rate cases, this Commission disregarded its precedent and reached a conflicting decision.

This Court must restrain the Commission's arbitrary use of discretion if the regulatory compact is to have any meaning. "It is well-settled that state agencies must employ 'adequate guiding standards' which ensure that the agency's decision-making process is not arbitrary[.]" *MW Clearing & Grading, Inc. v. N. Carolina Dep't*

of Env't & Nat. Res., Div. of Air Quality, 171 N.C. App. 170, 183, 614 S.E.2d 568, 577 (2005) (Jackson, J., dissenting) (citation omitted), *rev'd in part*, 360 N.C. 392, 628 S.E.2d 379 (2006) (adopting Justice Jackson's dissenting opinion). "Decisions are arbitrary and capricious when, among other things, they indicate a lack of fair and careful consideration or fail to display a reasoned judgment." *State ex rel. Utils. Comm'n v. Thornburg*, 314 N.C. 509, 515, 334 S.E.2d 772, 776 (1985) ("*Thornburg I*"). Decisions lacking any "determining principle" are also "arbitrary and capricious." *Tate Terrace Realty Inv'rs, Inc. v. Currituck Cty.*, 127 N.C. App. 212, 223, 488 S.E.2d 845, 851 (1997), *disc. rev. denied*, 347 N.C. 409, 496 S.E.2d 394 (1997). Where the Commission has decided cases differently under very similar facts, as it has done here, the Commission may be charged with making an arbitrary and capricious decision. *See Stein*, 851 S.E.2d at 289 fn 1 (Newby, J., concurring in part, dissenting in part). Such a charge is appropriate here where the Commission failed to articulate any reasons for diverging from its precedent.

i. <u>The Commission's ratemaking treatment of DENC's coal ash costs conflicts with its prior ratemaking treatment of DENC's coal ash costs.</u>

The Commission's decision in DENC's 2016 rate case was based on the Commission's "own independent conclusion supported by substantial evidence in the record." *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, Inc.*, 348 N.C. 452, 463, 500 S.E.2d 693, 701-2 (1998) ("*CUCA*"). As discussed further below, while the decision was not automatically binding on future Commissions, the Commission explicitly chose to give its ratemaking treatment of coal ash costs in 2016 DENC rate case decision precedential value in its Duke Energy decisions. The Commission

provided no reasoned basis for departing from its 2016 DENC Rate Case Order, which involved the same coal plants and same types of costs that are at issue in this case. This alone warrants reversal of the Commission's Order.

1. The Commission departed from its 2016 determination that a five-year amortization period was a "benefit to the ratepayer."

What was a "benefit" to DENC's ratepayers in 2016, the Commission has now determined to be unfair to the very same customers. Fair treatment of shareholders and ratepayers was also a primary consideration in the Commission's decision in 2016. In that case, the Commission determined that a five-year amortization period was "beneficial to [DENC]" and "a benefit to ratepayers." 2016 DENC Rate Order, at 62. In this case, the Commission changed course, determining that a ten-year amortization period achieves a "reasonable balancing" of coal ash costs between shareholders and ratepayers. (R pp 214-15). The Commission failed, however, to explain why a five-year amortization period was no longer a benefit to DENC's ratepayers; nor did it explain how a ten-year amortization period was more beneficial to DENC.

No party to the case even recommended a ten-year amortization period. Evidently, the Commission reached back to a 1983 Commission decision about cancelled nuclear plants for its inspiration. (R p 215). In its view, a ten-year amortization period was "consistent with the Commission's historical treatment of major plant cancellations," where "it has consistently used a write-off period of 10 or *fewer* years for all major plant cancellations." *Id.* (emphasis added) (citing *Virginia Elec. & Power Co.*, N.C.U.C. No. E-22, Sub 273 (Dec. 5, 1983)). Yet, the Commission

previously rejected a comparison of coal ash costs to nuclear plant cancellations in its Duke Energy decisions. *See* 2018 DEC Rate Order, at 276 ("this is not a nuclear plant discontinuance case" involving facilities that "were never used to generate electricity[.]"). Setting aside the Commission's new-found reliance on its nuclear cancellation precedent after explicitly rejecting it, the Commission erred by relying on its handling of nuclear discontinuance cases to rubber-stamp its chosen ten-year amortization period.

While it is true that the ten-year amortization period adopted by the Commission meets the outer bounds of the standard it adopted for cancelled nuclear plants, so would the five-year amortization period that has been adopted by the Commission on three separate occasions. *But only* a five-year amortization period would be consistent with the Commission's treatment of coal ash costs *and* nuclear abandonment costs. It was arbitrary and capricious for the Commission to rely on its historical treatment of nuclear cancellation costs in order to enlarge the amortization period, rather than rely on its more recent and applicable precedent involving "identical" coal ash costs.

2. The Commission departed from its 2016 determination that a return on the unamortized balance of DENC's coal ash costs was "just and reasonable."

In order to deny a return on DENC's coal ash costs here, the Commission reached contradictory conclusions based on the same "substantial evidence" that supported a return in 2016. The Order is devoid of any "determining principle" explaining why allowing a return on DENC's 2016 coal ash costs was unreasonable or improper so as to justify denying DENC's ability to return on those same costs

here. Nor could it, in light of this Court's recent decision in *Stein*. *See Stein*, 851 S.E.2d at 273. On the record before it, the Commission's denial of DENC's ability to earn a return was "arbitrary and capricious" and should be reversed.

The Commission's Order recites three purported bases for reducing the Company's recovery by denying a return: (1) the disputed prudency of DENC's historical coal ash activities; (2) the magnitude of the costs at issue; and (3) whether DENC's coal ash costs should be treated as "costs of property used and useful." The Commission considered each of these factors in 2016 when it allowed DENC to earn a return.

In support of the first basis, the Order cites to historical industry and Company documents that the Commission contends "call into question the prudence of DENC's actions and inactions and the risks accepted by DENC management at several of its CCR sites." (R p 212).[9] Based on these "questions" regarding historical actions – and despite an affirmative finding that the actual coal ash costs, themselves, were prudently incurred – the Commission determined that it would be "inequitable" for "ratepayers to bear the entire risk, and the rate impact, associated with DENC's CCR liabilities." (R p 211). Implied in the Commission's reasoning here is that it would have allowed DENC to earn a return on the costs it incurred from 2016 to 2019 if DENC had somehow managed its coal ash differently decades into the past. But *how*

[9] This portion of the Order cites as an example an earlier discussion about a regulatory enforcement action at the Possum Point plant. *See* (R pp 204-5). This example, however, does not support the Commission's reasoning. As the Commission found, "the evidence shows that DENC cooperated fully with Virginia DEQ [Department of Environmental Quality] in responding to the Possum Point Special Orders and ultimately reached a resolution of the groundwater concerns at that plant that was acceptable to Virginia DEQ." (R p 205).

should DENC have managed its coal ash differently so it could have ensured full recovery now? On this question, neither the Commission nor the intervenors could provide an answer. (R p 209 ("On the present record, the Commission has no substantial evidence on which to make such determinations.")). The Commission did, however, find that "there is substantial evidence regarding DENC's compliance with legal requirements for handling and storing CCRs that tends to show that DENC was attentive to the applicable legal standards of the day, as well as evolving standards." (R p 204).

Questions of "prudence" surrounding DENC's and the utility industry's historical ash management activities were first raised in the AGO's brief in the 2016 rate case. The AGO cited EPA's conclusion that "poor construction and management" of unlined ash ponds had caused environmental impacts in the form of groundwater contamination, noted that DENC had been sued for alleged environmental violations at its ash ponds, and asserted that DENC and other utilities knew "for many years that coal ash disposal has the potential to cause damaging pollution if disposal sites are not properly managed." Brief of the AGO, Docket No. E-22, Sub 532 (N.C.U.C. Nov. 16, 2016).[10] The Commission evaluated these theories, but determined that they were not a basis for disallowing DENC's prudently incurred coal ash costs. The Commission concluded that "[DENC], like many electric utilities in the United States,

[10] DENC requests that this Court take judicial notice of the AGO's 2016 brief because it is a public record, that was created by a state agency, and is available in an online, public docket. *See* N.C.G.S. § 8C-1, Rule 201 (2020); *State ex rel. Utils. Comm'n v. S. Bell Tel. & Tel. Co.*, 289 N.C. 286, 287, 221 S.E.2d 322, 323 (1976). The document is available at: https://starw1.ncuc.net/NCUC/ViewFile.aspx?Id=2a125a4d-661e-4084-a64c-dbb1a093c6cf.

has for decades generated electricity by burning coal. During those decades, the widely accepted reasonable and prudent method for handling CCRs has been to place them in coal ash landfills or ponds (repositories)." 2016 DENC Rate Order, at 59. The Commission also determined that "[t]he cost of complying with federal and state CCR remediation requirements was a risk that was unknown to the Company prior to 2015." *Id.* at 62.

In this case, the Commission heard the same theories that were made by the AGO in 2016, as well as by intervenors in Duke Energy's rate cases, yet reached a different result – denying a return on prudently incurred costs – without ever concluding that DENC imprudently managed its coal ash over the operational history of its plants. (R p 209) ("the evidence demonstrates a difference of opinion or dispute as to whether certain [historical] Company actions, omissions or decisions were prudent…"). A utility is entitled to the presumption that its actions are prudent, unless the prudency of its actions is challenged by substantial evidence. *Stein*, 851 S.E.2d at 261. While the historical prudency of DENC's coal ash management was certainly disputed in this case, no party sufficiently rebutted the presumption of prudency, and accordingly the Commission made no finding of imprudence. DENC was entitled to a presumption that its historical coal ash activities were prudent, as it was in 2016 when the presumption of prudency supported a return.

Indeed, rather than render a concrete decision, supported by findings of fact and conclusions of law with respect to historical prudency, the Commission instead commented that the record "raises questions" about DENC's prudence. But such

commentary cannot be the foundation of its decision, as every decision must be supported by sufficient findings of fact supported by substantial evidence in the record. *CUCA*, 348 N.C. at 460, 500 S.E.2d at 699. The Commission's authority to consider "other facts" is not a grant to "roam at large in an unfenced field" and "ignore the ordinary ratemaking standards." *Stein*, 851 S.E.2d at 272-73. The Commission then erroneously relied on its inability to resolve the issue of historical prudency as the basis for allocating costs between ratepayers and DENC's shareholders through denial of a return. It was error because the Commission's indecision about DENC's prudency is not a factual finding. Indecision is the absence of facts that can be found. *See CUCA*, 348 N.C. at 471, 500 S.E.2d at 705 (holding that the Commission's findings were "insufficient" where they lacked analysis and where the Commission failed to provide the weighing process by which it determined what it considers to be a "fair allocation of costs between the various customer classes"). It was also error because the Commission, under the guise of considering "other facts," supplanted the prudency framework. Where there is insufficient evidence in the record to support a finding of imprudence, the consequence must be a finding of prudence, even if some evidence may point to a different result. (R p 162) ("Perfection is not required.") As the Public Staff acknowledged, an after-the-fact prudency review of management decisions occurring over half a century is nearly impossible. (R p 216). For good reason – the prudency standard does not permit hindsight bias. While intervenors were at liberty to scour decades-old Company and industry documents, it was inevitable and predictable, given the passage of time and evolving regulatory

standards, that DENC's decades of ash management decisions could not be labeled wholesale as imprudent so as to justify a disallowance of DENC's coal ash costs. That is what makes the Commission's "determination" that DENC is "less-than" prudent but "more-than" imprudent most egregious. The Commission arbitrarily and unlawfully created a separate, lower standard as a backdoor to disallow prudently incurred costs.

Second, the Order observes that DENC's coal ash costs are "extraordinary, large" and "significant," likening them to the cancelled nuclear plant and manufactured natural gas costs. *Id.* However, in DENC's 2016 rate case, the Commission held that the extraordinary nature of these costs *supported* DENC's ability to earn a return. 2016 DENC Rate Order, at 62. ("The Company will have the opportunity to seek cost recovery for this unexpected and extraordinary cost expended in response to the CCR Final Rule which has required [DENC] to store CCRs in a manner different from that in which the CCRs were being stored prior to 2015.") The Commission's Order provided no factual basis for changing its position.

Third, the Commission determined that DENC's coal ash costs should not be treated as "costs of property used and useful," but rather as "deferred operating expenses." (R p 214). The Commission side-stepped entirely a determination of whether DENC's coal ash costs were "used and useful." (R pp 212-3). In DENC's 2016 rate case, the Commission concluded that DENC could earn a return, in part, *because* the nature of the costs made them "used and useful" property. 2016 DENC

Rate Order, at 61-2. Rejecting the AGO's argument in 2016 that DENC's coal ash were not "used and useful," the Commission reasoned:

> [T]he current CCR repositories are and have served their purpose of storing CCRs for many years. In that respect, they have been used and useful for [DENC]'s ratepayers. However, pursuant to the CCR Final Rule, [DENC] must incur expenses to the existing repositories for environmental remediation. As a result, the required solution for the CCR remediation serves the public policy of encouraging and promoting harmony between public utilities, their users and the environment. *See* G.S. 62-2(a)(5)… The result of [DENC]'s efforts should be the expenditure of funds to establish permanent CCR storage repositories… [T]he existing CCR repositories continue to be used and useful for storing CCRs, and will continue to be used and useful until [DENC] moves the CCRs to a permanent repository, or takes the necessary steps to cap and close the existing repository.

2016 DENC Rate Order, at 61-2. The Commission's Order ignores its prior "used and useful" analysis and replaces it with a discussion of DENC's coal ash accounting practices.[11] The evidence showed that DENC accounted for its coal ash costs the same way it had in its 2016 rate case, and the same way that Duke Energy accounted for its coal ash costs. (T vol. 6 p 678-79). For the Commission to rely on the same accounting practices that it approved in 2016 and later approved in Duke Energy's rate cases as the basis for not allowing a return in this case was arbitrary and capricious.

[11] For example, the Commission was not convinced by DENC's assertion that its coal ash costs were "working capital" entitled to a return, because DENC did not account for coal ash costs as "cash working capital." (R p 214). However, "cash working capital" is merely one component of DENC's "working capital" that is accounted for in its rate base. DENC's coal ash costs were accounted for as a regulatory asset and included in "Other Additions" to the rate base. (Doc. Exs. 2211, 2214).

3. The Commission's decision to allow DENC to earn a return on its coal ash costs during the deferral period undermines its decision to deny DENC the ability to earn a return on the unamortized balance of the very same costs.

The Commission's Order allows DENC to earn a return on its coal ash costs during the deferral period, which runs from 1 July 2016 through 30 June 2019. Yet, in the same Order, the Commission denies the Company the ability to earn a return on the unamortized balance of the very same costs during the recovery period. These conflicting determinations further demonstrate the "arbitrary and capricious" nature of the Commission's decision.

Deferral accounting allows a utility to record a regulatory asset in certain circumstances for costs it has incurred for financial reporting purposes. The regulatory asset represents costs that the utility will request for recovery through rates in a future proceeding. Once approved by the regulator, the regulatory asset is amortized on the utility's regulatory books and records over the recovery period. During the recovery period, the unrecovered portion of the costs is referred to as the "unamortized balance." A utility has to "carry" the unrecovered costs – both during the deferral period and recovery period – until the costs are recovered, incurring "carrying costs" along the way in the form of debt and equity financing costs..

The Commission determined that it has the "authority to approve a regulatory asset to defer for future recovery expenses that were incurred in the past and *even to provide for a return* on those deferred expenditures, such as by providing carrying costs." (R p 215) (emphasis added). Relying in part on its 2016 DENC Rate Order, the Commission then allowed DENC to earn a return on its coal ash costs during the

deferral period. *Id.* Attempting to insulate its treatment of DENC's unamortized costs, the Commission stated that its ratemaking treatment of deferred costs was "separate and distinct" from its denial of a return on the unamortized balance of those same costs. *Id.* DENC agrees with the Commission's ratemaking treatment of its deferred coal ash costs. DENC disagrees with the Commission's decision to treat the unamortized balance of these same costs differently.

It is illogical for DENC's coal ash costs to be considered capital costs that can earn a return for purposes of deferral accounting (R p 215), but that those same costs somehow transform into operation and maintenance expenses when they are included in the unamortized balance. (R p 214). But that is the effect of the Commission's Order. Given the similarity between deferred costs and the unamortized balance, the Commission's reasoning rests on a distinction without a difference and is "arbitrary and capricious."

ii. <u>The Commission's Order also conflicts with its prior ratemaking treatment of Duke Energy's coal ash costs.</u>

In 2017, the rate making treatment of coal ash costs was again before the Commission with Duke Energy's cases. The Commission relied on the precedent it established in the 2016 DENC Rate Order by amortizing Duke Energy's coal ash costs over five years with a return on the unamortized balance. The coal ash costs at issue in this case deserved, but did not receive, the same treatment, and the Commission's Order is devoid of any reasonable explanation for its deviation its own recent precedent.

1. The Commission gave no rationale for departing from its determination that a five-year amortization period for Duke Energy's coal ash costs was "appropriate and reasonable."

In Duke Energy's rate cases, like it did in the 2016 DENC Rate Order, the Commission concluded that a five-year amortization period for coal ash costs was "appropriate and reasonable." 2018 DEP Rate Order, at 18; 2018 DEC Rate Order, at 23. In the Duke Energy Progress case, the Commission reasoned that the "five-year period suggested by the Company is identical to the period over which Dominion's already-incurred coal ash basin closure costs were amortized in the 2016 [DENC] Rate Case." 2018 DEP Rate Order, at 188. The Duke Energy Carolinas rate case followed, and the Commission adopted the same reasoning: "[t]he five-year period suggested by the Company is identical to the period over which the Commission approved in the 2018 DEP Rate Case, as well as the period over which [DENC]'s already-incurred coal ash basin closure costs were amortized in the 2016 [DENC] Rate Case (Docket No. E-22, Sub 532)." 2018 DEC Rate Order, at 311. In contrast to this line of precedent, the Commission now prescribes a ten-year amortization period, yet does not explain why its previously adopted five-year amortization period, for the same costs, is no longer appropriate or reasonable.

2. The Commission gave no rationale for departing from its determination that a return on the unamortized balance of Duke Energy's coal ash costs was "just and reasonable."

In 2018, the Commission concluded that "[r]ates that impair the Company's ability to earn its authorized return [on coal ash costs] *are not just and reasonable*." 2018 DEC Rate Order, at 290 (emphasis added). Here, the Commission determined

"that just and reasonable rates are achieved, based on the evidence in the record in this proceeding, *only when* the unamortized balance of CCR Costs are *not allowed to earn a return*." (R p 214) (emphasis added). Despite adopting an approach that directly conflicts with its determinations in its three rate orders regarding coal ash cost recovery, the Commission articulated no basis for departing so drastically from its prior policy. Nor could it based on the record before it.

In *Stein*, this Court discussed the specific findings that supported upholding the Commission's decision to allow a return on Duke Energy's coal ash. Those findings included, (1) the existence of environmental laws and regulations that created an "'extraordinary and unprecedented' issue involving the potential expenditure of billions of dollars in order to address a significant environmental problem," and (2) "the 'magnitude, scope, duration and complexity' of the anticipated costs." *Stein*, 851 S.E.2d at 273. This Court also noted that the Commission's consideration of relevant "other facts" supported its decision to allow a return. *Id.* Those "other facts" included the Commission's decision to follow its own precedent for allowing a return on coal ash costs, which was first established by the 2016 DENC Rate Order. *See* 2018 DEP Rate Order, at 188; 2018 DEC Rate Order, at 275-76. Moreover, this Court in *Stein* affirmed the Commission's authority to allow a return on the unamortized balance of deferred *operating expenses*, which discretion the Commission exercised in Duke Energy's rate cases. *Stein*, 851 S.E.2d at 286.

The Commission here made the same findings that supported a return in Duke Energy decisions, yet it reached the opposite result and denied DENC's ability to earn

a return. DENC incurred its coal ash costs "to comply with federal and state environmental regulations associated with managing CCRs and converting or closing waste ash management facilities at seven of DENC's generation stations." (R p 94). These costs were incurred for the "identical purpose" that Duke Energy incurred its coal ash costs. *Stein*, 851 S.E.2d at 248. These new legal requirements and associated compliance costs were "unprecedented," because previously accepted and lawful means for disposing coal ash were no longer permitted. (R p 204). Like Duke Energy, DENC's coal ash costs "incurred during the Deferral Period were prudently incurred" (R p 94). Like Duke Energy, the Commission determined that DENC's coal ash costs were "extraordinary, large costs" (R p 211) and "significant." (R p 212). Having made the same findings in this case that supported its decision that fixing "just and reasonable" rates required allowing a return on Duke Energy's coal ash costs, the Commission's denial of a return here was "arbitrary and capricious."

iii. Any differences that exist between DENC and Duke Energy warrant more favorable ratemaking treatment for DENC.

The record in this case revealed some differences between DENC and the Duke Energy utilities, but, if anything, those differences break in DENC's favor. Nevertheless, the Commission ignored DENC's more favorable record and treated DENC less favorably than Duke Energy. By so doing, the Commission's decision to amortize DENC's coal ash costs over a longer period and deny a return was arbitrary and *not* "supported by competent, material and substantial evidence in view of the entire record." N.C.G.S. § 62-94(c).

The Commission's only limitation on Duke Energy's coal ash cost recovery was the imposition of a cost of service mismanagement penalty.[12] Following the coal ash spill at Duke Energy's Dan River Plant, Duke Energy pled guilty to environmental crimes in federal court, including criminal negligence for causing the Dan River spill. One of the central issues raised by the parties in Duke Energy's cases was whether Duke Energy's criminal conduct caused the North Carolina General Assembly to enact CAMA, thereby resulting in increases to Duke Energy's coal ash costs. CAMA was enacted before the CCR Rule and required Duke Energy to remediate its coal ash ponds in an accelerated fashion compared to the CCR Rule's requirements. The Commission found that the Duke Energy utilities had mismanaged their coal ash activities:

> While [Duke Energy] presents persuasive evidence that its alleged mismanagement has not been supported and was not the cause of CAMA, this evidence is difficult to reconcile with its admissions and guilty pleas before the federal district court in the criminal proceeding. [Duke Energy] represented that it mismanaged its CCR activities.

2018 DEP Rate Order, at 203; 2018 DEC Rate Order, at 319.

The Commission was clear that its penalty was tied to discrete instances of poor service as reflected in Duke Energy's federal plea agreements:

> [I]rresponsible management of its impoundments over a discrete period of time placed its customers at risk of inadequate service and has resulted in cost increases greater than those necessary to adequately maintain and operate its facilities… No evidence was submitted that [Duke Energy]'s mismanagement was imprudent from the initial date of operation.

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[12] "[B]ut for a management penalty, the Commission in its discretion would have allowed amortization of historical deferred [coal ash] costs over five years with full return on the unamortized balance[.]" *Stein*, 851 S.E.2d at 250.

2018 DEP Rate Order, at 204 & 2018 DEC Rate Order, at 320-321 (citing *State ex rel. Utils. Comm'n v. Gen. Tel. Co. of Se.*, 285 N.C. 671, 681, 208 S.E.2d 681, 687 (1974) ("[T]he quality of the service rendered is, necessarily, a factor to be considered in fixing the 'just and reasonable' rate[.]"). The Commission's mismanagement penalty did not, however, hinge on resolving the parties' dispute over the "policy-related 'reasonableness'" of Duke Energy's choices about how it managed its coal ash. *Stein*, 851 S.E.2d at 263 n.13.

In contrast to Duke Energy, the Commission *did not* find that DENC had provided inadequate service or otherwise mismanaged its coal ash; yet, DENC finds itself in a far worse position than Duke Energy. The Commission's mismanagement penalty resulted in a disallowance of roughly 13 percent of Duke Energy's coal ash costs. Strikingly, the Commission's denial of a return and extended amortization period in this case results in a disallowance of approximately 26 percent of DENC's prudently incurred coal ash costs. As the Commission stated, "DENC has not been found guilty of criminal negligence with respect to its management of waste coal ash facilities, has not had significant state regulatory enforcement actions, and that there is less evidence at this point of the extent of environmental impacts than were present in the DEC and DEP rate cases." (R p 179). Without a finding of mismanagement, there is no competent or substantial evidence in the record that supports a denial of

a return, let alone a denial that, in its effect, treats DENC twice as harshly as Duke Energy. [13]

iv. The Commission failed to articulate any grounds for treating DENC differently than Duke Energy.

Having found the same factors to be present that justified a five-year amortization period and a return on Duke Energy's coal costs – and finding none of the factors to be present that supported a reduction of Duke Energy's cost recovery to be present in this case–the Commission was required to make findings and conclusions to support its disparate treatment of DENC in this case. The Commission's Order proves entirely deficient in this respect.

While it is true that the Commission's exercise of its ratemaking authority is not bound by the doctrines of *res judicata* or *stare decisis*, the Commission cannot "arbitrarily" disregard its own precedent as it has done here. N.C.G.S. § 62-94(c); *see State ex rel. Utils. Comm'n v. Nantahala Power & Light Co.*, 326 N.C. 190, 199, 388 S.E.2d 118, 124 (1990) (*"Nantahala"*) ("While the Commission is not covered by our Administrative Procedure Act…., the Commission is still an administrative agency of the state government, and general tenets of administrative law are applicable to its operation except where modified by statute."). "It is textbook administrative law that an agency must provide[ ] a reasoned explanation for departing from precedent or

[13] That is not to say that the Commission could reconcile this discrepancy by increasing its penalty against Duke Energy, or by leveling DENC's recovery to be commensurate with Duke Energy's. All that DENC requests is fair and consistent treatment by the Commission. Where the Commission, on the issue of coal ash cost recovery, has determined that a finding of mismanagement is necessary before it can limit a utility's ability to earn a return, DENC and other public utilities should be able to rely on that standard.

treating similar situations differently." *New England Power Generators Ass'n, Inc. v. Fed. Energy Regul. Comm'n*, 881 F.3d 202, 210 (D.C. Cir. 2018)). "Although case-by-case adjudication sometimes results in decisions that seem at odds but can be distinguished on their facts, it is the agency's responsibility to provide a reasoned explanation of why those facts matter." *Id.* at 211;[14] *see also LeMoyne-Owen Coll. v. Nat'l Lab. Review Bd.*, 357 F.3d 55, 60 (D.C. Cir. 2004) ("An agency is by no means required to distinguish every precedent cited to it by an aggrieved party. . . . But where, as here, a party makes a significant showing that analogous cases have been decided differently, the agency must do more than simply ignore that argument.").

Decisions of utility regulators are no different, *Colorado Interstate Gas Co. v. Fed. Energy Regul. Comm'n*, 146 F.3d 889, 893 (D.C. Cir. 1998), and courts have routinely remanded or reversed decisions that depart, without explanation, from precedent. *See Ne. Energy Assocs. v. Fed. Energy Regul. Comm'n*, 158 F.3d 150, 155 (D.C. Cir. 1998) (remanding FERC's suspension of decreased rates for five months, where it had previously concluded that such a suspension "would be harsh and inequitable"); *W. Deptford Energy, LLC v. Fed. Energy Regul. Comm'n*, 766 F.3d 10, 22 (D.C. Cir. 2014) (concluding that it was "the very essence of unreasoned and arbitrary decisionmaking" where FERC reached the "exact opposite answer" regarding which event triggered the effective date of the same tariff than it had

[14] "If an administrative agency departs significantly from its own precedent, it must confront the issue squarely and explain why the departure is reasonable. Absent such an explanation, the agency's decision may be vacated on judicial review as arbitrary and capricious or an abuse of discretion even if the record contains substantial evidence to support the determination made." 2 Am. Jur. 2d *Administrative Law* § 360 (2020).

previously); *ANR Storage Co. v. Fed. Energy Regul. Comm'n*, 904 F.3d 1020, 1026 (D.C. Cir. 2018) (reversing as arbitrary and capricious FERC's decision to deny one utility the ability to charge market-based rates while previously allowing its nearly identical competitors to charge market-based rates in the same relevant market); *Colorado Interstate Gas Co.*, 146 F.3d at 893 (remanding a FERC order that did "not adequately explain its decision to treat pipelines and non-pipelines differently in a context where they appear similarly situated").

Nowhere did the Commission explain the material factors that led it to treat DENC substantially different than Duke Energy. *CUCA*, 348 N.C. at 468, 500 S.E.2d at 704 ("Any matter that presents a substantial difference as a ground for distinction between customers or the rates charged is a *material factor* in the determination of rates."). The Commission cannot plausibly say that the issue was not before it. DENC's concern over the Commission's potential disparate treatment from Duke Energy was front and center at the hearing (T vol. 6 pp 672-73) and in DENC's Motion for Reconsideration (R p 287). Yet DENC's concerns were brushed aside.

The Commission's Order evades any meaningful discussion of the two Duke Energy decisions that preceded it. Instead, the Commission's Order and Reconsideration Order focus on why the 2016 DENC decision should not have precedential value in this case (R p 202-3; 287-88). This reasoning entirely misses the point. The only clear limitation of the 2016 DENC decision was that a determination of the reasonableness and prudency of DENC's future "specific CCR

expenditures" would be left to future Commissions. (R p 203).[15] But the reasonableness and prudence of DENC's coal ash costs were not in dispute here. (R p 209) ("there is no dispute among the parties as to whether any CCR Costs were imprudently incurred"). The 2016 Commission also did not speak to whether future Commissions could or should follow its lead. By the time DENC filed its application in 2019, the Commission had spoken.

Between 2016 and 2018, the Commission decided the two Duke Energy rate cases. The Commission's Order and Reconsideration Order both conveniently ignore that DENC's 2016 rate case was "precedent" for the Duke Energy decisions. Had the Commission confronted this issue, it would have been forced to justify why Duke Energy could rely on the precedent established by DENC in 2016, but DENC could not rely on *its own* prior case. And while any attempted justification would be arbitrary, the Commission did not even try. In the Reconsideration Order, the Commission defended its decision stating that it "fully considered all of the facts in evidence and the applicable precedents in reaching its decision to set the amortization period for CCR Costs at ten years." (R p 290). But simply saying that it considered "applicable precedents" does not make it so.

The Commission's Order and Reconsideration Order do not contain any discussion or analysis of the Duke Energy decisions. Moreover, the Commission's

[15] As discussed further below, the Commission's reliance on the fact that the 2016 DENC decision was the result of a stipulation between DENC and the Public Staff is unavailing. The stipulation was not agreed to by all of the parties, and the Commission was, therefore, required to – and did – reach its own independent conclusion supported by substantial evidence in the record that the stipulation was just and reasonable to all parties. *CUCA.*, 348 N.C. at 463, 500 S.E.2d 701-2.

discussion of the 2016 DENC rate case is limited to explaining that a stipulation precludes it from being considered precedent here – ignoring, of course, that it was accepted as precedent in the Duke Energy rate cases. Through three successive rate cases, the Commission had established a clear precedent for, absent a finding of mismanagement, amortizing coal ash costs over five years and allowing a full return on the unamortized balance of coal ash costs that were incurred to comply with the federal CCR Rule and applicable state remediation standards. DENC is entitled to rely on that precedent, unless the Commission can provide a reasoned explanation for why those cases should not apply.

C. The Commission's Decision Violated DENC's Constitutional Rights.

The Commission's "arbitrary and capricious" decision also violates DENC's rights under Article I, section 19 of the North Carolina Constitution and the Fourteenth Amendment of the U.S. Constitution. Article I, section 19, of the North Carolina Constitution provides, in pertinent part: "No person shall be denied equal protection under the laws…" N.C. Const. art. I, § 19.

i. The Commission's arbitrary treatment of DENC amounts to a violation of the Equal Protection clause.

DENC understands that, for the privilege of serving North Carolinians, it surrenders price regulation to the Commission's discretion. DENC does not, however, surrender its right to be treated equally under the law. "Equality within the class or for those of like station and condition is all that is required to meet the test of constitutionality." *Leonard v. Maxwell*, 3 S.E.2d 316, 321 (N.C. 1939). The Commission's exercise of its legislative powers violates a utility's equal protection

rights when it arbitrarily singles out a utility for different treatment. *See Cheek v. City of Charlotte*, 273 N.C. 293, 160 S.E.2d 18 (1968) (holding that legislation that prohibited giving massages to a patron of the opposite sex at massage parlors but not at barber shops or health clubs was arbitrary and constituted unconstitutional class legislation); *Connecticut Light & Power Co. v. Fed. Energy Regul. Comm'n*, 627 F.2d 467, 473 (D.C. Cir. 1980) (noting that "treating regulated entities, whose apparent fact situation is stipulated to be the same, in a markedly different manner might give rise to an Equal Protection problem"). This Court interprets the state and federal equal protection clauses synonymously. *See State v. Bryant*, 359 N.C. 554, 563, 614 S.E.2d 479, 485 (2005). The Commission's arbitrary decision does not meet the minimum standards of constitutionality.

This Court's reasons for not finding an equal protection violation in *Nantahala* necessitate a different result here. In *Nantahala*, the Court was asked to decide whether the Commission violated the equal protection clause when it entered an order that treated telecommunication utilities differently than electric utilities. *Nantahala*, 326 N.C. at 204, 388 S.E.2d at 126. The Commission's order required Nantahala, an electric utility, to pass on to ratepayers the benefits of federal tax savings resulting from the Tax Reform Act of 1986. The same order did not require telecommunication utilities to pass on all of their tax savings to ratepayers. *Id.* at 203, 388 S.E.2d at 126. The Court held that Nantahala's equal protection rights were not violated, "there were factors surrounding [telecommunication utilities], which the

Commission made clear in its orders, that made them subject to different treatment from the electric utilities." *Id.* at 204, 388 S.E.2d at 126.

In contrast to *Nantahala*, the Commission here was faced with the same class of utility (electric) and "identical" types of costs (coal ash) that it had previously addressed. The Commission failed to articulate any factors or rational basis for subjecting DENC to different treatment than identically situated North Carolina electric utilities. The Commission violated DENC's equal protection rights by arbitrarily singling it out for differing treatment.

CONCLUSION

Regulatory certainty is in the public interest. The Commission's Order acknowledged this when it cautioned itself to be "mindful of the need for regulatory certainty and endeavors to achieve regulatory certainty through compliance with and application of the provisions of the Act to the facts in evidence." (R p 288). Ironically, the Commission failed to heed its own advice, and DENC is the direct casualty. More broadly, neither the public interest nor DENC's customers benefit from regulatory *uncertainty*. When the Commission departs from its own precedent, utilities and the public they serve are entitled to a full and reasoned explanation for that departure. When the Commission cannot provide a sufficient explanation or no explanation exists, it must follow its precedent. DENC respectfully asks the Court to (1) VACATE the Commission's denial of a return on the unamortized balance of DENC's coal ash costs, and (2) VACATE the Commission's determination to amortize DENC's coal ash costs over ten years; and REMAND the case with instructions for the Commission to (1) allow a return on the unamortized balance of DENC's coal ash costs consistent

with past Commission precedent, and (2) amortize DENC's coal ash costs over five years consistent with past Commission precedent.

This the 19th day of January, 2021.

Electronically submitted
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N.C. App. R. 33(b) Certification:
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CERTIFICATE OF SERVICE

I hereby certify that the undersigned counsel has this day served the foregoing **APPELLANT'S BRIEF** in the above-captioned action on all parties to this cause by depositing the original and/or copy hereof, postage prepaid, in the United States Mail, addressed to the following:

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This is the 19th day of January, 2021.

Electronically submitted
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(b) From any final order or decision of the Utilities Commission in a general rate case, appeal as of right lies directly to the Supreme Court.

Chapter 62

Public Utilities

Article 1.

General Provisions.

§ 62-2. Declaration of policy.

(a) Upon investigation, it has been determined that the rates, services and operations of public utilities as defined herein, are affected with the public interest and that the availability of an adequate and reliable supply of electric power and natural gas to the people, economy and government of North Carolina is a matter of public policy. It is hereby declared to be the policy of the State of North Carolina:

(1) To provide fair regulation of public utilities in the interest of the public;

(2) To promote the inherent advantage of regulated public utilities;

(3) To promote adequate, reliable and economical utility service to all of the citizens and residents of the State;

(3a) To assure that resources necessary to meet future growth through the provision of adequate, reliable utility service include use of the entire spectrum of demand-side options, including but not limited to conservation, load management and efficiency programs, as additional sources of energy supply and/or energy demand reductions. To that end, to require energy planning and fixing of rates in a manner to result in the least cost mix of generation and demand-reduction measures which is achievable, including consideration of appropriate rewards to utilities for efficiency and conservation which decrease utility bills;

(4) To provide just and reasonable rates and charges for public utility services without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices and consistent with long-term management and conservation of energy resources by avoiding wasteful, uneconomic and inefficient uses of energy;

(4a) To assure that facilities necessary to meet future growth can be financed by the utilities operating in this State on terms which are reasonable and fair to both the customers and existing investors of such utilities; and to that end to authorize fixing of rates in such a manner as to result in lower costs of new facilities and lower rates over the operating lives of such new facilities by making provisions in the rate-making process for the investment of public utilities in plants under construction;

(5) To encourage and promote harmony between public utilities, their users and the environment;

(6) To foster the continued service of public utilities on a well-planned and coordinated basis that is consistent with the level of energy needed for the protection of public health and safety and for the promotion of the general welfare as expressed in the State energy policy;

(7) To seek to adjust the rate of growth of regulated energy supply facilities serving the State to the policy requirements of statewide development;

(8) To cooperate with other states and with the federal government in promoting and coordinating interstate and intrastate public utility service and reliability of public utility energy supply;

(9) To facilitate the construction of facilities in and the extension of natural gas service to unserved areas in order to promote the public welfare throughout the State and to that end to authorize the creation of expansion funds for natural gas local distribution companies or gas districts to be administered under the supervision of the North Carolina Utilities Commission; and

(10) To promote the development of renewable energy and energy efficiency through the implementation of a Renewable Energy and Energy Efficiency Portfolio Standard (REPS) that will do all of the following:

a. Diversify the resources used to reliably meet the energy needs of consumers in the State.

b. Provide greater energy security through the use of indigenous energy resources available within the State.

c. Encourage private investment in renewable energy and energy efficiency.

d. Provide improved air quality and other benefits to energy consumers and citizens of the State.

(b) To these ends, therefore, authority shall be vested in the North Carolina Utilities Commission to regulate public utilities generally, their rates, services and operations, and their expansion in relation to long-term energy conservation and management policies and statewide development requirements, and in the manner and in accordance with the policies set forth in this Chapter. Nothing in this Chapter shall be construed to imply any extension of Utilities Commission regulatory jurisdiction over any industry or enterprise that is not subject to the regulatory jurisdiction of said Commission.

. . .

Article 2.

Organization of Utilities Commission.

§ 62-10. Number; appointment; terms; qualifications; chairman; vacancies; compensation; other employment prohibited.

(a) The North Carolina Utilities Commission shall consist of seven commissioners who shall be appointed by the Governor subject to confirmation by the General Assembly by joint resolution. The names of commissioners to be appointed by the Governor shall be submitted by the Governor to the General Assembly for confirmation by the General Assembly on or before May 1, of the year in which the terms for which the appointments are to be made are to expire. Upon failure of the Governor to submit names as herein provided, the Lieutenant Governor and Speaker of the House jointly shall submit the names of a like number of commissioners to the General Assembly on or before May 15 of the same year for confirmation by the General Assembly. Regardless of the way in which names of commissioners are submitted, confirmation of commissioners must be accomplished prior to adjournment of the then current session of the General Assembly. This subsection shall be subject to the provisions of subsection (c) of this section.

(b) The terms of the commissioners now serving shall expire at the conclusion of the term for which they were appointed which shall remain as before with two regular eight-year terms expiring on July 1 of each fourth year after July 1, 1965, and the fifth term expiring on July 1 of each eighth year after July 1, 1963. The terms of office of utilities commissioners thereafter shall be six years commencing on July 1 of the year in which the predecessor terms expired, and ending on July 1 of the sixth year thereafter.

(c) In order to increase the number of commissioners to seven, the names of two additional commissioners shall be submitted to the General Assembly on or before May 27, 1975, for confirmation by the General Assembly as provided in G.S. 62-10(a). The commissioners so appointed and confirmed shall serve new terms commencing on July 1, 1975, one of which shall be for a period of two years (with the immediate successor serving for a period of six years), and one of which shall be for a period of two years.

Thereafter, the terms of office of the additional commissioners shall be for six years as provided in G.S. 62-10(b).

(d) A commissioner in office shall continue to serve until his successor is duly confirmed and qualified but such holdover shall not affect the expiration date of such succeeding term.

. . .

Article 5.

Review and Enforcement of Orders.

§ 62-90. Right of appeal; filing of exceptions.

(a) Any party to a proceeding before the Commission may appeal from any final order or decision of the Commission within 30 days after the entry of such final order or decision, or within such time thereafter as may be fixed by the Commission, not to exceed 30 additional days, and by order made within 30 days, if the party aggrieved by such decision or order shall file with the Commission notice of appeal and exceptions which shall set forth specifically the ground or grounds on which the aggrieved party considers said decisions or order to be unlawful, unjust, unreasonable or unwarranted, and including errors alleged to have been committed by the Commission.

All other parties may give notice of cross appeal and set out exceptions which shall set forth specifically the grounds on which the said party considers said decision or order to be unlawful, unjust, unreasonable or unwarranted, and including errors alleged to have been committed by the Commission. Such notice of cross appeal and exceptions shall be filed with the Commission within 20 days after the first notice of appeal and exceptions has been filed, or within such time thereafter as may be fixed by the Commission, not to exceed 20 additional days by order made within 20 days of the first filed notice of appeal and exceptions.

(b) Any party may appeal from all or any portion of any final order or decision of the Commission in the manner herein provided. Copy of the notice of appeal shall be mailed by the appealing party at the time of filing with the Commission, to each party to the proceeding to the addresses as they appear in the files of the Commission in the proceeding. The failure of any party, other than the Commission, to be served with or to receive a copy of the notice of appeal shall not affect the validity or regularity of the appeal.

(c) 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.

(d) The appeal shall lie to the appellate division of the General Court of Justice as provided in G.S. 7A-29. The procedure for the appeal shall be as provided by the rules of appellate procedure.

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§ 62-94. Record on appeal; extent of review.

(a) On appeal the court shall review the record and the exceptions and assignments of error in accordance with the rules of appellate procedure, and any alleged irregularities in procedures before the Commission, not shown in the record, shall be considered under the rules of appellate procedure.

(b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial

rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions, or

(2) In excess of statutory authority or jurisdiction of the Commission, or

(3) Made upon unlawful proceedings, or

(4) Affected by other errors of law, or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or

(6) Arbitrary or capricious.

(c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. The appellant shall not be permitted to rely upon any grounds for relief on appeal which were not set forth specifically in his notice of appeal filed with the Commission.

(d) The court shall also compel action of the Commission unlawfully withheld or unlawfully or unreasonably delayed.

(e) Upon any appeal, the rates fixed or any rule, regulation, finding, determination, or order made by the Commission under the provisions of this Chapter shall be prima facie just and reasonable.

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Article 7.

Rates of Public Utilities

§ 62-133. How rates fixed.

(a) In fixing the rates for any public utility subject to the provisions of this Chapter, other than bus companies, motor carriers and certain water and sewer utilities, the Commission shall fix such rates as shall be fair both to the public utilities and to the consumer.

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

(1) Ascertain the reasonable original cost or the fair value under G.S. 62-133.1A of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within the State, less that portion of the cost that has been consumed by previous use recovered by depreciation expense. In addition, construction work in progress may be included in the cost of the public utility's property under any of the following circumstances:

a. To the extent the Commission considers inclusion in the public interest and necessary to the financial stability of the utility in question, reasonable and prudent expenditures for construction work in progress may be included, subject to the provisions of subdivision (4a) of this subsection.

b. For baseload electric generating facilities, reasonable and prudent expenditures shall be included pursuant to subdivisions (2) or (3) of G.S. 62-110.1(f1), whichever applies, subject to the provisions of subdivision (4a) of this subsection.

(1a) Apply the rate of return established under subdivision (4) of this subsection to rights-of-way acquired through agreements with the Department of Transportation pursuant to G.S. 136-19.5(a) if acquisition is consistent with a definite plan to provide service within five years of the date of the agreement and if such right-of-way acquisition will result in benefits to the ratepayers. If a right-of-way is not used within a reasonable time after the expiration of the five-year period, it may be removed from the rate base by the Commission when rates for the public utility are next established under this section.

(2) Estimate such public utility's revenue under the present and proposed rates.

(3) Ascertain such public utility's reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation.

(4) Fix such rate of return on the cost of the property ascertained pursuant to subdivision (1) of this subsection as will enable the public utility by sound management to produce a fair return for its shareholders, considering changing economic conditions and other factors, including, but not limited to, the inclusion of construction

work in progress in the utility's property under sub-subdivision b. of subdivision (1) of this subsection, as they then exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise, and to compete in the market for capital funds on terms that are reasonable and that are fair to its customers and to its existing investors.

(4a) Require each public utility to discontinue capitalization of the composite carrying cost of capital funds used to finance construction (allowance for funds) on the construction work in progress included in its rate based upon the effective date of the first and each subsequent general rate order issued with respect to it after the effective date of this subsection; allowance for funds may be capitalized with respect to expenditures for construction work in progress not included in the utility's property upon which the rates were fixed. In determining net operating income for return, the Commission shall not include any capitalized allowance for funds used during construction on the construction work in progress included in the utility's rate base.

(5) Fix such rates to be charged by the public utility as will earn in addition to reasonable operating expenses ascertained pursuant to subdivision (3) of this subsection the rate of return fixed pursuant to subdivisions (4) and (4a) on the cost of the public utility's property ascertained pursuant to subdivisions (1) and (1a) of this subsection.

(c) The original cost of the public utility's property, including its construction work in progress, shall be determined as of the end of the test period used in the hearing and the probable future revenues and expenses shall be based on the plant and equipment in operation at that time. If the public utility elects to establish rate base using fair value, the fair value determination of the public utility's property shall be made as provided in G.S. 62-133.1A, and the probable future revenues and expenses shall be based on the plant and equipment in operation at the end of the test period. The test period shall consist of 12 months' historical operating experience prior to the date the rates are proposed to become effective, but the Commission shall consider such relevant, material and competent evidence as may be offered by any party to the proceeding tending to show actual changes in costs, revenues or the cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within this State, including its construction work in progress, which is based upon circumstances and events occurring up to the time the hearing is closed.

(d) The Commission shall consider all other material facts of record that will enable it to determine what are reasonable and just rates.

(e) The fixing of a rate of return shall not bar the fixing of a different rate of return in a subsequent proceeding.

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§ 62-134. Change of rates; notice; suspension and investigation.

(a) Unless the Commission otherwise orders, no public utility shall make any changes in any rate which has been duly established under this Chapter, except after 30 days' notice to the Commission, which notice shall plainly state the changes proposed to be made in the rates then in force, and the time when the changed rates will go into effect. The public utility shall also give such notice, which may include notice by publication, of the proposed changes to other interested persons as the Commission in its discretion may direct. All proposed changes shall be shown by filing new schedules, or shall be plainly indicated upon schedules filed and in force at the time and kept open to public inspection. The Commission, for good cause shown in writing, may allow changes in rates without requiring the 30 days' notice, under such conditions as it may prescribe. All such changes shall be immediately indicated upon its schedules by such public utility.

(b) Whenever there is filed with the Commission by any public utility any schedule stating a new or revised rate or rates, the Commission may, either upon complaint or upon its own initiative, upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate or rates. Pending such hearing and the decision thereon, the Commission, upon filing with such schedule and delivering to the public utility affected thereby a statement in writing of its reasons therefor, may, at any time before they become effective, suspend the operation of such rate or rates, but not for a longer period than 270 days beyond the time when such rate or rates would otherwise go into effect. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate shall go into effect at the end of such period. After hearing, whether completed before or after the rate goes into effect, the Commission may make such order with respect thereto as would be proper in a proceeding instituted after it had become effective.

(c) At any hearing involving a rate changed or sought to be changed by the public utility, the burden of proof shall be upon the public utility to show that the changed rate is just and reasonable.

(d) Notwithstanding the provisions of this Article, any public utility engaged solely in distributing electricity to retail customers, which electricity has been purchased at wholesale rates from another public utility, an electric membership corporation or a municipality, may in its discretion, and without the necessity of public hearings as in this section is otherwise provided, elect to adopt the same retail rates to customers charged by the public utility, electric membership corporation or municipality from whom the wholesale power is purchased for the same service, unless the North Carolina Utility Commission finds upon a hearing, either on its own initiative or upon complaint, that the rate of return earned by such utility upon the basis of such rates is unjust and unreasonable. In such a proceeding the burden of proof shall be upon the electrical distribution company.

(e) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1197, s. 2.

(f) The Commission may adopt rules prescribing the information and exhibits required to be filed with any applications, or tariff for an increase in utility rates, including but not limited to all of the evidence or proof through the end of the test period which the utility will rely on at any hearing on such increase, and the Commission may suspend such increase until such data, information or exhibits are filed, in addition to the time provided for suspension of such increase in other provisions of this Chapter.

(g) The provisions of this section shall not be applicable to bus companies or to their rates, fares or tariffs.

(h) Notwithstanding the requirements of subsections (a) and (b) of this section, the Commission may, in lieu of fixing specific rates or tariffs for competitive services offered by a public utility defined in G.S. 62-3(23)a.6., adopt practices and procedures to permit pricing flexibility, detariffing services, or both. In exercising its authority to permit pricing flexibility, detariffing of services, or both, the Commission shall first determine that the service is competitive. After a determination that the service is competitive, the Commission shall consider the following in deciding whether to permit pricing flexibility, detariffing of services, or both:

(1) The extent to which competing telecommunications services are available from alternative providers in the relevant geographic or service market;

(2) The market share, growth in market share, ease of entry, and affiliations of alternative providers;

(3) The size and number of alternative providers and the ability of such alternative providers to make functionally equivalent or substitute services readily available at competitive rates and on competitive terms and conditions;

(4) Whether the exercise of Commission authority produces tangible benefits to consumers that exceed those available by reliance on market forces;

(5) Whether the exercise of Commission authority inhibits the public utility from competing with unregulated providers of functionally equivalent telecommunications services;

(6) Whether the existence of competition tends to prevent abuses, unjust discrimination or excessive charges for the service or facility offered;

(7) Whether the public utility would gain an unfair advantage in its competitive activities; and

(8) Any other relevant factors protecting the public interest.

(i) On motion of any interested party and for good cause shown, the Commission shall hold hearings prior to adopting any pricing flexibility or detariffing of services permitted under this section. The Commission may also revoke a determination made under this section when the Commission determines, after notice and opportunity to be heard, that the public interest requires that the rates and charges for the service be more fully regulated.

(j) Notwithstanding the provisions of G.S. 62-140, the Commission may permit public utilities subject to subsection (h) of this section to offer competitive services to business customers upon agreement between the public utility and the customer provided the services are compensatory and cover the costs of providing the service.

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Rules and Regulations of the North Carolina Utilities Commission

Chapter 1.

Practice and Procedure.

Rule R1-17. FILING OF INCREASED RATES, APPLICATION FOR AUTHORITY TO ADJUST RATES.

(a) Application of Rule. — This rule does not apply to the establishment of a rate or charge for a new service, nor to an adjustment or a change of a particular rate or charge for the purpose of eliminating inequities, preferences, or discriminations. It does apply to all applications for or filings of a general increase in rates, fares, or charges for revenue purposes or to increase the rate of return on investment or to change transportation rates, fares, etc. All Class A and B electric, telephone, natural gas, water, and sewer utilities shall file written letters of intent to file general rate applications with the Commission thirty (30) days in advance of any filing thereof.

(b) Contents of Filing or Application. — The filing or application shall clearly set out the reasons or conditions which, in the opinion of the applicant, warrant an increase in applicant's rates, fares, or charges, whether such increase is to be brought about by a change in rate schedules, by a change in any classification, contract, practice, rule, regulation, or otherwise, and said application shall contain, among other things, the following data, either embodied in the application or attached thereto as exhibits:

(1) Present Charges. — A statement (not necessarily in tariff form) showing the rates, fares, tolls, or other charges presently in effect which the applicant seeks to increase.

(2) Proposed Charges. — A statement showing the rates, fares, tolls, or other charges which the applicant seeks to place in effect.

(3) Original Cost. — A statement or exhibit showing the original cost of all property of the applicant used or useful in the public service to which such proposed increased rates relate. If the original cost of any such property cannot be accurately determined, such facts should be stated and the best estimate of the original cost given. In case such property consists of plants or facilities which have been devoted to the public use by some other person, municipality, or utility, and subsequently purchased by the applicant, the purchase price of such plants or

facilities must be shown, and also the original cost and accrued depreciation at the time of purchase must be shown, if known.

(4) Present Fair Value. — If applicant intends to offer proof as to the present fair value of its property, the application shall state the nature of such proof in such form and detail as to disclose fully the method used in obtaining such proof and the accuracy thereof. In the preparation of such data, it is recommended that the various property accounts be identified by the account numbers used in the Uniform System of Accounts.

(5) Depreciation. — The application shall show the accrued depreciation on said property as shown on applicant's books and the rate or method used in computing the amount charged to depreciation.

(6) Material and Supplies. — A statement showing the cost of material and supplies which the applicant had on hand on the closing date of the twelve months' period referred to in (8) below. If the amount on hand is more or less than reasonably necessary for efficient and economical operation of the business, an explanation should be made.

(7) Cash Working Capital. — A statement showing the amount of cash working capital which the petitioner keeps on hand and finds necessary to keep on hand for the efficient, economical operation of the business.

(8) Operating Experience. — A statement covering the last twelve consecutive months for which data are available, showing

a. The gross operating revenues received,

b. The expenses incurred, including operating expenses, depreciation, and taxes, and

c. The net operating income for return on investment.

(9) Effect of Proposed Increase. — A statement showing the applicant's estimate of

a. The additional annual gross revenue which the proposed increase in rates and charges will produce,

b. The additional annual expenses anticipated by reason of such additional gross revenue,

c. The net additional revenue which the proposed increase in rates will produce, and

d. The rate of return which the applicant estimates it will receive on the value of its property after giving effect to the proposed increase in rates.

e. This statement is to include the total capital structure of the utility before and after the proposed increase. Ratios for each component of the capital structure are to be shown with the common stockholders' equity capital and the net income used in the rate of return on the common equity calculation clearly identifiable.

f. Every general rate application shall contain a one-page Summary of all proposed increases and changes affecting customers and such Summary shall appear as Appendix 1.

g. Rescinded by NCUC Docket No. M-100, Sub 82, 4/27/81.

(10) Balance Sheet. — The application shall include a balance sheet and income statement for a recent representative period.

(11) Working Papers to Be Available. — Supporting data and working papers underlying the above exhibits shall be made available promptly upon request in the offices of the Commission or Public Staff in Raleigh or in an office of the public utility in North Carolina designated by the Commission, for examination by all interested parties.

(12) All general rate case applications of Class A and B electric, telephone and natural gas companies, and Class A water and sewer companies shall be accompanied by the information specified in the following Commission forms respectively:

For Class A and B Electric Utilities:

(a) NCUC Form E-1, Rate Case Information Report — Electric Companies

For Class A and B Telephone Utilities:

(b) NCUC Form P-1, Rate Case Information Report — Telephone Companies

For Class A and B Natural Gas Utilities:

(c) NCUC Form G-1, Rate Case Information Report — Natural Gas Companies

For Class A Water and Sewer Utilities:

(d) NCUC Form W-1, Rate Case Information Report — Water and Sewer Companies

(13) Repealed.

In the event any affected utility wishes to rely on G.S. 62-133 (c) and offer evidence on actual changes based on circumstances and events occurring up to the time the hearing is closed, such utility should file with any general rate application detailed estimates of any such data and such estimates should be expressly identified and presented in the context of the filed test year data and, if possible, in the context of a twelve (12) month period of time ending the last day of the month nearest and following 120 days from the date of the application. Said period of time should contain the necessary normalizations and annualizations of all revenues, expenses and rate base items necessary for the Commission to properly investigate the impact of any individual circumstance or event occurring after the test period cited by the applicant in support of its application. Any estimate made shall be filed in sufficient detail for review by the Commission.

(c) Supplemental Data. — The Commission shall consider such relevant, material, and competent evidence as may be offered by any party to the proceeding tending to show actual changes in costs, revenues, or the cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within this State, including its construction work in progress, which is based upon circumstances and events occurring up to the time the hearing is closed.

Information relating to the change(s) referred to above relied upon by the applicant shall be filed with the Commission ten (10) working days prior to the date that the testimony of the Public Staff and other intervenors is due to be filed to the extent said change(s) are known by the applicant at that time.

To the extent that additional information becomes available subsequent to ten (10) working days prior to the filing of testimony by the Public Staff and other intervenors, such information which will be offered to support change(s) shall be made available to the Commission and other parties as

soon as practicable. Under such circumstances the Public Staff and other intervenors shall have the right to address said evidence through additional direct testimony, such option to be exercised at the discretion of the Public Staff and other intervenors.

(d) Notice of General Rate Application and Hearing. — Within thirty (30) days from the filing of any general rate case application by any electric, telephone, or natural gas utility, such utility should provide public notice to its customers in newspapers having general circulation in its service area as follows:

> (Public Utility) filed a general rate application with the North Carolina Utilities Commission on (date) requesting an increase in additional annual revenues of approximately (Amount of proposed increase in dollars). The Utilities Commission will set a public hearing on the rate application within six months from the date of filing and will require detailed Notice to the Public regarding the proposed rates in advance of the Hearing.

The Commission will thereafter prescribe the form of Notice to the Public in the Order scheduling the Hearing.

(e) Parties. — To the end that those affected by any proposed increase in rates or charges may have every opportunity to be heard, such persons may become parties to such proceedings as provided by Rule R1-6, or as provided by Rule R1-19, or without filing formal pleading by entering their appearances of record at the time the cause is called for hearing, as provided by Rule R1-23, but matters settled at prehearing conferences or by stipulations of parties, as provided in G.S. 62-69 will not ordinarily be set aside or changed at the instance of those not parties of record at the time.

(f) Denial of Filing or Application for Failure to Include Material Contents.

(1) The Commission on its own motion or at the request of the Commission Staff, Public Staff, or any party in interest in any general rate case shall review the filing or application within 15 days after such filing and notify the applicant by letter of any additional information needed to complete the filing under Rule R1-17, and give notice to the applicant of the remedy provided by this rule for securing such information, and give the applicant 5 days to file such additional information in satisfaction of said letter request.

(2) If any material data or information required by Rule R1-17 (b) is not filed with the tariff or application for rate increase and is not secured after informal request as provided in Rule R1-17 (f) (1) above, the Commission on its own motion or on motion of the Commission Staff, Public Staff, or motion of any party having an interest in the proceeding made within 30 days after the filing of said tariff or application, may order the utility to appear and show cause within a period of 20 days after issuance of said order why said filing or application should not be denied for failure to comply with any material provision of this rule, including the filing of the contents of said application as prescribed under subsection (b) above.

(3) Such order to appear and show cause why the tariff filing or application should not be dismissed for failure to file material contents thereof shall specify with particularity the alleged deficiency or deficiencies in said tariff filing or application.

(4) Any utility company served with such a show cause order shall have the right to file all of the data and information and exhibits alleged as deficiencies in said show cause order at any time prior to the hearing on said show cause order or at the hearing on said show cause order and thus satisfy the show cause order, whereupon such show cause order shall be dismissed before or at the hearing set thereon, and the proceeding on the tariff filing or rate application shall proceed as in the case of a properly filed tariff or application for a general rate increase.

(5) If the Commission shall find after notice and hearing that the filing or application is incomplete and does not contain material portions of the contents required under subsection (b) necessary for complete determination of the justness and reasonableness of the rates filed or applied for, and that the applicant has failed to file said material data and information necessary for determination of the justness and reasonableness of said rates after notice and opportunity to complete said filing as provided herein, the Commission shall deny said application or dismiss said tariff filing, without prejudice to the refiling of said application or tariff filing with the complete contents prescribed herein.

(6) The Commission shall make its determination on such show cause order within ten (10) days after the show cause hearing provided in this subsection, and shall issue an order thereon dismissing the show cause proceeding where such deficiencies are satisfied and continuing the investigation of the application, or dismissing the filing or application

for material and unsatisfied deficiencies therein as provided in this subsection.

(g) Procedure for Applications Under G.S. 62-133(f). — Repealed by NCUC Docket No. G-100, Sub 58, 2/17/92.

(h) Procedure for Participation in Exploration and Drilling Programs and Approval of Associated Changes in Natural Gas Rates. — Repealed by NCUC Docket No. G-100, Sub 79, 12/02/99.

(i) Procedure for Filings under G.S. 62-134(d). —

(1) Any public utility adopting the basic retail rates of its wholesale electricity supplier under the provisions of G.S. 62-134(d), including each subsequent adoption of modified basic retail rates of its wholesale supplier, shall within 30 days of such adoption file with the Commission a Report of Adoption. The Report shall include the following as a minimum:

(a) A balance sheet as of a date within three months of the date of adoption.

(b) An income statement for the twelve months ending at the date of the balance sheet.

(c) An estimate of the revenues to be produced by rates that have been adopted.

(2) If the utility elects to adopt the monthly adjustments in the retail fuel charge of its wholesale supplier, then it must adopt decrease adjustments as well as increase adjustments. In such event, the utility shall file with the Commission a letter notice of each such adoption but is not required to file the Report of Adoption required under (i) (1) above.

(3) Filings of notice of adoption of basic rate changes under (i) (1) above shall be accompanied by the filing fee required for applications for rate increases but a filing fee is not required with monthly notices of adoption of adjustments to fuel charges.

(4) A new docket number shall be assigned to each filing under (i) (1) above. Subsequent monthly filings under (i) (2) above shall be made in the same docket until a new basic rate increase docket is established.

. . .

Hearing Transcript Excerpts

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532, and others. Do you see that?

A Yes.

Q And I'd submit to you, if you can double check, that that is a copy of the filing of Agreement and Stipulation of Settlement between Dominion and the Public Staff and CIGFUR in the last Dominion rate case in 2016.

A Yes. I agree.

Q You'd agree to that?

A Yes.

MS. FORCE: And I'd ask that that be identified as AGO McLeod Cross Examination Exhibit 3, please.

CHAIR MITCHELL: The exhibits will be so marked.

(Whereupon, McLeod AGO Cross Examination Exhibits 2 and 3 were marked for identification.)

Q And I have some questions, but they're not going to refer directly to those. I just wanted to get them into the record, so I --

A Okay.

Q -- appreciate your --

A Yeah.

Q -- help with that.

MS. FORCE: I'd also ask the Commission, before

I forget, to take judicial notice of the rate case Order in E-22, Sub 532, that's dated December 22nd, 2016, and it's 150 pages.

CHAIR MITCHELL: Hearing no objection, we will take judicial notice of that Order.

MS. FORCE: Thank you. I do have -- I wanted to introduce something else into the record, and I appreciate it. These are things that we can take up separately so we don't take up time at the hearing. But I want to get some clarification. There was a -- I think at the beginning Mr. Kaylor asked that the filings that were made by the Company, including the E-1 filings, be admitted into this record; is that right? And that includes confidential --

MR. KAYLOR: Correct.

MS. FORCE: -- filings. I'd just like to note that there was an NCUC Form E-1, Item 10, pages 162 through 169, that refer to coal ash costs in this, and I want to make sure that's in the record.

And with that, I don't have any other questions. Thank you.

CHAIR MITCHELL: Any additional cross examination for the witness?

MR. XENOPOULOS: No, thank you.

were addressed in DENC's 1983 general rate case; and (2) costs of environmental cleanup at manufactured gas plants.

Q. Do you agree with Mr. Maness that an equitable sharing of coal ash costs as proposed by the Public Staff is appropriate considering the Commission's treatment of losses associated with abandoned nuclear plant costs?

A. No. Abandoned nuclear plant costs are not comparable to the costs of CCR remediation. In the past, abandoned nuclear plant costs were never used and useful in providing utility service to customers and thus not eligible for inclusion in rate base.

Q. Has the Commission previously considered intervenor arguments that CCR costs should be treated in a manner similar to nuclear plant abandonment costs?

A. Yes, the Commission has consistently rejected this argument in three rate cases in the past three years. First, as described above, in the Company's 2016 rate case, the Commission found that CCR repositories were and continue to be used and useful and were therefore not abandoned. Indeed, the Commission specifically found that "the costs at issue in this case are test year remediation costs, not unamortized costs of abandoned plants."[11]

The Commission applied this rationale again in the 2018 DEP and DEC Rate Cases, distinguishing DEP's and DEC's request to recover the costs of CCR

[11] 2016 Rate Order, at 62.

remediation from abandoned nuclear plant costs on the grounds that the former costs were used and useful while the latter costs were not, as the nuclear facilities at issue had *never* been placed into service or otherwise used to generate electricity.[12] Accordingly, consistent with the Commission's determination in all three of these recent rate cases, the Company's CCR compliance costs are eligible for recovery through amortization and a return on the unamortized balance, similar to other types of used and useful utility property.

Q. Did the Commission provide any further guidance on this issue in the recent 2018 DEP and DEC Rate Cases?

A. Yes. In both the 2018 DEP and DEC Rate Cases, the Commission found that the 1988 DEP rate case provided an example of nuclear cost recovery that is more analogous to a request to recover the costs of CCR disposal. In that case, the relevant issue was the reasonableness and prudence of the costs of constructing and placing into service Unit 1 of the Shearon Harris nuclear plant. The Commission found that some nuclear costs related to Shearon Harris—particularly those related to Harris Unit 1—were prudently incurred and used and useful.[13] Accordingly, the Commission allowed full recovery of the prudently incurred, used and useful portion of the Shearon Harris Plant

[12] 2018 DEC Order at 276 (noting that such costs "had never been placed in rate base as plant in service prior to the general rate cases at issue, and to the extent they were costs in abandoned nuclear facilities, they were facilities never used to generate electricity"); 2018 DEP Order at 194 ("There are . . . significant distinctions between [nuclear abandonment costs] and the present case. First and foremost, this case does not involve 'abandoned plan' or cancellation costs. Rather, it involves 'reasonable and prudent' and 'used and useful' expenditures to the Company[.]").

[13] See Order dated August 5, 1988, in Docket No. E-2, Sub 537.

The Commission also consistently found the costs associated with coal ash disposal to be used and useful in the 2018 DEP and DEC Rate Cases. Most recently, the Commission specifically explained in the 2018 DEC Rate Case that "[c]apital expenditures undertaken to enable compliance with the law qualify as 'used and useful,' in that the Company does not have the option to fail to comply, and . . . [such costs] are routinely recoverable in rates."[21]

Consistent with the Commission's determination in the 2016 Rate Order and the 2018 DEC and DEP Rate Cases, DENC's ongoing coal ash disposal costs continue to be used and useful and incurred to comply with the federal CCR Rule as well as various Virginia statutes, rules, and regulations. Consequently, these types of costs and, if any amount is deferred over time, a return would be appropriately recoverable in rates to ensure that the Company received the equivalent of the full amount of those costs.

Q. **Mr. Maness argues that the concept of used and useful property under North Carolina's ratemaking statute only applies to a public utility's property including "true working capital" and not to the expenses the utility incurs in the operation, maintenance, or disposal of that property. (Maness, at 24) Please respond.**

A. Mr. Maness' contention that the term "used and useful" does not apply to the expenses that a utility incurs in the operation, maintenance, or disposal of its property is patently incorrect. While I am not an attorney, I have been

[21] DEC Order at 268.

informed by counsel that the North Carolina Supreme Court in *State ex rel. Utils. Comm'n v. Virginia Elec. & Power Co.*, 285 N.C. 398, 206 S.E.2d 283 (1974) ("*VEPCO*") held that working capital, including "funds reasonably invested in . . . materials and supplies and [the utility's] cash funds reasonably so held for payment of operating expenses" could be included in rate base so long as such funds were investor-furnished, not customer-furnished. The Commission recently applied the holding of *VEPCO* in both the 2018 DEP and DEC Rate Cases, finding that the because "the Company appropriately accounted for coal ash basin closure costs in the working capital section of rate base, and as these funds were investor-furnished, not customer-furnished, *VEPCO* holds that they are "used and useful" [and] the Company is entitled to earn a return on those funds over the period in which the costs are amortized."[22] Here, the Company has treated its coal ash-related cash expenditures in the same way as DEP and DEC treated their coal ash expenses in their respective 2018 rate cases and in the same way DENC treated its own coal ash expenditures in its 2016 Rate Case. Because DENC appropriately accounted for coal ash basin closure costs in the working capital section of rate base and such funds were paid for by investors, they are considered "used and useful" and the Company is entitled to earn a return.

[22] DEP Order at 195; 2017 DEC Order at 269 ("DEC is subject to these new legal requirements and must handle and store coal ash in a manner that complies with them. As such, . . . the capital costs of compliance are "used and useful," and the Company is authorized to recover them . . . along with a return as adjusted below on its outlay of these funds.").