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Jul 29 2020

July 29, 2020

VIA ELECTRONIC FILING

Ms. Kimberley A. Campbell, Chief Clerk
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
Raleigh, North Carolina 27603

Re: Virginia Electric and Power Company, d/b/a Dominion Energy North Carolina's Notice of Appeal and Exceptions
Docket No. E-22, Sub 562

Dear Ms. Campbell:

Enclosed on behalf of Virginia Electric and Power Company, d/b/a Dominion Energy North Carolina, is the *Notice of Appeal and Exceptions* for filing in the above-referenced proceeding.

If you have any questions regarding this filing, please do not hesitate to call me. Thank you for your assistance with this matter.

Very truly yours,

/s/Mary Lynne Grigg

MLG:sjg

Enclosure

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-22, SUB 562

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Dominion Energy North Carolina for Adjustment of Rates and Charges Applicable to Electric Service in North Carolina	)	DOMINION ENERGY NORTH CAROLINA'S NOTICE OF APPEAL AND EXCEPTIONS

NOW COMES Virginia Electric and Power Company, d/b/a Dominion Energy North Carolina ("DENC" or the "Company"), pursuant to N.C.G.S. § 62-90 and Rule 18 of the North Carolina Rules of Appellate Procedure, and gives Notice of Appeal to the North Carolina Supreme Court from the February 24, 2020 *Order Accepting Public Staff Stipulation in Part, Accepting CIGFUR Stipulation, Deciding Contested Issues, and Granting Partial Rate Increase* issued by the North Carolina Utilities Commission (the "Commission") in the above-captioned proceeding ("Order"). Pursuant to N.C.G.S. § 62-90(a), DENC sets forth below the exceptions and the grounds on which it considers the Order to be erroneous as a matter of law. As set forth below, the Commission committed reversible error in determining that the Company (1) cannot earn a return on the unamortized balance of its coal combustion residuals ("CCRs") costs over the amortization period and (2) must amortize recovery of CCR costs over ten years.

On April 24, 2020, the Company filed a Motion for Reconsideration and Clarification ("Motion") on the three issues in the Commission's Order.[1] On

[1] The Company's Motion tolled the deadline to file an appeal of the Commission's decision to the Supreme Court. *See State ex rel. Utilities Comm'n v. MCI Telecommunications Corp.*, 132 N.C. App. 625, 630, 514 S.E.2d 276, 280 (1999).

July 28, 2020, the Commission issued its *Order Deciding Motions for Reconsideration and Clarification, and Requiring Implementation of New Rates* ("Reconsideration Order"), which granted reconsideration and ruled on one issue and denied reconsideration on the remaining two. The issues that the Commission declined to reconsider are those the Company now provides notice of appeal.

EXCEPTION NO. 1

The Order's Evidence and Conclusions for Findings of Fact Nos. 53-55 and the underlying Findings of Fact are affected by errors of law, unsupported by substantial evidence, arbitrary and capricious, and unconstitutional in that they deny the Company a return during the ten-year amortization period for its CCR[2] costs. The Commission has consistently held, including in the three most recent electric utility general rate cases, that for cost recovery, a utility must show that the costs it seeks to recover are (1) "known and measurable"; (2) "reasonable and prudent"; and (3) "used and useful" in the provision of service to customers.[3] In each of the past three general rate cases, the Commission has held that CCR costs meet this standard. The Company's CCR costs in its current rate case meet this standard as well. However, the Commission's Order departs from this well-established precedent and classifies the Company's CCR costs as "deferred operating expenses" not entitled to a return rather than "property used and useful" that is entitled to a rate of return by statute. *See* N.C.G.S. §§ 62-133(b)(1) & (5).

[2] "CCR" as used herein includes fly ash, bottom ash, and other by-products from combustion of coal in coal-fired electric generation plants.

[3] *See Order Approving Rate Increase and Cost Deferrals and Revising PJM Regulatory Conditions*, Docket No. E-22, Sub 532 (December 22, 2016) ("2016 Rate Case Order"); *Order Accepting Stipulation, Deciding Contested Issues and Granting Partial Rate Increase*, Docket No. E-2, Sub 1142 (February 23, 2018) ("2017 DEP Order"); *Order Accepting Stipulation, Deciding Contested Issues, and Requirements Revenue Reduction*, Docket No. E-7, Sub 1146 (June 22, 2018) ("2017 DEC Order").

The Order states:

> [T]he Commission determines 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. *Utilities Comm'n v. Duke Power Co.*, 305 N.C. 1, 18, 287 S.E.2d 786, 796 (1982). Accordingly, based on the record as a whole, the Commission concludes that it is appropriate to treat the CCR Costs as deferred operating expenses and not as costs of property used and useful within the meaning and scope of N.C.G.S. § 62-133(b) and to not allow a return on the unamortized balance of the CCR Costs.

Order at 134.

This directly contravenes the Commission's findings and conclusions in the Company's 2016 Rate Case Order where the Commission allowed for recovery of CCR costs, with a return, after determining that "CCR repositories are and have served their purpose … they have been used and useful for [the Company's] ratepayers." 2016 Rate Case Order at 61.[4]

Moreover, the Commission solidified its position on this issue in the 2017 DEP Order by referencing the Company's 2016 rate case when the Public Staff attempted to liken CCR costs to abandoned nuclear plant costs:

> First and foremost, this case does not involve "abandoned plant" or cancellation costs. Rather, it involves "reasonable and prudent" and "used and useful" expenditures by [DEP], similar to the Commission's determination in the [Company's 2016 Rate Case Order].

DEP Order at 171.

[4] In the 2016 Rate Case Order, the Commission rejected the Office of the Attorney General's recommendation to exclude the unamortized balance of CCR ARO costs from rate base. The Commission stated "the 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 [the Company's] ratepayers. However, pursuant to the CCR Final Rule, [the Company] must incur expenses to the existing repositories for environmental remediation . . . . Like the existing CCR repositories, these permanent storage repositories will be used and useful for [the Company's] ratepayers." 2016 Rate Case Order at 61.

The Commission's decision to now classify the Company's CCR costs as operating expenses that are not "used and useful," and ineligible for a return, not only departs from its three most recent orders, but also runs counter to North Carolina Supreme Court precedent. In *Utilities Comm'n v. Virginia Elec. & Power Co.*, the Court held that "[w]hile Chapter 62 of the General Statutes makes no reference to working capital, as such, the utility's own funds reasonably invested in such materials and supplies and its cash funds reasonably so held for payment of operating expenses, as they become payable, fall within the meaning of the term 'property used and useful in providing the service,' as used in G.S. 62-133(b)(1), and are a proper addition to the rate base on which the utility must be permitted to earn a fair rate of return." 285 N.C. 398, 414-15, 206 S.E.2d 283, 295-96 (1974). Section 62-133 does not define the phrase "public utility's property used and useful" nor does it restrict "property" to simply generators and power lines. Instead, the term includes all assets necessary to provide electricity to the public and the test is whether the property in question serves the public and was paid by debt or equity investors—"the utility's own funds."

Here, the CCR costs, necessary to comply with current environmental laws, were funded by the Company's investors and therefore the Order incorrectly classified them as deferred operating expenses that are not used and useful. For example, in DEP's and DEC's 2017 Rate Case Orders, the Commission correctly concluded that the funds advanced by the utilities to comply with the CCR rule are "investor-supplied funds, not ratepayer supplied funds and under principles of equity, law and fairness are eligible for a return [on investment]." 2017 DEC Order at 276. The Commission also recognized that failure to allow a return on investment on these investor-supplied funds would deprive

investors of the time value of money on these funds. Further, not only is the Commission's decision to deny a return on the Company's CCR costs inconsistent with this precedent, as the Commission noted in the DEC case denying a return on this capital would increase the risk of investing in the Company, "ultimately increasing the Company's cost of capital." *Id*.

The Commission's decision to deny cost recovery, in the form of a return, for these CCR costs in the present case is arbitrary and capricious, in legal error, unconstitutional, and unsupported by substantial evidence in the record. The Commission's departure from precedent here to reclassify CCR costs as deferred operating expenses that are not used and useful is not supported by competent, material, and substantial evidence. In the 2017 DEC Order and 2017 DEP Order, the Commission determined that CCR remediation costs were "used and useful" and the factual predicates underlying the propriety of a return were met: the closure costs were appropriately deferred and the costs were paid through investor-supplied funds and have not been recovered through rates. 2017 DEC Order at 276; 2017 DEP Order at 195. The same standard was met here. Therefore, the Commission's decision to deny a return on the Company's CCR costs over the amortization period under the similar circumstances presented here is arbitrary and inconsistent with its own precedent.

The arguments to justify the classification of the Company's CCR costs as deferred operating expenses that are not "used and useful," and deny a return over the amortization period are not compelling. First, the Commission likens the CCR costs to those in an abandoned nuclear plant circumstance or like the manufactured gas plant ("MGP") cleanup costs, concluding that, like those costs, CCR costs are not used and

useful. But this is inconsistent with the Commission's findings in the 2017 DEP Order where the Commission explained that CCR costs are not abandoned plant or cancellation; instead, they are "reasonable and prudent" and "used and useful" expenditures. 2017 DEP Order at 191. The Commission also found its past treatment of MGP cleanup costs distinguishable from CCR costs for two additional reasons: (1) decades passed between when those cleanup costs were incurred versus when the utility sought to recover them and (2) the utility seeking to recover the cleanup costs did not even own the MGP facilities at the time of cleanup. *Id.* at 192-93.

Second, the Commission points to its broad authority to set just and reasonable rates, and by disallowing a return on the Company's CCR costs then the resulting rates would represent a more equal balance of costs between the Company's shareholders and its customers. As Commissioner Clodfelter aptly notes in his dissent, this logic is synonymous with the "equitable sharing" theory that the Commission flatly rejected in the past three rate cases and nominally rejected in the present case: "much of the reasoning offered by the Commission is the same as that invoked by the Public Staff to support its own 'equitable sharing' proposal." Order at 136; Clodfelter Dissent at 4-5. The Commission itself has stated that the equitable sharing

> concept is standard-less, and, therefore, from the Commission's view arbitrary for purposes of disallowing identifiable costs. … were the Commission to adopt it, the Commission's action would be subject to an arbitrary and capricious attack and likely subject itself to reversal.

2017 DEC Order at 273.

The North Carolina Supreme Court has also made clear that the Commission does not have the discretionary power to effectuate equitable sharing. *See State ex rel. Utils. Comm'n v. Thornburg*, 325 N.C. 463, 495-98, 385 S.E.2d 451, 469-71 (1989).

Thus, the Commission has reversed course in the Order and is attempting to use "discretion," which it recently held it does not possess, to implement the Public Staff's equitable sharing proposal without finding a single specific instance of imprudence related to the Company's CCR costs: "there is no dispute among the parties as to whether any CCR Costs were imprudently incurred." Order at 129. Effectively, by denying a return over the 10-year amortization period, the Commission is disallowing 26% of the Company's prudently incurred CCR costs.

Denying the Company a return during the amortization period also constitutes an unconstitutional take of capital, as well as violates Article 1, Section 19 of the North Carolina Constitution as a deprivation of the Company's substantive due process and equal protection rights. Rates established by the Commission must provide the utility with the opportunity of recovering its reasonable operating expenses, as well as provide a fair and reasonable return on the investments made by the Company in providing utility service to its customers.[5] It is undisputed that coal ash remediation costs were incurred as a result of producing electricity for the Company's customers in North Carolina. Denying the Company the opportunity to recover those costs would therefore be confiscatory and would unconstitutionally deprive the utility of its property without due process or just compensation. The Commission's decision that, on the one hand, the Company's deferred CCR costs are reasonable but, on the other hand, the Company should not be permitted to recover their respective carrying costs contradicts long-standing constitutional precedent and would be fundamentally unfair. Furthermore, no

[5] *See Bluefield Water Works Co. v. Publ. Serv. Comm'n.*, 262 U.S. 679, 690 (1923); *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 604 (1944).

regulated utility can operate efficiently when its regulator treats similarly situated regulated entities disparately.

Finally, the Commission is decreasing future revenue requirements and rates to compensate for what it perceives to be deficiencies in the depreciation expense component of revenue requirements in the instant case and in prior rate cases, which were in fact accepted by the Commission at the time.[6] *See* Order at 143. This, too, is an arbitrary and capricious decision that is also unsupported by the evidence in this case. In its Order, the Commission did not rely on competent, substantial evidence to support its findings of fact or conclusions of law, nor did it articulate any fixed rules or standards under which the Commission's Order can be judged. Consequently, the Commission erred in denying a return over the amortization period of the Company's CCR costs without a rational basis and this decision should be reversed.

EXCEPTION NO. 2

The Commission also erred by imposing a ten-year amortization period on the recovery of the Company's prudently incurred CCR costs. This extended amortization period violates the due process principles recognized in *Hope* and *Bluefield* that require the rates of a regulated utility be set to allow a reasonable opportunity to recover the utility's expenses incurred in providing service. Further, the Commission's requirement that the Company must recover its CCR costs over period as long as ten years, without a

[6] While the Commission's Reconsideration Order did modify one of the determinations in its Order, this decision was based on a "change in circumstances." *See* Reconsideration Order at 5. The Commission's Reconsideration Order did not, however, consider the "additional or alternative arguments" DENC advanced in its Motion such as whether the Company's accounting treatment of CCR costs in its depreciation expense was proper regardless of the change in circumstances. *Id.*

return, is arbitrary and capricious, unconstitutional, and unsupported by substantial evidence.

In its Evidence and Conclusions for Findings of Fact Nos. 53-55, the only basis the Commission provides for the ten-year amortization period is its authority to implement "just and reasonable" rates to reach a division of the CCR costs between the Company's shareholders and customers that the Commission determined was equitable. There is otherwise nothing in the record to support the Commission's decision to set a ten-year amortization period when they recently determined a five-year amortization period was appropriate in the Company's 2016 rate case as well as in DEP's 2017 rate case and DEC's 2017 rate case.

More fundamentally, the ten-year amortization period fails to allow a reasonable opportunity to recover the expenses and, in fact, ensures that the utility will not recover its expenses since the utility will be repaid its expenses with less valuable future dollars. This outcome is contrary to the Commission's own acknowledgement that "one of the fundamentals of cost-based ratemaking as it has developed in this state is that the full cost of providing utility service should be recovered, as near as may be possible, from rates in effect in the period in which service is provided." Order at 137. The Company's proposed five-year amortization period results in less intergenerational inequity than the ten-year amortization period because a longer amortization period will result in "pancaking" of costs approved in this case with cost recovery of future costs. *See* Order at 132 (stating that "allocating all of the CCR Costs to ratepayers … raises intergenerational equity concerns").

For these reasons, the Commission's determination that the Company must recover its CCR costs over a ten-year period, without a return, is arbitrary and capricious and unsupported by substantial evidence in the record and instead is rooted in the equitable sharing theory the Commission itself has found to be arbitrary.

CONCLUSION

For the reasons set forth above, the Order is arbitrary and capricious, is affected by errors of law, and is unsupported by competent, material, and substantial evidence in light of the entire record.

Respectfully submitted this the 29th day of July, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Virginia Electric and Power Company, d/b/a Dominion Energy North Carolina's Notice of Appeal and Exceptions*, as filed in Docket No. E-22, Sub 562, was served electronically upon all parties of record.

This, the 29th day of July, 2020.

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