

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 Virginia Electric and Power	)	
Company, d/b/a Dominion Energy North	)	ATTORNEY GENERAL'S
Carolina, for Adjustment of Rates and	)	OFFICE NOTICE OF
Charges Applicable to Electric Service in	)	CROSS APPEAL
North Carolina	)	

The North Carolina Attorney General pursuant to N.C. Gen. Stat. § 7A-29(b), § 62-90 *et al.*, and Rule 18 of the North Carolina Rules of Appellate Procedure, gives Notice of Cross Appeal to the North Carolina Supreme Court from the 24 February 2020 Order Accepting Public Staff Stipulation in Part, Accepting CIGFUR Stipulation, Deciding Contested Issues and Granting Partial Rate Increase ("February Order"), in the above referenced matter, as revised and clarified by the Commission's 28 July 2020 Order Deciding Motions for Reconsideration and Clarification, and Requiring Implementation of New Rates issued by the North Carolina Utilities Commission (the Commission) in these proceedings.

Pursuant to N.C. Gen. Stat. § 62-90(a), the Attorney General identifies the exceptions and the grounds on which he considers the decision to be unlawful, unjust, unreasonable, or unwarranted because it is in excess of the Commission's statutory authority; affected by errors of law; unsupported by

competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious.

#### **EXCEPTION NO. 1**

The Commission's findings and conclusions that a return was warranted on the coal ash costs of Virginia Electric and Power Company, d/b/a Dominion Energy North Carolina ("Dominion" or the "Company"), as the costs were deferred during the period July 1, 2016 through June 30, 2019 and up to the effective date of new rates (the "Deferral Period") are affected by errors of law; unsupported by competent, material and substantial evidence in view of the entire record as submitted; in excess of statutory authority; and arbitrary or capricious in view of the following:

- Based on the record, the Commission correctly concluded that it is appropriate to treat the Company's coal ash costs as deferred operating expenses and not as costs of property used and useful within the meaning and scope of N.C. Gen. Stat. § 62-133. (February Order at 134)
- Nonetheless, the Commission erroneously concluded that it could allow the Company to recover a rate of return on the costs during the Deferral Period calculated at the Company's previously authorized weighted average cost of capital (which the Commission referred to as "financing costs"). (February Order at 135)
- The Commission exceeded its statutory authority when it held that it could "approve a regulatory asset to defer for future recovery expenses

that were incurred in the past and even ... provide for a return on those deferred expenditures, such as by providing for carrying costs....” (*Id.*)

- The Commission erred in its decision that N.C. Gen. Stat. § 62-133 and applicable legal principles allow the recovery of a return on deferred operating expenses. (*Id.*) The Commission can only grant a return on the cost of property used and useful, and the Company’s coal ash costs are not costs of property used and useful within the meaning and scope of N.C. Gen. Stat. § 62-133.
- Alternatively, the Commission’s determination that it is reasonable to allow a rate of return during the deferral period is not supported by competent, material and substantial evidence in view of the entire record as submitted and is arbitrary and capricious. (*Id.*)

(Finding of Fact Nos. 54-55, Evidence and Conclusions in support thereof, and Ordering Paragraph Nos. 7-8)

## **EXCEPTION NO. 2**

The Commission’s findings and conclusions that the Company’s authorized rate of return on common equity (“ROE”) should be fixed at 9.75% are affected by errors of law; unsupported by competent, material and substantial evidence in view of the entire record as submitted; and arbitrary or capricious in view of the following:

- The Commission correctly observed that it must exercise its independent judgment and arrive at its own independent conclusions as to the proper ROE when a non-unanimous stipulation is presented for

consideration, as occurred in this case. See *State ex rel. Utilities Commission v. Carolina Utility Customers Ass'n*, 348 N.C. 452, 500 S.E.2d 693 (1998) and *State ex rel. Utilities Commission v. Carolina Utility Customers Ass'n*, 351 N.C. 223, 524 S.E.2d 10 (2000). (February Order at 33)

- However, the Commission's conclusion that fixed the authorized ROE at 9.75% was not supported by substantial evidence in the record as a whole because the conclusion was affected by the improper consideration of ROEs or averages of ROEs that have been authorized by regulators for utilities in other cases, and improperly rejected contradictory evidence because it did not align with the ROEs authorized in other cases See, e.g., *State ex rel. Utilities Com. v. Public Staff*, 331 N.C. 215, 222-226, 415 S.E.2d 354, 359-362 (1990); *State ex rel. Utilities Commission v. Cooper*, 367 N.C.430, 443, 758 S.E.2d 635, 643 (2014).

(Finding of Fact Nos. 12-16, Evidence and Conclusions in support thereof and Ordering Paragraph Nos. 1, 3)

### **CONCLUSION**

For the reasons stated above, the Commission's Order is in excess of the Commission's statutory authority; affected by errors of law; unsupported by competent, material and substantial evidence in view of the entire record as submitted; and arbitrary or capricious.

Respectfully submitted this the 4<sup>th</sup> day of September, 2020.

/s/  
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