



**NORTH CAROLINA
PUBLIC STAFF
UTILITIES COMMISSION**

January 18, 2019

M. Lynn Jarvis, Chief Clerk
North Carolina Utilities Commission
Mail Service Center 4325
Raleigh, North Carolina 27699-4300

Re: Docket No. E-7, SUB 1181; Docket No. SP-12478, SUB 0; an
Docket No. SP-12479, SUB 0 – Public Staff's Motion

Dear Ms. Jarvis:

In connection with the above-referenced dockets, I transmit herewith for filing on behalf of the Public Staff the attached Motion.

By copy of this letter, I am serving to all parties of record.

Sincerely,

Electronically Signed
/s/ Tim Dodge
Staff Attorney
tim.dodge@psncuc.nc.gov

Attachment

cc: Parties of Record

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**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. E-7, SUB 1181
DOCKET NO. SP-12478, SUB 0
DOCKET NO. SP-12479, SUB 0

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Transfer of Certificates of Public)
Convenience and Necessity and)
Ownership Interests in Generating)
Facilities from Duke Energy Carolinas, LLC,)
to Northbrook Carolina Hydro II, LLC, and)
Northbrook Tuxedo, LLC)

**MOTION OF THE PUBLIC
STAFF**

NOW COMES THE PUBLIC STAFF – North Carolina Utilities Commission, by and through its Executive Director, Christopher J. Ayers, and respectfully moves the Commission to order that questions of the reasonableness of the amount of any deferred loss arising from the sale of hydroelectric facilities identified in this docket be subject to review in the next general rate case of Duke Energy Carolinas, LLC (DEC). In support of this motion the Public Staff shows the following:

1. This proceeding was initiated with the filing of a Joint Notice of Transfer, Request for Approval of Certificates of Public Convenience and Necessity, Request for Accounting Order and Request for Declaratory Ruling (Petition) on July 5, 2018. The Petition gives notice of the proposed sale of five hydroelectric generating facilities from DEC to Northbrook Carolina Hydro II, LLC, and Northbrook Tuxedo, LLC. The Petition anticipates a \$27 million loss on the sale (North Carolina retail share).

2. The Petition asks for an accounting order allowing the \$27 million loss to be deferred to a regulatory asset, which would enable DEC to avoid having to write off the

loss on its books. The Petition states that DEC will propose to amortize the regulatory asset over a period of time at the approved return in the next rate case.

3. Paragraph 12 of the Petition states in part: “An accounting order granting the relief that DEC seeks will not preclude the Commission or parties from addressing the reasonableness of the costs deferred arising from the Transaction in the next general rate proceedings filed by DEC.” Consistent with this statement, on September 4, 2018, the Public Staff filed comments (Public Staff Comments) generally supportive of the Petition, with the exception of the time at which amortization of the regulatory asset should begin.¹ The Public Staff also requested that the question of “whether it is reasonable to impose the full \$27 million loss on sale of the hydro facilities on ratepayers” . . . “be preserved as an open issue until DEC’s next general rate case when the reasonableness of recovery of the deferred costs will be addressed.” Public Staff Comments at p. 5. The Public Staff Comments indicated that the proposed sale of the hydroelectric facilities raised a question meriting investigation in this docket; namely, whether it was reasonable for DEC to invest approximately \$18 million in the hydroelectric facilities from 2015 – 2017 and another \$865,000 in 2018, in light of DEC’s position that it was no longer cost effective for the utility to continue to operate the facilities.

4. In Reply Comments filed on September 18, 2018, DEC argued that because the 2015 – 2017 capital investments in the hydroelectric facilities were incorporated in its last general rate case, Docket No. E-7, Sub 1146 (Sub 1146 Proceeding), it would not be appropriate to subject those costs to a reasonableness review. DEC argued that with

¹ The Public Staff also has not yet taken a position regarding whether or not a return on the unamortized deferred costs should be allowed to be charged to the ratepayers, either through inclusion of the unamortized costs in rate base or otherwise.

respect to the deferred loss on sale, the only costs that should be subject to a reasonableness review in its next rate case would be the legal and transaction-related costs. DEC witness Williams takes a similar stance in her December 21, 2018, prefiled testimony in this docket.

5. To the extent that the 2015 - 2017 capital expenditures on the hydroelectric facilities were included in rate base in the Sub 1146 Proceeding, the Public Staff requests that the Commission, in its order on the Petition, allow further review of the reasonableness of those costs in DEC's next general rate case pursuant to N.C. Gen. Stat. § 62-80, for the reasons stated below.

a. The Petition filed by DEC on July 5, 2018, says: "An accounting order granting the relief that DEC seeks will not preclude the Commission or parties from addressing the reasonableness of the costs deferred arising from the Transaction in the next general rate proceedings [sic] filed by DEC." The "costs deferred" are the \$27 million loss (North Carolina retail allocation). The large majority of the loss arises from the difference in sale price and net book value of the facilities – not from the legal and transaction-related costs. DEC is now substantially reversing the position it set out in the Petition: DEC's Reply Comments argue that only the legal and transaction-related portion of the loss on sale may be reviewed for reasonableness in its next general rate case. The reasonableness of the amount of loss on sale necessarily includes review of the net book value that arose from DEC's decision to invest millions in the facilities shortly before deciding to sell them. Where DEC initiated this proceeding with the promise that a reasonableness review would not be precluded in its next general

rate case, there is compelling reason to use N.C. Gen. Stat. § 62-80 to hold the Company to its promise.

b. DEC observes that it notified the Public Staff of the proposed sale of the hydroelectric facilities in August of 2017, two days before it filed its rate case application the Sub 1146 Proceeding. DEC argues that the Public Staff thus had notice of the proposed sale in time to conduct a full reasonableness review in conjunction with the rate case, and should not get "another bite at the apple." However, this argument neglects the reality of the rate case investigation process and would leave ratepayers in an unfair position. The reality is that DEC provided the Public Staff with a bare outline of its sale proposal in August 2017. The Company provided a second update in February 2018. The February 2018 update, which indicated DEC had no binding offers for the hydroelectric facilities, occurred more than a month after the end of the discovery period in the Sub 1146 Proceeding and after the Public Staff filed its rate case testimony. DEC did not provide the Public Staff with the amount of loss on sale until May 9, 2018, shortly after parties filed proposed orders in the Sub 1146 Proceeding. Even at that time, DEC indicated it was still negotiating the sale. The proposed sale of the hydroelectric facilities had not become concrete enough to merit investigation when the Public Staff was preparing its rate case testimony. Indeed, the Public Staff did not send its first data request on the hydroelectric facilities to DEC until May 22, 2018. The proposed hydroelectric sale was too remote, uncertain, and lacking in quantification at the time of the Public Staff's rate case investigation to put the Public Staff on notice that a detailed investigation of prior investment in

those facilities was needed. Furthermore, as a general matter, when a proceeding subsequent to a general rate case narrows and focuses attention on a specific account or category of plant investment, the Public Staff believes that it would be unreasonable and might lead to an outcome unfair to the ratepayers to preclude examination of that narrower subset of costs simply because it had been included in a much larger set of costs reviewed in an inherently more time- and resource-constrained general rate case proceeding.

c. DEC's reply comments argue that it would "potentially result in impermissible retroactive ratemaking" if a portion of the loss on sale were found to be imprudent and disallowed in its next rate case. However, review of the 2015 - 2017 costs in the next rate case would not be retroactive ratemaking, as defined by the N.C. Supreme Court, if rates were adjusted on a prospective basis to exclude recovery of any costs found to be imprudent. The Court has ruled that:

Retroactive ratemaking has been defined as "[a]djustments to future rates to rectify undue past profits" It has also been defined as occurring "when an additional charge is made for past use of utility service, or the utility is required to refund revenues collected, pursuant to then lawfully established rates, for such past use."

(Citations omitted.) *State ex rel. Utilities Com. v. Nantahala Power & Light Co.*, 326 N.C. 190, 205 (1990). The Public Staff is not suggesting that any finding of imprudence of capital expenditures in a future rate case should result in retroactive recovery of revenues from rates established in the Sub 1146 Proceeding. Rather, an adjustment of the amount of recoverable loss on sale – if imprudence or unreasonableness is shown - should be made effective beginning on the date of

approval of the sale. As shown by the Court's definition above, this would not amount to retroactive ratemaking.

6. The Commission has authority under N.C. Gen. Stat. § 62-80 to reconsider the prudence of the small hydro expenditures made in 2015 - 2017. Amendment of a rate case order may be done "at any time" under N.C. Gen. Stat. § 62-80. More generally, "the final order of the Commission therein is not within the doctrine of *stare decisis*. Circumstances change and emergencies arise. Petitions for amendment, modification or revocation of rate orders may be filed at any time." (Citation omitted.) *State ex rel. Utilities Com. v. Carolina Power & Light Co.*, 250 N.C. 421, 430 (1959). The circumstances of the present case are highly unusual, and merit a review of the reasonableness of the 2015 – 2017 expenditures. As discussed by DEC witness Williams, the Public Staff recognizes that stability and finality in ratemaking are important as a general concept, but should not impose a strict and inviolable barrier where unusual and compelling circumstances justify an investigation.

7. This motion to preserve for later review the question of the reasonableness of DEC's net *book* value for the subject hydroelectric facilities, and therefore its loss on sale, does not forecast or suggest that there is anything unreasonable or imprudent about DEC's 2015 – 2017 expenditures on its hydroelectric facilities. The Public Staff simply believes it should be allowed to investigate the question before making a recommendation on cost recovery for the loss on sale.

WHEREFORE, the Public Staff moves that the Commission include in its ruling on the Petition an ordering paragraph to the effect that the reasonableness of the loss on sale may be reviewed in DEC's next rate case, including the reasonableness of

expenditures on those facilities during the 2015 – 2017 period, pursuant to the Commission's authority under N.C. Gen. Stat. § 62-80 for good cause shown.

Respectfully submitted this the 18th day of January, 2019.

PUBLIC STAFF
Christopher J. Ayers
Executive Director

David T. Drooz
Chief Counsel

Electronically submitted
/s/ Tim R. Dodge
Staff Attorney

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CERTIFICATE OF SERVICE

I certify that a copy of this Motion of the Public Staff has been served on all parties of record or their attorneys, or both, by United States mail, first class or better; by hand delivery; or by means of facsimile or electronic delivery upon agreement of the receiving party.

This the 18th day of January, 2019.

Electronically submitted
/s/ Tim R. Dodge