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November 6, 2019

VIA ELECTRONIC FILING

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

Re: Docket No. E-22, Sub 562
Docket No. E-22, Sub 566

Dear Ms. Campbell:

Enclosed on behalf of Virginia Electric and Power Company, d/b/a Dominion Energy North Carolina, is Dominion Energy North Carolina's *Post-Hearing Brief*, for filing in the above-referenced proceeding. I have also provided a Word copy of the Brief to briefs@ncuc.net.

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:asm

Enclosure

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STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-22, SUB 562
DOCKET NO. E-22, SUB 566

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-22, SUB 562 In the Matter of Application of Dominion Energy North Carolina for Adjustment of Rates and Charges Applicable to Electric Service in North Carolina **DOCKET NO. E-22, SUB 566** In the Matter of Petition of Virginia Electric and Power Company, d/b/a Dominion Energy North Carolina for an Accounting Order to Defer Certain Capital and Operating Costs Associated with Greensville County Combined Cycle Addition	)	POST-HEARING BRIEF OF VIRGINIA ELECTRIC AND POWER COMPANY, D/B/A DOMINION ENERGY NORTH CAROLINA

INTRODUCTION AND SUMMARY OF THE CONTESTED ISSUE

Virginia Electric and Power Company, d/b/a Dominion Energy North Carolina ("DENC" or the "Company") is requesting recovery of its prudently and reasonably incurred environmental compliance costs relating to the storage and placement of coal combustion residuals ("CCR" or "coal ash") at its coal-fired generation plants. The recovery and accounting treatment of these costs represent the contested issues at the evidentiary hearing for these dockets.[1]

[1] All uncontested issues, which were resolved via stipulation, are addressed in the Company's and the Public Staff's Joint Proposed Order.

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Electric utilities operating in North Carolina must comply with federal and state environmental regulations. Utilities also have a responsibility to provide adequate, reliable, and affordable electricity service to their customers. In meeting those responsibilities, utilities must consider and adapt to other domestic and international externalities. As North Carolina's oldest regulatory body, the North Carolina Utilities Commission (the "Commission") has witnessed those externalities first hand. In the last half-century, North Carolina electric utilities have been faced with the OPEC oil embargo, the expansion - then contraction - of nuclear development, and fluctuating fuel costs, just to name a few.

During the same period, the federal government and states have progressively tightened environmental regulations that apply to electric generation plants. For example, in response to the Clean Air Act, many utilities in the 1970s began shifting away from coal-fired generation in favor of oil-fired generation. Skyrocketing oil prices throughout the 1970s, though, caused utilities to convert to and expand coal-fired generation in the 1980s to reduce the cost of electricity.[2] Federal legislation passed in the 1970s in response to the oil embargo actively promoted the increased use of coal-fired generation to replace oil and natural gas.[3] In recent decades, utilities have shifted from coal to natural gas and renewable energy resources.

Fluctuating and tumultuous fuel costs have led utilities to shift fuel sources to minimize electricity costs for their customers. At the same time, ever strengthening

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[2] *Fuel Choice in Steam Electric Generation: Historical Overview*, Energy Information Administration (1985), DENC Post-Hearing Exhibit 1a, at 23.

[3] *Id*. at 99-100.

environmental regulations, while providing societal benefits, increase costs for utilities and, thereby, their customers.

The federal Coal Combustion Residuals Rule ("CCR Rule"), which was promulgated by the Environmental Protection Agency ("EPA") in 2014, is an environmental regulation that has significantly increased the Company's environmental compliance obligations. The Company has a responsibility to fully comply with the CCR Rule. The Company also has a responsibility to its customers to minimize the costs it incurs to comply with the CCR Rule. The Company has done so by prudently and reasonably managing its CCR projects that are at issue in this case from July 1, 2016 through June 30, 2019. No party to this case has challenged a single CCR compliance cost incurred by the Company.

This Post-Hearing Brief addresses DENC's position on the lone contested issues in the case, which are whether the Company is entitled to recover its environmental compliance costs incurred over a period from July 1, 2016 through June 30, 2019. For the reasons set forth in this Post-Hearing Brief, the Company's positions with respect to the issues addressed herein should be adopted by the Commission.

SUMMARY OF ARGUMENT AS TO COAL COMBUSTION RESIDUAL ENVIRONMENTAL COMPLIANCE COST RECOVERY

On December 22, 2016, the Commission concluded that the Company's activities to close or retrofit its CCR ponds and landfills in Virginia and West Virginia, as well as the associated costs of those activities incurred through June 30, 2016, were reasonable and prudent. *Order Approving Rate Increase and Cost Deferrals and Revising PJM Regulatory Conditions*, Docket No. E-22, Sub 532, at 10 (Dec. 22, 2016) ("2016 DENC Rate Case"). The costs in this case, incurred between July 1, 2016 and June 30, 2019,

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reflect a continuation of the CCR Rule compliance activities that were the subject of the 2016 DENC Rate Case. As it did in the 2016 DENC Rate Case (*id*. at 54), the Public Staff investigated the Company's activities and found that the efforts and costs incurred from July 1, 2016 through June 30, 2019 were prudent and reasonable. (Tr. Vol. 6 at 299.) The only difference between this case and the 2016 DENC Rate Case is that, here, the Public Staff has asked the Commission to apply an arbitrary disallowance of forty (40) percent of the Company's CCR costs.

The Public Staff's disallowance theory originated in rate cases brought by Duke Energy Carolinas, LLC ("DE Carolinas") and Duke Energy Progress, LLC ("DE Progress") in 2018 (Docket No. E-2, Sub 1142 ("2018 DE Progress Rate Case") and Docket No. E-7, Sub 1146 ("2018 DE Carolinas Rate Case"), collectively the "2018 Duke Energy Rate Cases"). Like this case, the recovery of DE Progress' and DE Carolinas' CCR costs was one of the primary contested issues in those cases. In the 2018 Duke Energy Rate Cases, the Public Staff radically departed from the legal cost recovery standard. In place of the accepted standard, the Public Staff urged the Commission to do away with standards of any kind and to adopt its "equitable sharing" disallowance theory.

The Commission soundly rejected the Public Staff's equitable sharing theory in the 2018 Duke Energy Rate Cases, finding that it was legally deficient and choosing not to exercise its discretion as requested by the Public Staff. (2018 DE Progress Rate Case Order at 189.) As the Commission concluded in the 2018 Duke Energy Rate Cases, the Public Staff's "equitable sharing" argument is completely arbitrary and based upon a fundamental misapprehension of the law, applicable Supreme Court precedent, and the limits of this Commission's discretion. Under North Carolina's statutory cost recovery

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framework, the Commission does not possess the discretion to disallow any prudently incurred, used and useful, costs. Even if it did possess such authority, the Commission cannot exercise its discretion to impose such a disallowance that has no "determining principle[s]." *See Tate Terrace Realty Investors, Inc. v. Currituck Cty.*, 127 N.C. App. 212, 222-23, 488 S.E.2d 845, 851 (1997). The Commission, therefore, confirmed that the traditional cost recovery standard should be applied to CCR compliance costs:

> 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.

(2018 DE Progress Rate Case Order at 143; DE Carolinas Rate Case Order at 209.)

The Public Staff has resurrected its "equitable sharing" disallowance theory in this case. Once again, the Public Staff urges the Commission to adopt a blanket "equitable sharing" disallowance to DENC's CCR costs without offering any guiding standards or determining principles. Because the Public Staff's "equitable sharing" theory is plagued by the same deficiencies that were present in the 2018 Duke Energy Rate Cases, the Commission should reject the Public Staff's proposal here.

In the 2016 DENC Rate Case, the Commission found that the CCR costs incurred by the Company through June 2016 were reasonable and prudent, and that they were also used and useful. It also found that the five-year amortization period proposed in the Stipulation between the Company and the Public Staff was reasonable under the circumstances, and that future costs could be deferred and recovered as appropriate in future rate cases.[4] While the specific activities and costs have changed since its last rate

[4] In the 2018 DE Carolinas Rate Case, the Commission, relying in part on its holding in the 2016 DENC Rate Case, held:

case as the Company's CCR compliance projects have progressed towards completion, the CCR cost recovery issues posed in this case are identical to the issues in the 2016 DENC Rate Case. The Commission should decide the identical issues posed in this case in like fashion.

BACKGROUND FACTS

The reasonableness and prudency of CCR compliance costs for which DENC seeks recovery in this case is addressed in the Company's Proposed Order and is not a subject of this Post-Hearing Brief. Suffice it to say that, as detailed in the Proposed Order, DENC has presented overwhelming evidence that the costs were in fact reasonably and prudently incurred, and that cost recovery is wholly warranted. Further, no intervenor in this case has contested the reasonableness or prudency of these costs. (Tr. Vol. 6 at 299.) The inquiry should end there.

However, as noted above, the Public Staff proposes an "equitable sharing" disallowance of DENC's CCR compliance costs. The Public Staff's "equitable sharing" proposal is put forward by Witness Maness and supported by Witness Lucas. (*Id.* at 218-19.) Just as in the 2018 Duke Energy Rate Cases, the bases of the "equitable sharing" theory are (1) the Commission's purported "history" of sharing "extremely large costs that do not result in any new generation of electricity for customers" and (2) the Company's alleged failure to prevent environmental contamination from its coal ash

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> "No witness argues that the Commission lacks the discretion to follow the precedent it established in the two previous cases, DNCP 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. Gen. Stat. § 62-133(d) and follow its precedent here – amortize the ARO costs over five years and authorize a return on the unamortized balance."

2018 DE Carolinas Rate Case Order at 275-76.

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basins. (*Id.*) Further, Witness Maness proposes sharing these costs in the same manner as the Public Staff proposed in the 2018 Duke Energy Rate Cases. First, he removes the unamortized coal ash basin closure costs from rate base, thereby eliminating any return on that unamortized balance. (*Id.* at 17.) The second step is to choose an amortization period that will manufacture the desired level of "sharing." (*Id.*) The sharing level that the Public Staff and Witness Maness deem "equitable" is 40% to the Company and 60% to customers. (*Id.* at 222.) Mathematically, that results in a 19-year amortization period, (*id.* at 246); although, when adjusted for the stipulated rate of return to which the Company and the Public Staff agreed subject to the Commission's approval, was appropriate in this case, the amortization period is reduced to 18 years. (*Id.*) Even under the 18-year amortization period, however, the sharing level remains 40% to the Company and 60% to customers.[5] (*Id.* at 247.)

LEGAL STANDARD

The Company's CCR compliance costs are recoverable in rates if it shows that the costs it seeks to recover are (1) "known and measurable";[6] (2) "reasonable and prudent"; and (3) "used and useful" in the provision of service to customers. Jonathan A. Lesser & Leonardo R. Giacchino, *Fundamentals of Utility Regulation* at 41-43 (Pub. Utils. Reports, Inc., ed., 2007.) Application of this framework is what is required by North Carolina's ratemaking statute (*see* N.C. Gen. Stat. § 62-133(b)(5)). As this Commission has stated, "[t]o fix rates that do not allow a utility to recover its costs…would be an

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[5] The proposed sharing in the DE Progress case was 50/50 and in the DE Carolinas case was 51/49. In this case, while the Public Staff has recommended a lesser shareholder sharing percentage (60/40) for the Company, the recommendation is still just as arbitrary.

[6] No intervenor in this case challenges that DENC's CCR compliance costs from July 1, 2016 through June 30, 2019 were "known and measurable."

unconstitutional taking." *In the Matter of Application of Carolina Power & Light Co., d/b/a Progress Energy Carolinas, Inc., for Adjustment of Rates & Charges Applicable to Elec. Util. Serv. in N. Carolina*, Docket No. E-2, Sub 1023, 306 P.U.R.4th 392, at *23 (May 30, 2013).

I. REASONABLE AND PRUDENT

The standard for judging prudence is "whether management decisions were made in a reasonable manner and at an appropriate time on the basis of what was reasonably known or reasonably should have been known at that time. … [T]his standard is one of reasonableness that must be based on a contemporaneous view of the action or decision under question. Perfection is not required. Hindsight analysis – the judging of events based on subsequent developments – is not permitted." *In re Carolina Power & Light Co.*, Docket No. E-2, Sub 537, 94 P.U.R.4th 353, 368 (Aug. 5, 1988) ("1988 DEP Rate Order") (citing *North Carolina ex. rel. Utils. Comm'n v. Gen. Tel. Co. of the Se*, 281 N.C. 318, 345, 189 S.E.2d 705, 722 (1972)).

Challenging prudence requires a detailed and fact intensive analysis, and the challenger is required to (1) identify specific and discrete instances of imprudence; (2) demonstrate the existence of prudent alternatives; and (3) quantify the effects by calculating imprudently incurred costs. *Id.*; *see State ex rel. Utils. Comm'n v. Thornburg*, 325 N.C. 484, 489, 385 S.E.2d 463, 466 (1989) (*"Thornburg II*") (upholding the Commission's prudency determination in the 1988 DEP Order).

II. USED AND USEFUL

"Used and useful" is a concept directly embedded in the ratemaking statute – N.C. Gen. Stat. § 62-133(b)(1) states that the Commission must "[a]scertain the reasonable

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original 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 the State, less that portion of the cost which has been consumed by previous use recovered by depreciation expense . . . ." In general, the Supreme Court's treatment of the concept has been in the negative, i.e., asserting as a basis for its decision that something is not "used and useful" – for example, excess common facilities are not "used and useful" as a matter of law, *see Thornburg II*, 325 N.C. at 495-96, 385 S.E.2d at 469, and a water treatment plant that was not in service as of the end of the test year and would never again be in service was not "used and useful" within the meaning of N.C. Gen. Stat. § 62-133(b)(1). *State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc.*, 335 N.C. 493, 508, 439 S.E.2d 127, 135 (1994). The reverse, of course, is that if the expenditures do support and provide service to customers, the costs are "used and useful."

III. BURDEN OF PROOF

The burden of proof to show that rates are just and reasonable is always on the utility. *See* N.C. Gen. Stat. § 62-134(c). But intervenors have a burden of production in the event that they dispute an aspect of the utility's prima facie case. *See*, *e.g.*, *State ex rel. Utils. Comm'n v. Conservation Council*, 312 N.C. 59, 64 (1984) (utility's costs are "presumed to be reasonable" unless challenged); *State ex rel. Utils. Comm'n v. Intervenor Residents of Bent Creek/Mt. Carmel Subdivisions*, 305 N.C. 62, 76, 286 S.E.2d 770, 779 (1982) ("The burden of going forward with evidence of reasonableness and justness arises only when the Commission requires it or affirmative evidence is offered by a party to the proceeding that challenges the reasonableness of expenses…").

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If the intervenor meets its burden of production through competent, material evidence, the ultimate burden of persuasion reverts to the utility, in accordance with N.C. Gen. Stat. § 62-134(c).

ARGUMENT

It is at the outset important to distinguish between what this case is about and what this case is not about. This case *is* about the Company's proposal to recover discrete coal ash basin closure costs actually incurred from July 1, 2016 through June 30, 2019, which reflect a continuation of the activities and associated costs that were approved in the 2016 DENC Rate Case. Resolving this issue requires the Commission to answer three questions: (1) are the costs known and measurable; (2) were the costs reasonably and prudently incurred; and (3) are the expenditures used and useful in the provision of service to customers? The answers to each question is yes, and DENC is entitled to full recovery of its CCR costs, with a return.

This case *is not* about determining "culpability" for alleged environmental impacts from the Company's historical storage of CCR at its facilities. The Public Staff's *ad hominem* attack on the Company falsely portrays DENC, as well as the entire electric generation industry, as "culpable" for environmental impacts from a half-century of CCR management practices and, thereby, undeserving of complete cost recovery for its CCR compliance costs. That portrayal is wrong. It is also irrelevant and immaterial, because the Public Staff admits that it would be recommending "equitable sharing" irrespective of any alleged "culpability."

This case also *is not* about finding a way to penalize the Company for incurring large costs to comply with mandatory environmental regulations. The Public Staff's real

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rationale for its "equitable sharing" proposal is the magnitude of the costs. However, absent any finding of unreasonable or imprudent management, a disallowance purely based on the magnitude of costs is legally deficient, standard-less, and irresponsible. This Commission should reject the Public Staff's unprincipled disallowance theory and allow DENC full recovery of its CCR costs.

I. THE CCR COMPLIANCE COSTS INCURRED BY DENC TO COMPLY WITH THE CCR RULE FROM JULY 1, 2016 THROUGH JUNE 30, 2019 ARE "KNOWN AND MEASUREABLE", "REASONABLE AND PRUDENT", AND "USED AND USEFUL"; ACCORDINGLY, DENC IS ENTITLED TO RECOVERY OF THOSE COSTS IN RATES, WITH A RETURN.

The Company has met its burden – both the prima facie burden of production and the ultimate burden of persuasion – of showing that the CCR costs it incurred from July 1, 2016 through June 30, 2019 are recoverable and that a return is warranted. The following facts in this case are undisputed:

1. DENC is required to comply with the CCR Rule mandate of closure of the Company's coal ash basins.
2. DENC's CCR compliance costs at issue in this case were incurred to comply with mandatory environmental regulations. These costs were not being recovered in rates in effect when the costs were incurred. Rather, they were deferred for consideration in a future proceeding in accordance with the 2016 DENC Rate Case Order.
3. DENC's CCR compliance costs are "known and measurable."
4. DENC's discrete CCR compliance costs are "reasonable and prudent." The Public Staff reviewed DENC's contracts and costs associated with the

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Company's CCR compliance activities and did not identify a single imprudent cost that should be disallowed. (Tr. Vol. 6 at 260-61.)

The Commission has held on three separate occasions, beginning with the 2016 DENC Rate Case, that CCR Rule compliance activities and costs are "used and useful." Accordingly, the Company is entitled to recovery in rates of its reasonable and prudent CCR compliance costs, with a return.

A. The Prudency Standard

The proper standard with which to evaluate the Company's CCR compliance costs is the prudency standard. Absent any evidence that a discrete cost was imprudently or unreasonably incurred, the Company is entitled to complete recovery of its costs. The Public Staff has not met its burden of proving imprudence, because the Public Staff did not identify a single, discrete CCR compliance cost to be imprudently incurred.

The Public Staff recognizes that the prudency standard applies. Otherwise, the Public Staff would have had no reason to investigate and review the Company's CCR compliance contracts and associated costs, which it did. In fact, the Public Staff applied the prudency standard in this case to support a disallowance of costs the Company incurred to comply with EPA's effluent limitation guideline rule at Chesterfield.[7] However, the Public Staff chose not to apply the prudency standard to evaluate the Company's decades-old CCR management decisions. (Tr. Vol. 6 at 184-85.) The Public Staff cannot apply the proper standard in some situations and ignore the standard when it is inconvenient or incompatible with its disallowance theory.

[7] This issue was resolved in the stipulation between the Public Staff and DENC.

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The prudency standard is incompatible with the Public Staff's "equitable sharing" theory in two ways. First, the application of the prudency standard to DENC's historical CCR management practices would require the Public Staff to identify specific imprudent actions or decisions in the distant past, then tie those imprudent actions to increased present-day costs. (*Id*. at 293.) The Public Staff admitted that such an undertaking "would be too speculative. We can't go back in time and determine certain actions and certain costs [to be imprudent]." (*Id*. at 294.) Second, the prudence standard prohibits judging prior Company actions and decisions based on subsequent developments. In this case, the Public Staff argues that "equitable sharing" is appropriate because DENC's historical practices dating back as far as the 1960s require "costly and new management and closure requirements" under the CCR Rule that was adopted in 2015. The incompatibility of the legally permissible prudency standard and the Public Staff's theory demonstrates why the Public Staff's hindsight review is improper and has no place in this or any other regulatory proceeding before this Commission.

Unable to support its theory under the prudency standard, the Public Staff resorts to *ad hominem* attacks on the Company and its state regulators. Through Witness Lucas, the Public Staff contends that DENC's "culpability" supports its "equitable sharing" disallowance. There are two reasons this argument must fail. First, it is unlawful, as the Commission has never based a disallowance on a finding of culpability. Prior to its involvement in the 2018 Duke Energy Rate Cases, the Public Staff admits it is not aware of any instance where "culpability" had been a basis for a proposed disallowance. (Tr. Vol. 6 at 259.) Second, Witness Lucas' testimony is immaterial to Witness Maness' "equitable sharing" theory. Witness Maness testified that "[e]ven if the reasons for

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equitable sharing set forth by Mr. Lucas were not present, the Public Staff still believes that some level of sharing, comparable to that previously used for abandonment losses or cancelled nuclear generation facilities,[8] would be appropriate and reasonable for DENC's CCR costs." (Tr. Vol. 6 at 219.) Witnesses Lucas and Maness admitted that the Public Staff could not say how Mr. Lucas' testimony factored into the 60/40 sharing proposal:

> **Q:** Mr. Lucas, let's pretend your…testimony never existed in this case. What would the equitable sharing recommendation be?
>
> **Lucas:** We can't come up with a number. Do you want to add to that?
>
> **Maness:** Sure. We didn't do an investigation of that nature as to exactly what it would be.

(*Id*. at 301.)

It is evident from the Public Staff's admissions that Witness Lucas' testimony serves no relevant or material purpose in this case. His testimony is simply intended to cast the Company as a "bad actor" with the hope that the Commission will punish the Company with a disallowance. The Commission should reject the Public Staff's unfair, arbitrary, and punitive disallowance theory.

i. DENC's Historical CCR Management Practices Were Consistent with Industry and Regulatory Standards.

Even if this Commission was inclined to review the Company's historical CCR management practices in hindsight, the Company offered overwhelming evidence that the Company's historical CCR management practices (i.e., pre-CCR Rule) were consistent

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[8] Witness Maness testified that in those cases, the Commission approved a 30 percent disallowance. But, he later admits that the Public Staff cannot say that its recommendation in this case, absent Witness Lucas' testimony, would have been the same as those cases because it never did that type of investigation. (Tr. Vol. 6 at 300-01.)

with industry practices and then-applicable environmental regulations. Company Witness Williams testified: "The Company's ash handling practices have included a combination of management options over time, which have been consistent with the industry standard and regulatory requirements. DENC has primarily utilized impoundments and landfills to manage its CCR." (Tr. Vol. 5 at 84-85.) The Commission reached the same conclusion in the 2016 DENC Rate Case. *See* 2016 DENC Rate Case Order at 60. Moreover, the Public Staff does not dispute that the Company's CCR management practices have been consistent with industry practices. (*See e.g.*, Tr. Vol. 6 at 111-12 ("In the eastern United States, the availability of fresh water allowed electric generators to sluice the ash remaining in the boiler fire boxes after combustion (bottom ash) into ash storage ponds.").) Instead, the Public Staff condemns these industry standard practices.

The Public Staff alleges that even if the Company's design, operation, and construction of its CCR impoundments met industry standards, the Company and industry did not do enough to improve and modernize their CCR management practices. (Tr. Vol. 6, at 144.) Key documents that the Public Staff cited in its testimony to rebut Witness Williams' testimony actually refute the Public Staff's theory or are otherwise irrelevant. A lengthy discussion of these documents can be found in DENC's proposed order and will not be repeated here.

More glaring, however, is the Public Staff's inability to explain what the industry standards should have been. Certainly, if the Public Staff is going to argue that DENC's practices were inadequate, it first has to define adequate standards. The Public Staff could not articulate these standards, let alone how the Company should have acted

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differently to conform to those standards, at which sites it should have taken those actions, and how much those actions would have cost the Company. (Tr. Vol. 6 at 293.) The Public Staff's vague and conclusory criticisms do not meet the burden of proof for challenging DENC's costs. It would be illogical to require the Company to refute allegations that it did not comply with appropriate standards when evidence of those standards was never presented. The Company offered overwhelming evidence that its historical CCR management practices were in line with then-applicable industry standards and practices, and thereby reasonable and prudent.

The Public Staff was also critical of pre-CCR rule environmental regulations and DENC's state regulators, going so far as to accuse the Virginia Department of Environmental Quality ("VA DEQ") as being ethically compromised and incapable of doing its job. (Tr. Vol. 7 at 107-113.) The Public Staff's purported solution to this alleged regulator malfeasance and neglect was that DENC and other utilities should have installed comprehensive groundwater monitoring well networks to determine if the risk was materializing at their ash ponds. (Tr. Vol. 6 at 141-44.) In addition to being vague and lacking in any necessary specifics, the Public Staff's proposed "solution" is based on an invalid assumption that additional monitoring would have avoided present-day costs, which is discussed further in Section I.A.ii. below.

The Public Staff's criticisms of industry practices and DENC's regulators are not only unfounded and unreliable (*see* Company Rebuttal Ex. JEW-3), they also irresponsibly invite this Commission into impermissible territory. The Public Staff effectively asks this Commission to do two things: (1) rewrite pre-CCR Rule industry standards for environmental controls and retroactively apply them to the Company's

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historical construction of CCR storage facilities; and (2) invalidate the regulatory judgment of and environmental permits issued by DENC's environmental regulators ("WV DEP") by manufacturing environmental violations when no enforcement action had otherwise been taken (i.e., VA DEQ and West Virginia Department of Environmental Protection). The Public Staff is asking too much from this Commission.

Even for facilities constructed in North Carolina, the determination of the necessary environmental controls for electric generating facilities and enforcement of environmental regulations associated with those facilities are left to environmental regulators. *See State ex rel. Utilities Comm'n v. High Rock Lake Ass'n, Inc.*, 37 N.C. App. 138, 142, 245 S.E.2d 787, 791 (1978), *appeal dismissed*, *review denied*, 295 N.C. 646, 248 S.E.2d 257. That is not to say that environmental issues surrounding electric generation are not a legitimate concern of this Commission. However, the Commission has addressed those concerns by requiring oversight by environmental regulators. *High Rock* involved a CPCN for expansion of Duke Energy's Perkins Nuclear Station. Certain intervenors objected to the expansion due to concerns over potential water quality impacts to the Yadkin River. In upholding the Commission's approval of the CPCN, the North Carolina Court of Appeals found:

> That the Utilities Commission was aware of and concerned with intervenor's legitimate interest in the quality of the Yadkin River is evidenced by the conditions placed upon the certificate which subject construction of the facility to approval by *agencies better equipped to deal with environmental protection, i. e. the North Carolina Department of Natural and Economic Resources*, the Environmental Management Commission, and the Nuclear Regulatory Commission. Moreover, the order refers to at least four other federal agencies and one other state department whose regulations affect certain aspects of the construction and the record suggests that many more local, state and federal bodies will be involved.

(*Id.*) (emphasis added). *See also* Docket No. E-7, Subs 791, 832 (2008) ("When raised, issues of historical preservation, and also issues of environmental permitting, are traditionally left to the State and federal agencies that have been given statutory responsibility for addressing such issues.").

Following the *High Rock* decision, the Commission expanded on its understanding of the limits of its authority to address environmental issues in Docket No. SP-11 (1985):

> [T]he authority of the utilities commission to deal with environmental concerns is quite limited. The North Carolina court of appeals, in addressing a certificate proceeding such as the present one, has written that 'the purpose of requiring a certificate of public convenience and necessity before a generating facility can be built is to prevent costly overbuilding. Environmental concerns are generally left to other regulatory agencies, except as they affect the cost and efficiency of the proposed generating facility.' [*High Rock*]. Thus, only environmental concerns that affect the cost and efficiency of a proposed generating facility are within the jurisdiction of this commission. By the term 'cost,' the court meant the cost to the applicant of the generating facility, *not indirect costs to society such as those resulting from deterioration of the environment. Such indirect costs must be weighed by other regulatory agencies*. We do not question the importance of the environmental concerns expressed at our hearing. These concerns should be considered by the appropriate bodies. We merely recognize that, in light of the court of appeals decision, these concerns are not within our jurisdiction…[W]e cannot predict what regulatory requirements (and resulting costs) may be imposed by other agencies. Some agencies may deny permits necessary for construction or operation of the proposed facility. We believe the resolution is for us to issue a conditional certificate.

In re Carolina Cogeneration Co., Inc., 65 P.U.R.4th 489, 494 (Mar. 6, 1985) (emphasis added).

High Rock and *Carolina Cogeneration* confirm that the scope of the Commission's expertise and authority with respect to environmental matters is limited, and the Commission has consistently refrained from rendering decisions that would

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Nov 06 2019

supplant the judgment of utilities' environmental regulators. Yet, the Public Staff asks the Commission to do exactly that.

The Public Staff argues that "equitable sharing" in this case is warranted because DENC: (1) allegedly "failed to improve and modernize" its CCR management practices (Tr. Vol. 6 at 144); and (2) has "culpability" for non-compliance with environmental regulations." (*Id*. at 186.) Regarding the first contention, DENC's electric plants and associated environmental controls, including its CCR storage areas, were regulated by permits issued by its state environmental regulators. As the Commission and the North Carolina Court of Appeals have held, those agencies are best equipped, through their permitting and oversight authority, to deal with environmental protection. *High Rock*, 37 N.C. App. at 142, 245 S.E.2d at 791. Therefore, it would be those environmental regulators who would be in the best position to determine whether DENC's environmental control technologies were sufficiently "modernized." There is no dispute that DENC followed the directives of its environmental regulators in Virginia and West Virginia, and the Commission should rely on the informed judgment of those regulators – not the subjective judgment of the Public Staff.

As to the second contention, the Public Staff's purported evidence of DENC's culpability is the existence of exceedances of Virginia's groundwater standards that, in Witness Lucas' opinion, "appear" to be violations of Virginia's and West Virginia's anti-degradation policy; however, Witness Lucas could not find a single instance where DENC was found to be in violation of said policies by VA DEQ or WV DEP. (Tr. Vol. 6 at 291.) Witness Lucas also acknowledged that "DENC has not had significant state regulatory enforcement actions taken against it." (*Id*. at 189.) In fact, other than a single

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instance in the 1980s, Witness Lucas could not cite any examples of where DENC was found to be in violation of Virginia's groundwater standards. (*Id*. at 331.) Further, as Company Witness Williams explained, VA DEQ determined in 1991 that the Company had sufficiently resolved the violation from the 1980s. (Tr. Vol. 7 at 124-25, 141.) Since the Public Staff cannot hang its hat on enforcement actions taken by VA DEQ and WV DEP to support its theory, the Public Staff instead looks to the Commission to exercise VA DEQ's and WV DEP's enforcement authority. As the Commission acknowledged in the 2018 DE Carolinas Rate Case, this is not the Commission's role:

> The Commission's duty is not to determine liability to and assess damages for torts committed by management for injury to the environment or to receptors of contaminants. Environmental regulators and courts of general jurisdiction are the appropriate arbitrators of those disputes. DEC's unlined impoundments at issue operated pursuant to environmental permits as wastewater treatment facilities by DEQ or its predecessor. That agency's statutory mandate is environmental protection and would be the agency to rectify a breach of a duty of due care, if any, such as that advocated by certain Intervenors in this case. The issue before this economic regulatory tribunal is imprudence – who should bear the remediation costs - the utility's stockholders or its consumers and on the basis of what justification.

DE Carolinas Rate Case Order at 261.

The Public Staff offered no competent evidence that DENC's historical CCR management practices violated industry standards or then-applicable environmental regulations. The Public Staff could not identify a single, specific action that DENC should have taken in the past with respect to its CCR management. Without that evidence, the Public Staff resorted to criticizing the standards, regulations, and even the regulators to support its disallowance theory. Once again, the Public Staff failed to provide any specifics, thereby inviting this Commission to fill in the gaps. The

Commission should reject the Public Staff's unsupported and improper disallowance theory.

ii. The Public Staff's Theory Relies Upon Flawed Assumptions.

The Public Staff alleges that the Company's historical practices have resulted in its present-day costs. As discussed above, this allegation is unsupported by competent evidence, because the Public Staff made no attempt to identify any specific action the Company should have taken, nor could it identify a single, discrete, present-day cost that could have been avoided. This allegation is also flawed because it wrongly assumes that if the Company managed its CCR storage areas differently, the Company's present-day CCR compliance costs could have been avoided or reduced.

The Public Staff vaguely suggests that DENC should have installed comprehensive groundwater monitoring well networks to determine if the risk was materializing at their ash ponds. (Tr. Vol. 6 at 141-44.) Presumably, this means more wells, but Witness Lucas admitted that he is not in a position to offer any necessary guidance or parameters to explain how DENC could have sufficiently monitored groundwater to satisfy the Public Staff. (Tr. Vol. 7 at 78-80; Tr. Vol. 6 at 286-287 (testifying that the Public Staff does not have the authority or expertise to determine the number, location, depth of groundwater monitoring wells at a given site).) While the Company could not respond to any specific criticisms of its groundwater monitoring program – because there were no specific criticisms – Company Witness Williams rejected the Public Staff's general criticism that DENC's groundwater monitoring was not sufficient. He noted that VA DEQ developed a comprehensive groundwater monitoring program in 1998, which built upon groundwater monitoring requirements that

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were already included in DENC's environmental permits. (Tr. Vol. 7 at 137-140.) The Public Staff offered no evidence that the Company did not comply with groundwater monitoring requirements imposed by its environmental regulators. Further, the Public Staff made no attempt to connect the lack of, in its view, comprehensive monitoring networks and DENC's present-day CCR costs.

Unrebutted evidence presented by the Company actually showed that additional wells or monitoring data would not have made a difference at all. The CCR Rule has imposed significant new groundwater monitoring requirements on DENC, including the drilling of additional wells and testing for additional constituents. Historical (i.e., pre-CCR Rule) groundwater data, which was collected pursuant to permits issued by VA DEQ and WV DEP, and CCR Rule groundwater data are consistent in that they show that there are no risks to private or public water supply wells from elevated groundwater concentrations and that those elevated concentrations are within DENC's property boundaries. (Tr. Vol. 7 at 94.) Had the CCR Rule data been available to VA DEQ and WV DEP prior to the enactment of the CCR Rule, there is no evidence to suggest that state environmental regulators would have required the Company to alter its CCR management practices or take more drastic remedial action. (*Id*. at 93.) To the contrary, without evidence of offsite risk, state regulators would have had no reason to require the Company to retrofit, close, excavate, or cease use of unlined surface impoundments. (*Id*.) Without an environmental justification, the Company certainly would have had no economic justification for taking such actions independent of a regulatory directive. (*Id*.)

Even if such actions were warranted – a position which the Public Staff did not take – there is no evidence that present-day costs would have been avoided or reduced at

all. It is undisputed that all impoundments and landfills – lined or unlined – have the potential to leak to some degree. In fact, the technical analysis supporting the CCR Rule assumed that modern, state-of-the-art composite liners will leak through holes, assumed to be one per acre, and impact groundwater. (*Id*. at 118.) Earlier liner technology was, unsurprisingly, less robust. (*Id*. at 117.) Had the Company "modernized" its practices in the 1980s to, for example, install liners at its unlined impoundments, the Company would likely have been in the same position that it is today. (*Id*. at 116-17.) As an illustration, a comparison of groundwater monitoring results from Possum Point and Bremo supports this conclusion. Possum Point's Pond D was constructed with a clay liner and a slurry wall. Bremo's North Ash pond is unlined. The present-day groundwater results at Possum Point's Pond D and Bremo's North Ash Pond are nearly the same, and the closure requirements under the CCR Rule for both sites is the same. (*Id*.) There is no credible evidence in the record that DENC's pre-CCR Rule CCR management practices caused it to incur unjustified costs in the July 1, 2016 through June 30, 2019 timeframe. (*Id*. at 81-82.)

B. Used and Useful

Despite consistent Commission Orders to the contrary, the Public Staff, through the testimony of Witness Maness, takes the position here, as it did in the previous two Duke Energy rate cases, that the costs the Company has incurred to comply with CCR laws and regulations are not "used and useful." (Tr. Vol. 6 at 229.) However, the Commission has already decided that the Public Staff's position is incorrect. As a threshold matter, 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

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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 and consistently applied the holding of *VEPCO* in the 2018 Duke Energy Rate Cases. In the 2018 DE Progress Rate Case, the Commission found that 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." 2018 DE Progress Rate Case Order at 195. Similarly in the 2018 DE Carolinas Rate Case, the Commission found that "[o]ther expenses of a more O&M or general administration variety were incurred yet deferred under the deferral orders of this Commission, meaning that the Company is afforded the opportunity to recover them in rates at a later time. The funds used to pay for those costs were furnished by the Company and its investors, and the costs are eligible for a return on, not merely a return of, those funds, lest its earnings be impaired. In this sense, just like "classic" working capital, these funds are "property" of the Company, used and useful in the provision of electric service to its customers." 2018 DE Carolinas Rate Case Order at 292.

Here, as explained by Company Witness McLeod, the Company treated its coal ash-related cash expenditures in the same way that Duke Energy Progress and Duke Energy Carolinas treated their coal ash expenses in their respective 2018 rate cases and in the same way the Company treated its own coal ash expenditures in the 2016 DENC Rate

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Case. (Tr. Vol 6 at 679.) Further, Company Witness McLeod explained that the Commission has consistently included the unamortized balance of O&M related to prior periods that are deferred, like the Company's CCR cost deferral in this case, as a component of rate base in working capital. (Tr. Vol 7 pp. 27-33.) As a result of the deferral, the costs are financed through investor-supplied funds rather than through customer-paid rates. The deferred balance reflects that the Company has spent cash on compliance with CCR environmental regulations and have yet to be recovered through rates.

In order to qualify for deferral accounting, the utility must make a *prima facia* case showing that the cost is not being recovered in rates in effect when the costs are incurred. Stated differently, a determination is made that the company's investor has provided the funds to cover the costs, not the ratepayer. No party argues that the costs should be deemed recovered through prior rates. Once the decision to defer is made, the costs lose their accounting classification as operating statement O&M costs and they become, for regulatory accounting purposes, components of the regulatory asset on DENC's balance sheet. Since the Company appropriately accounted for the costs of CCR basin closure and environmental remediation in the working capital section of rate base and because all of those expenditures were explicitly excluded from rate recovery in the 2016 DENC Rate Case and heretofore paid for by investors, not ratepayers (Tr. Vol 6 at 679), the costs are "used and useful" and the Company is entitled to earn a return. To hold otherwise would be inconsistent with long-standing precedent set by both this Commission and the North Carolina Supreme Court and would impair the Company's ability to earn its authorized return.

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Contrary to this past guidance from the Commission, the Public Staff persists in making the flawed argument that the term "used and useful" only applies to the public utility's property, not expenses it incurs in the operation, maintenance, or disposal of that property and that the Company's CCR costs are really "capitalized expenses" which are not "used and useful." (*Id.* at 229-30.) From the outset, however, the Public Staff has never been able to establish the appropriate support for this theory. For example, the Public Staff acknowledged and recognized in the 2018 DE Progress Rate Case that the deferred CCR costs do not fit into traditional categories: "The Public Staff believed that the non-capital costs and depreciation expense related to compliance with state and federal requirements . . . these very unique deferred expenses . . . the unusual circumstances of these costs . . . the unique nature of the costs and the complexity of the issues surrounding the determination of ultimate rate recovery." (2018 DE Progress Rate Case, Tr. Vol. 18 at 300-01.)

In the 2018 DE Progress Rate Case, Witness Maness was asked why it was his opinion that certain ARO capital costs were not appropriately classified as used and useful.

> Q. Just to be clear, one of the things we are doing -- we showed it up on the screen here yesterday - we are putting liners under these coal ash pits, right?
>
> A. Yes, sir.
>
> Q. And that's - and we are putting caps or proposing to put caps over some coal ash basins?
>
> A. Yes.
>
> Q. Isn't that used and useful expenditure to keep the coal ash where it belongs?

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> A. Well, that raises a number of interesting questions, and I can't pretend to be able to answer them in detail. I have been searching for some answers in the accounting literature and haven't found anything direct yet.

(*Id*. at 65-66).

In the absence of any credible authority to the contrary, it is clear that the Company's CCR expenses are "used and useful" pursuant to the Commission's past holdings and that the Company is entitled to a return.

II. THE PUBLIC STAFF'S 60/40 "EQUITABLE SHARING" PROPOSAL IS ARBITRARY, IS BASED UPON A FUNDAMENTAL MISAPPREHENSION OF THE LIMITS OF THE COMMISSION'S DISCRETION, AND SHOULD BE REJECTED.

In a marked departure from the Commission's established prudence framework, which requires a rigorous analysis of the Company's costs and specific challenges to those costs, the Public Staff, through the testimony of Witnesses Lucas and Maness, proposes a 40% disallowance of the Company's already-incurred coal ash basin closure costs through what Witness Maness terms a 60/40 "equitable sharing" arrangement between shareholders and customers. (Tr. Vol. 6 at 235.) Witness Maness implements this sharing concept in two steps. First, he removes the unamortized coal ash basin closure costs from rate base, thereby eliminating any return on that unamortized balance. (*Id*.) The second step is to choose an amortization period that will result in the desired level of "sharing." (*Id*. at 310.) As the Public Staff's desired level is 60/40, mathematically that results in an 18-year amortization period at the rate of return the Company and the Public Staff agreed, subject to the Commission's approval, was appropriate in this case. (*Id*. at 235-36.)

This proposal is completely arbitrary – there is no rationale that supports a 60% disallowance. The Public Staff merely chose this number, then backed in to the

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mechanism to achieve that level of disallowance. But under this "method" why would a 70/30, or an 80/20, or, for that matter, a 52.8/47.2 sharing not be equally appropriate (or inappropriate)? Witness Maness indicates merely that this ratio was selected based on the Public Staff's "qualitative judgment". (*Id*. at 32.)

Black's Law Dictionary defines an "arbitrary and capricious" decision as one which, *inter alia*, is "without determining principle." *See Tate Terrace Realty Investors, Inc. v. Currituck Cty.*, 127 N.C. App. 212, 222-23 (1997). There is indeed no "determining principle" in the Public Staff's 60/40 "equitable sharing" proposal. As such, were the Commission to adopt it, the Commission would be acting arbitrarily and capriciously, and would subject itself to reversal. An illustrative case is *Sanchez v. Town of Beaufort*, 211 N.C. App. 574, *disc. review denied*, 365 N.C. 349 (2011), in which the Court held that it was arbitrary and capricious for a municipal body to "cherry pick" a standard without providing any basis for any particular determining principle. 211 N.C. App. at 580. In this case, the Beaufort Historic Preservation Commission ("BHPC") attempted to limit the construction of petitioner's home to twenty-four feet in height "without the use of any determining principle from the BHPC guidelines." 211 N.C. App. at 582. Rather, the BHPC members based the standard "on their own personal preferences," with each member providing a manner of re-working the project's construction to comply with a twenty-four foot height maximum, but none providing a reason as to *why twenty-four feet* when the height "*could be a different number* ...." *Id*. at 581 (emphasis in original). Thus, while the BHPC members could certainly provide a way to arrive at the height maximum, they could not provide a "why" for *that particular* height maximum. Failure to provide a determining principle for the height maximum itself rendered the BHPC's

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decision arbitrary and capricious. *Id*. at 582.

Ultimately, it is the Public Staff's position, as articulated through Witness Maness, that it is "within the legal discretion of the Commission to decide" whether the equitable sharing mechanism is appropriate. (Tr. Vol. 6 at 223.) This position is untenable as a matter of law. To understand exactly how, it is necessary first to examine the Public Staff's purported rationales for its sharing proposal: first, the Company's alleged past failures, as detailed in the testimony of Public Staff witness Lucas, to prevent environmental contamination from its coal ash basins, and, second, an asserted "history of approval of sharing of extremely large costs that do not result in any new generation of electricity for customers." (*Id.* at 219-20.)

As to the first asserted predicate, though the Company disputes the existence of any such "failures," as set out in the testimony of Company Witness Williams and as discussed in the Proposed Order, submitted herewith, it is ultimately irrelevant to the Public Staff's 60/40 sharing proposal. As Witness Maness admitted, the Public Staff's position, simply stated, is that it does not matter if the Company's actions in incurring the CCR Rule and state law compliance costs were prudent – the Public Staff's 60/40 equitable sharing proposal would still apply. As Witness Maness testified, "Whether or not some specific disallowances of imprudently incurred or otherwise unreasonable costs are made in a specific case, it is still appropriate to consider whether equitable sharing is appropriate for the remainder of a particular body of costs not specifically found to be imprudent or unreasonable." (*Id.* at 220.) Accordingly, the real rationale for the Public Staff's proposal is Witness Maness' second predicate: the proposition that the Commission has a "history of approval of sharing of extremely large costs that do not result in any new generation of

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electricity for customers." (*Id.* at 219.)

Witness Maness clearly overstates the case – as Witness McLeod notes, there is "no provision of Chapter 62 requiring different treatment for 'extremely large costs'" (*id.* at 683-84), and, in any event, witness McLeod detailed any number of "extremely large cost" items not associated with new generation for which cost recovery is routinely allowed. (*Id.*) This is yet another example of the arbitrariness inherent in the Public Staff's sharing proposal.

But on another level, it appears that what Witness Maness is really saying is that this rationale for the sharing proposal is grounded in the Public Staff's view of the Commission's discretion, which he apparently believes is limitless and unbridled. He states first that pursuant to N.C. Gen. Stat. § 62-133(b)(1), and with the exception of construction work in progress under certain circumstances, "the only costs that the Commission is required to include in rate base are … the 'reasonable original cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period ….'" (*Id.* at 223.) He further indicates that he is advised by counsel that "beyond these requirements what is and what is not in rate base is fully within the Commission's discretion to decide, as long as the rates set thereby are fair and reasonable to both the utility and the consumers." (*Id.*) The Public Staff's view of the Commission's discretion is wrong.

As Witness Maness explained in his testimony, the Public Staff looks to the Commission's *Order Granting Partial Increase in Rates and Charges* in Docket No. E-2, Sub 526 (Aug. 27, 1987) (the "1987 DEP Rate Order") and its affirmance by the Supreme Court in *Thornburg I*, 325 N.C. 463 (1989) as precedent for its 50/50 equitable sharing

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concept. The Public Staff has picked the wrong Commission Order, and the wrong *Thornburg* case. The correct Orders are the 1988 DEP Rate Order and the Commission's *Order Denying Motions for Reconsideration* in the 1988 DEP Rate Case (Docket No. E-2, Sub 537) ("1988 DEP Reconsideration Order"), and the Supreme Court's reversal in part of those Orders in *Thornburg II*.

The principal issue in the 1987 DEP Rate Case/*Thornburg I* was whether DE Progress could recover in rates any portion of the costs associated with the abandoned Units 2, 3, and 4 of the Shearon Harris nuclear plant. The Commission had previously decided that the Company could amortize the costs associated with these abandoned units over a ten-year period, but that "no ratemaking treatment should be allowed which would have the effect of allowing … [the Company] to earn a return on the unamortized balance." 1987 DEP Rate Order, at 61. Over the objections of the Attorney General, the Commission decided to continue to follow that process in the 1987 case – it allowed amortization of abandonment costs over a ten-year period as an operating expense under N.C. Gen. Stat. §§ 62-133(b)(3) and 62-133(c), but no return. The Supreme Court, in a passage extensively quoted in witness Maness' testimony (*see* Tr. Vol. 6 at 227-28), affirmed the Commission's decision. It held that N.C. Gen. Stat. §§ 62- 133(b)(3) and 62-133(c) were elastic enough to include abandonment costs as utility "expense," and that N.C. Gen. Stat. § 62-133(d), which allows the Commission to factor in "all other material facts of record that will enable it to determine what are just and reasonable rates," also provided support for the Commission's decision. It held further that as a matter of policy, a return of, but not a return on, the abandonment costs was appropriate. *Thornburg I*, 325 N.C. at 476-81.

In *Thornburg I*, the Court held specifically that the Commission's recovery but no return decision was "within the Commission's discretion" and would not be disturbed. *Id*. at 481. That decision effected a "sharing" between the Company's shareholders, on the one hand, and its customers, on the other – shareholders received a return of the costs, but no return on the costs. The Public Staff, through Witness Maness' testimony, relies on this holding for the proposition that "reasonable rates can include a sharing between ratepayers and investors with regard to plant cancellation costs" (Tr. Vol. 6 at 226), and argues that the Commission possesses discretion to implement this sharing.

There are, however, significant distinctions between the 1987 DEP Rate Case/*Thornburg I* and the present case. First and foremost, this case does not involve "abandoned plant" or cancellation costs. Rather, it involves "used and useful" expenditures by the Company. As such, the discretion which the Public Staff relies upon to support its "equitable sharing" concept does not exist. This can be seen when examining the correct prior orders of this Commission and the correct *Thornburg* case: the 1988 DEP Rate Order, the 1988 DEP Reconsideration Order, and *Thornburg II*.

In the 1988 DEP Rate Case, the principal issue for decision 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, for the most part, the Harris Unit 1 costs for which DE Progress sought recovery were reasonable and prudent, and that portion of the 1988 DEP Rate Order was upheld by the Supreme Court. 325 N.C. at 489 (finding "no error" in that part of the Commission's Order). However, the Commission reached a different result with respect to $570 million in costs the

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Commission purportedly considered were incurred in connection with facilities to be shared with Units 2, 3, and 4 units that DE Progress had abandoned. The Commission found that while these costs were prudently incurred, they should be shared between the Company's customers and its shareholders. Specifically, the Commission found that approximately $180 million of those costs were properly classified as "abandonment" costs and should be borne by shareholders. 1988 DEP Rate Order, at *452-53. The remaining $390 million were left in rate base.

Responding to the Public Staff's request that the Commission reconsider this decision and remove the entire $570 million from rate base on the grounds that all of it related to abandoned plant, the Commission reaffirmed its decision in the 1988 DEP Reconsideration Order and provided additional explanation for its ruling. It stated that the Public Staff's request that the full $570 million for the common facilities be treated as abandonment costs was based upon a "misunderstanding" of the 1988 DEP Rate Order and the Commission's objective in splitting this $570 million item into $390 million of rate base and $180 million in cancellation costs. (1988 DEP Reconsideration Order, at 2-3.) The Commission did not (it says in the 1988 DEP Reconsideration Order) intend to treat the "excess common facilities" as abandoned plant; rather, it effected an "equitable sharing" of the $570 million between customers and shareholders. The Commission reiterated that the Company's choice of the cluster design – which engendered the shared facilities – was reasonable and prudent, and that except as specifically indicated in the 1988 DEP Rate Order, the costs of the Shearon Harris plant were "reasonable and prudently incurred." Thus, the Commission found, the $570 million at issue was also reasonably and prudently incurred.

Nevertheless, the Commission held it was appropriate to share the $570 million at issue, and it indicated that it came up with the allocation (essentially one-third to cancellation costs and two-thirds to rate base) on its own and adopted it "for reasons of fairness and equity." (*Id*. at 4-5.) Specifically, the Commission held that it continued "to believe that a reasonable and equitable apportionment of the burden and risks associated with … [the Company's] prudent investment in common facilities is appropriate." It stated further that its assignment of $180 million as the value of the Company's prudent investment in common facilities to be treated as cancellation costs for ratemaking purposes was an appropriate exercise of its "regulatory discretion." *Id*.

The Supreme Court disagreed. It held that the Commission did not have the discretionary power to effectuate its "equitable sharing" decision. Rather, the facilities were either "used and useful," and therefore in rate base, or they were not. The Court looked to the Commission's finding that the facilities in question were "excess common facilities," and held that "excess" facilities were not "used and useful" as a matter of law. *Thornburg II,* 325 N.C. at 495. Accordingly, looking to the correct Commission and Supreme Court precedent, it is abundantly clear that the Commission should reject the Public Staff's "equitable sharing" concept, because it is inequitable and not supported by the evidence in this case.

CONCLUSION

The Company has shown that it is entitled to full recovery of the actual coal ash basin closure costs it incurred from July 1, 2016 through June 30, 2019, along with a return, inasmuch as those costs are known and measurable, reasonable and prudent, and used and useful. Recovery of those costs over a five-year amortization period, with a

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return on the unamortized balance, is appropriate. The Company's proposed recovery of its expected ongoing compliance costs is also reasonable and appropriate and should be adopted, along with the recommendation (which no party opposes) for the establishment of a regulatory asset/liability account to which coal ash basin closure costs incurred from July 1, 2016, but excluding any costs already recovered, should be deferred.

Respectfully submitted this 6th day of November, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Post-Hearing Brief*, as filed in Docket Nos. E-22, Subs 562 and 566, was served electronically or via U.S. mail, first-class, postage prepaid, upon all parties of record.

This, the 6th day of November, 2019.

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