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Apr 24 2020

April 24, 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: Motion for Reconsideration and Clarification
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 its *Motion for Reconsideration and Clarification* ("Motion") for filing in the above-referenced proceeding. A Word version of the Motion is being provided via email 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:kjg

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 Virginia Electric and Power	)	DOMINION ENERGY NORTH
Company d/b/a Dominion Energy North	)	CAROLINA'S MOTION FOR
Carolina for Adjustment of Rates and Charges	)	RECONSIDERATION AND
Applicable to Electric Service in North Carolina	)	CLARIFICATION

NOW COMES Virginia Electric and Power Company, d/b/a Dominion Energy North Carolina ("DENC" or the "Company"), and respectfully moves the North Carolina Utilities Commission ("Commission") to reconsider its February 24, 2020 *Order Accepting Public Staff Stipulation in Part, Accepting CIGFUR Stipulation, Deciding Contested Issues, and Granting Partial Rate Increase* issued in the above-captioned proceeding ("Order"). As set forth below, the Company requests that the Commission reconsider its determinations that the Company (1) should have included CCR costs in its depreciation expense and must do so going forward; (2) cannot earn a return on the unamortized balance of its coal combustion residuals ("CCRs") costs over the amortization period; and (3) must amortize recovery of CCR costs over ten years. The Company is also requesting clarification that it may continue to defer its CCR costs incurred after June 30, 2019, for consideration in a future rate case proceeding.[1]

[1] On March 16, 2020, the Company filed its *Motion for Extension of Time to File Notice of Appeal and Exceptions* in the above-captioned docket. The Commission granted this motion on March 17, 2020, and extended the deadline to file a notice of appeal and exceptions to the Order until April 24, 2020. By filing this Motion for Reconsideration and Clarification with the Commission, the deadline to file a notice of appeal and exceptions is tolled. *See State ex rel. Utilities Comm'n v. MCI Telecommunications Corp.,* 132 N.C. App. 625, 630, 514 S.E.2d 276, 280 (1999).

STANDARD FOR RECONSIDERATION OF ORDER

The Public Utilities Act provides the Commission broad authority to reconsider its orders where a misapprehension of facts or the introduction of additional evidence shows that the Commission's finding and conclusions are unjust, unreasonable, or contrary to the public interest. Specifically, section 62-80 of the General Statutes provides:

> The Commission may at any time upon notice to the public utility and to the other parties of record affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it. Any order rescinding, altering or amending a prior order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original orders or decisions.

N.C. Gen. Stat. § 62-80. This Section has been interpreted on a number of occasions to allow the Commission to consider additional evidence upon reconsideration. *See, e.g., State ex rel Utils. Comm'n v. North Carolina Gas Service*, 128 N.C. App. 288, 293-94, 494 S.E.2d 621, 625, *rev. denied*, 348 N.C. 78, 505 S.E.2d 886 (1998) (affirming Commission's consideration of new evidence in a reconsideration proceeding).[2]

For purposes of this case, the Public Utilities Act provides the Commission authority to reconsider the Order based upon new evidence of the Company's recent decision to early retire the remaining coals units 5 and 6 at its Chesterfield Power Station in 2023 as well as evidence already part of the record in this proceeding that the Company believes was misapprehended in the Commission's Order. The Act also

[2] *See also Order Denying Motions for Reconsideration and to Compel Discovery* at 4, Docket Nos. E-2, Sub 998, *et al*. (Dec. 10, 2012) (noting "new evidence" as one of the permissible grounds for reconsideration in addition to change in circumstances or misapprehension of facts); *see also*, *Order on Reconsideration Amending Order and Scheduling New Hearing* at 4, Docket No. G-5, Sub 481 (May 21, 2007) (acknowledging that N.C.G.S. § 62-80 "permits the taking of … additional evidence" in reconsideration proceedings); *Order Denying Motion for Reconsideration and/or Clarification* at 8, Docket No. P-100, Sub 133 (July 28, 2003) (recognizing that the presentation of new evidence can merit reconsideration).

provides that other parties of record may respond to the Company's evidence presented herein. This process allows full and fair consideration of DENC's request and assures a reasonable and fair result is achieved consistent with the public interest.

ISSUES PRESENTED FOR RECONSIDERATION

Issue Presented 1: The Company requests that the Commission reconsider its findings regarding accounting for CCR[3] costs: the decision to require the Company to include CCR costs as part of cost of removal in future depreciation studies is inconsistent with applicable accounting principles and impractical given the Company's recent retirement of several of its coal facilities.

The Commission incorrectly concluded that DENC did not properly account for CCR costs, thereby creating an unjust and unreasonable result. Under generally accepted accounting principles ("GAAP") and Federal Energy Regulatory Commission ("FERC") accounting rules, which the Commission has consistently held are applicable to the Company,[4] once the Company had a legal obligation to remediate coal ash basins, it was required to account for the costs as an asset retirement obligation ("ARO").[5] Costs accounted for as AROs are not included in the cost of removal component of depreciation under GAAP[6] and FERC[7] rules. Therefore, the Company did not include CCR costs as a component of cost of removal in its 2016 depreciation study.

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

[4] "ARO accounting complies with the authoritative statements of GAAP, FERC, and this Commission." *Order Accepting Stipulation, Deciding Contested Issues, and Requirements Revenue Reduction*, Docket No. E-7, Sub 1146, at 284 (June 22, 2018) ("2017 DEC Order"); *see also* Commission Rule R8-27.

[5] This legal obligation occurred on April 17, 2015, when the United States Environmental Protection Agency published the final Coal Combustion Residuals Rule in the *Federal Register*.

[6] *See* DENC Witness McLeod direct testimony at 21; NCUC Form E-1, Supplemental Item No. 10 at 24; and Public Staff Witness Maness direct at 5-6.

[7] The FERC Uniform System of Accounts defines cost of removal as "the cost of demolishing, dismantling, tearing down or otherwise removing electric plant, including the cost of transportation and handling incidental thereto. *It does not include the cost of removal activities associated with asset retirement obligations that are capitalized as part of the tangible long-lived assets that give rise to the obligation*" (CFR Title 18, Chapter I, Subchapter C Part 101, Definition 10) (emphasis added). *See also* Public Staff Witness Maness direct at 6.

Moreover, the Commission was critical of the fact that the Company did not include CCR costs in its past depreciation studies. But the Commission nonetheless approved the Company's revenue requirements with the depreciation expense based on such studies that did not include CCR costs to establish rates that were deemed just and reasonable. In fact, each of the Commission's recent past orders approved the depreciation expense as reasonable despite the absence of any attempt to project possible future CCR costs in that expense.[8] Yet here, in the Evidence and Conclusions supporting Findings of Fact Nos. 56-59, the Commission *sua sponte* determined that the Company should have included projections of possible CCR costs in its depreciation expense in the past, as well as going forward.

The record in this proceeding is inadequate to support these Findings of Fact and the Commission's departure from past precedent. For example, the Commission cites testimony in a 2015 South Dakota proceeding as its primary support. This 2015 testimony, however, predates the Company's 2016 depreciation study, which did not include 74% of the total CCR costs presented in this proceeding because the relevant units were retired or had been impaired for financial reporting purposes and did not appear in the 2016 depreciation study. Further, the Commission's reliance on a 2011

[8] *See Order Approving Rate Increase and Cost Deferrals and Revising PJM Regulatory Conditions*, Docket No. E-22, Sub 532, at 9 (Dec. 22, 2016) ("2016 Rate Case Order") ("The costs of rate case and operating revenue deductions reflected in and underlying the Stipulation, as well as the level of operating revenues under present rates, were prudently and reasonably incurred."); *Order Granting General Rate Increase*, Docket No. E-22, Sub 479, at 15 (Dec. 21, 2012) ("The appropriate level of depreciation and amortization expense under present rates for use in this proceeding is $42,599,000."); *Order Granting General Rate Increase, Approving Fuel Charge Adjustment, and Approving Stipulation and Supplemental Agreement*, Docket No. E-22, Sub 459, at 12 (Dec. 13, 2010) ("The Commission finds and concludes that the annualized amount of depreciation and amortization expense, as updated, of $36,026,000, included as an operating revenue deduction in this proceeding under the provisions of the Stipulation, and provided on Company Joint Testimony Exhibit 2 filed on October 12, 2010, is just and reasonable.").

water utility case[9] in support of its determination is misplaced because the Commission issued orders in the Company's 2010 and 2012 rate cases in which DENC did not include CCR costs in its depreciation rates and the Commission did not raise any concerns with this approach.

Not only is the Commission's requirement that the Company include CCR-related ARO expenses in the cost of removal component of its depreciation expenses contrary to GAAP and FERC accounting principles, it also would only apply to a small subset of future CCR costs. Many of the generating units with outstanding CCR-related AROs have either been retired or have been impaired for financial reporting purposes, and therefore, will not appear in future depreciation studies. In fact, most of the assets subject to the CCR-related ARO have been or will be retired in the near future with nothing left of these assets to depreciate. Since the hearing, the Company now plans to early retire the remaining coal units 5 and 6 at the Chesterfield Power Station by 2023, leaving only 4% of the remaining CCR-related ARO pertaining to coal units that will be included in future depreciation studies.

Finally, the additional administrative burden for such a small percentage of remaining coal assets more than outweighs any ratemaking benefit. The Company performs its periodic deprecation studies on a system-level basis, not by jurisdiction. Furthermore, there currently exist recovery methods in both Virginia and North Carolina, albeit different. Introducing amounts to the depreciation study process for a single jurisdiction will add the need for additional procedures and analysis to ensure that costs

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[9] *Order Granting Partial Rate Increase*, Docket No. W-218, Sub 319 (November 3, 2011).

are properly segregated between depreciation and other legacy recovery mechanisms among jurisdictions.

In light of this evidence, including the Company's minimal remaining assets subject to the CCR-related ARO, the Company respectfully requests that the Commission reconsider its Findings of Fact Nos. 56-59 to the extent they require the Company to include CCR-related ARO expenses in the cost of removal component of its depreciation expense.

Issue Presented 2: The Company requests that the Commission reconsider Findings of Fact Nos. 53-55 and the underlying discussion and conclusions in that they deny the Company a return during the ten-year amortization period for its CCR costs, which is arbitrary, inconsistent with past decisions, and unconstitutional.

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.[10] 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. Gen. Stat. §§ 62-133(b)(1) & (5).

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.

[10] *See* 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"); 2017 DEC Order.

> *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 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.[11]

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.

The Commission's decision to now classify the Company's funding and deferral of CCR costs as 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

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[11] 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.

"[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. The Commission has previously found that CCR costs necessary to comply with environmental laws are in fact used and useful. 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. Thus, the Commission's decision to deny a return on the Company's CCR costs inconsistent with precedent. Moreover, 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 a departure from precedent. 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.

In addition to the Commission's departure from past 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 in useful. But this comparison 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. Unlike cancelled projects or MGP sites, each of DENC's coal power stations provided countless hours of energy production for the benefit of DENC's customers for decades.

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. Similarly, 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 any 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.[12] 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 regulated utility can operate efficiently when its regulator treats similarly situated regulated entities disparately.

Finally, as explained in Issue No. 1, the Commission is decreasing future revenue requirements and rates to compensate for what it perceives to be deficiencies in the

[12] *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).

depreciation expense component of revenue requirements in prior cases; depreciation expenses that were, in fact, accepted by the Commission at the time. *See* Order at 143. This, too, is an arbitrary and capricious decision that is unsupported by the evidence in this case and is another instance of the Commission creating regulatory uncertainty by reaching different conclusions based on substantially similar facts.

In its Order, the Commission did not articulate any fixed rules or standards under which the Commission's decision to deny the Company a return over the amortization period can be judged. As a result, the Company respectfully requests that the Commission reconsider its decision on this issue consistent with its decisions on the same issue in recent rate cases to ensure regulatory consistency. *See* 2017 DEC Order at 275-76 ("The Commission chooses to exercise its discretion and authority under N.C. Gen. Stat. § 133(d) and follow its precedent here – amortize the ARO costs over five years and authorize a return on the unamortized balance").

Issue Presented 3: The Company requests that the Commission reconsider its decision to require 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 a period as long as ten years, without a 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 – particularly when it recently determined a five-year amortization period was appropriate in the Company's 2016 rate case as well as in DEP's and DEC's 2017 rate case.

More fundamentally, the ten-year amortization period fails to allow the Company a reasonable opportunity to recover the expenses and, in fact, ensures that DENC will not recover its expenses since it will recover those 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. In contrast, the Company's proposed five-year amortization period results in less intergenerational inequity than the ten-year amortization period because the costs are recovered over a shorter period. Furthermore, 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 instead is rooted in the equitable sharing theory the Commission itself has found to be arbitrary.[13]

[13] The Commission also appears to, in part, have based its decision to restrict the Company's CCR cost recovery to a ten-year amortization period with no return based on the fact that the Company did not include CCR costs in its depreciation expense.

The Company respectfully requests that the Commission reconsider this determination in light of its past three general electric rate case orders granting a five-year amortization period for recovery of these costs.

REQUEST FOR CLARIFICATION

DENC requests clarification that it is appropriate for it to record its July 1, 2019 and future CCR costs in a deferral account until its next general rate case. No intervenor presented direct evidence disputing the Company's continued authority to defer CCR compliance costs, and such deferral treatment is consistent with accounting practices on this issue.

CONCLUSION

The Commission has the broad authority to reconsider its orders where a misapprehension of facts or introduction of additional evidence shows that the Commission's finding and conclusions are unjust, unreasonable, or contrary to the public interest. The evidence presented herein shows that the Order does not achieve a just and reasonable result based upon the evidence presented at the hearing and the new evidence introduced herein regarding the retirement of the of Company's coal assets. Reconsideration for further review in the Company's 2019 Rate Case is an appropriate remedy, and the Company therefore requests the Commission reconsider its Order on the three issues raised above and clarify that it is appropriate for DENC to defer its CCR costs incurred after June 30, 2019, for consideration in a future rate case proceeding.

Respectfully submitted this the 24th day of April, 2020.

/s/Mary Lynne Grigg
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion for Reconsideration and Clarification*, as filed in Docket No. E-22, Sub 562, was served electronically or via U.S. mail, first-class, postage prepaid, upon all parties of record.

This, the 24th day of April, 2020.

/s/Mary Lynne Grigg

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