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January 9, 2012

Renne C. Vance
Chief Clerk
NC Utilities Commission
4325 Mail Service Center
Raleigh, NC 27699-4325

Re: Docket No. E-7, Sub 989 (Duke Rate Case)

Dear Ms. Vance:

Please find for filing the original and 30 copies of the BRIEF BY NC WARN, NC JUSTICE CENTER AND NC HOUSING COALITION. I am also including a diskette with the brief in different formats for your convenience.

Please note the change in mailing address as reflected in the letterhead above.

Thank you for your attention to this matter.

Sincerely,

John Runkle

John D. Runkle
Counsel for NCWARN, NC Justice Center
and NC Housing Coalition

cc. Parties of record

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-7, SUB 989

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Application of Duke Energy Carolinas LLC, for an Increase in and Revisions to Its Rates and Charges Applicable to Electric Utility Service in North Carolina	)))))	BRIEF BY NC WARN, NC JUSTICE CENTER AND NC HOUSING COALITION

NOW COMES NC WARN, the NC Justice Center and the NC Housing Coalition, (collectively the "Advocacy Groups"), by and through the undersigned counsel, with a brief proposing findings and conclusions on issues presented at the public and evidentiary hearings on this matter. This brief relies heavily on the expert testimony provided by Roger D. Colton and Gary Cook on behalf of the Advocacy Groups as supported by testimony of many members of the public who overwhelmingly opposed the proposed rate increase. The Advocacy Groups are proposing findings below on:

1. the limitations with the Agreement and Stipulation of Settlement (the "settlement agreement") between Duke Energy and the Public Staff;

2. the unfair and discriminatory impacts on low-income families from Duke Energy's practices regarding residential late payment charges and shutoff notices; and

3. the failure of the rate allocation methods to reflect the cost of new generation required by new industries, such as the data centers.

SCOPE OF REVIEW

Pursuant to G.S. 62-130, the "Commission shall make, fix, establish or allow just and reasonable rates for all public utilities subject to its jurisdiction." This authority includes both the Commission's duty to the public as well as to the utility. *State ex rel. N.C. Utilities Commission v. Westco Tel. Co.*, 266 N.C. 450, 146 S.E.2d 487 (1966). In the context of the rate case the duty of the Commission is to approve rates it finds "just and reasonable."

In defining this duty, case law states that the "Commission has no power to authorize rates that result in unreasonable and unjust discrimination." *State ex rel. N.C. Utilities Commission v. N.C. Textile Mfrs. Ass'n, Inc.*, 313 N.C. 215, 328 S.E.2d 264 (1985). Factors in determining whether a proposed rate results in unreasonable discrimination include "quantity of use, time of use, manner of service, costs of rendering the two services, competitive conditions, consumption characteristics of several classes and value of service to each class." *N.C. Textile Mfrs, supra.*

Another restriction on the Commission's rate-making authority is that rates must reflect the need for the utility service, and this requires an examination of proposed generating facilities and other major expenses the utility proposes to incur. The "present rate payers may not be required to pay excessive rates for service to provide a return on property which will not be needed in providing utility service within the reasonable future." *State ex rel. N.C. Utilities Commission v. General Tel. Co. of Southeast*, 281 N.C. 318, 189 S.E.2d 705 (1972).

As demonstrated below, both of these restrictions are crucial to assessing the impacts of Duke Energy's rates and practices concerning its practices regarding

residential late payment charges and shutoff notices, affecting primarily low-income families. These restrictions are also the lens by which the Commission should review the new demands of new industries, such as the data centers. In North Carolina today, the multibillion dollar cost of new generating facilities is the direct cause of more and more frequent rate increases.

PROPOSED FINDINGS

Proposed Finding 1. The settlement agreement entered into by the Public Staff and Duke Energy does not resolve all of the potential issues.

Duke Energy's original application was for an overall 15.5% increase in its rates, a total increase in annual sales revenues of approximately of approximately $646 million. In the request, the rates of the various customer classes would increase from 8.3 to 17.4%, with the greatest increase for the residential customers. The request also proposed an increase of 41% for residential customers in the basic facility charge ("BFC"), i.e., the minimum monthly payment regardless of electricity consumed, raising it from $9.22 to $13.02 per month. The return on equity (ROE) requested by Duke Energy was 11.5%. Application, p. 7.

A settlement agreement entered into by Duke Energy and the Public Staff was filed on November, 28, 2011, the first day of the hearing. In addition to other stipulations and adjustments, the settlement was for a 7.21% across the board increase on all rates and tariffs, a total increase in annual sales revenues of approximately $309 million. The proposed increase in the BFC was also 7.21%. Tr. Vol. 4, pp. 293-294. The ROE was reduced to 10.5%, with an embedded cost of debt of 5.41%, providing an

overall rate of return of 8.11%. Exhibit 1 to the settlement agreement shows the Public Staff's adjustments to Duke's initial request in the first column of figures, the total from Duke's rebuttal testimony (accepting some of the Public Staff adjustments) in the second column, and then the adjustments in the settlement in the third column

Although the rate increase in the settlement agreement was significantly reduced from the original request, many members of the public testified that it was still an exorbitant amount, given the state of the North Carolina economy. The 7.21% increase would have an inordinate impact on low-income families and those, such as seniors, on fixed incomes. The economic difficulties facing not only low-income households in general, but the aging and the working poor in particular, make it important to provide Duke Energy's residential customers the ability to maximize their control over their home energy bills. This was expressed succinctly at the Raleigh public hearing by such witnesses as Bill Wilson, Associate Director for AARP North Carolina (Tr. Vol. 1, pp. 45-48); Gene Nichol, Director of the UNC Poverty Center (Tr. Vol. 1, pp. 100-102); and Amino Joie Turner, State Director for the NAACP (Tr. Vol. 1, pp. 37-41).

The settlement agreement specifically does not resolve Mr. Colton's recommendations on the residential late payment charge (Finding 2 below) and the shutoff notices (Finding 3 below), although Duke Energy's voluntary contribution for low-income programs partially remedied his concern that certain late payment charges should be used for crisis assistance (Finding 4 below).

Proposed Finding 2. Duke Energy's residential late payment charge, including the allocation of revenue generated by the late charge, is not reasonable.

Mr. Colton, a nationally-acknowledged expert on utility service to low-income families, appeared on behalf of the Advocacy Groups. In his testimony, he assessed the reasonableness of Duke Energy's residential late payment charge from three perspectives: (1) the level of the late fee; (2) the point at which the late fee is imposed; and (3) the extent to which late fees are imposed during periods of non-collection activity. He concluded that Duke Energy's late payment fee is unreasonable and should be modified so the late payment charge is not imposed on any arrears that have been made subject to a deferred payment arrangement on which payments are current; nor shall late fees be imposed during months in which regulatory restrictions exist on the disconnection of service for nonpayment. He further recommended that Duke Energy should be authorized to implement a late fee for all accounts that have an arrears of more than 60-days old but no more than Duke Energy's composite cost of capital or to the Internal Revenue Service's statutory interest rate for delinquent taxes, whichever is less. Tr. Vol. 6, pp. 131, 128-141,

Mr. Colton concluded that low-income households are treated disparately in Duke Energy's application of its late fee. The late fee is not an effective incentive to pay, and has no effect on reducing either Duke Energy's arrears or its uncollectibles. The late payment charge tends to exacerbate rather than to mitigate the ability of low-income customers to make their bill payments in a full and timely fashion. Tr. Vol. 6, p , 133.

Mr. Colton recommended that the Commission should exempt Duke Energy's low-income customers from imposition of the late payment charge. Mr. Colton further

concluded that while payment-troubled low-income customers disproportionately pay late fee revenue, that late fee revenue is then disproportionately distributed to high-use, non-low-income customers. Tr. Vol. 6, pp. 134-135. The effect of this discriminatory revenue allocation is to transfer income from Duke Energy's low-income customers who have trouble being able to afford their bill to Duke Energy's non-low-income customers.

Proposed Finding 3. Duke Energy's shutoff notices are unfair and deceptive credit and collection practices.

In his testimony on behalf of the Advocacy Groups, Mr. Colton described Duke Energy's disconnection notice contained on its residential bills as an unfair and deceptive credit and collection practice. The disconnection notice contains two threats of action directed to the customer should the customer not pay by the date certain provided on the face of the bill. These false and deceptive shutoff notices include notices to customers indicating that a payment must be made by a date certain in order to avoid the disconnection of service and to avoid the imposition of additional fees on the customer's utility account. Shutoff notices should be limited to those instances where the notice provides a realistic and meaningful notice of an impending shutoff. Tr. Vol. 6, pp. 136-137, 154-157.

In addition, Mr. Colton recommended that Duke Energy should be penalized for routinely issuing unlawful, unfair and deceptive shutoff notices and for engaging in unfair and deceptive collection practices. He recommended a remedial action to assist customers in paying their bills when their accounts are in arrears, specifically that the Commission direct Duke Energy to engage in an outreach campaign for the Earned

Income Tax Credit ("EITC") funded at $500,000 per year for a six-year period. The financial remedy imposed on Duke Energy would then be used to benefit the population of customers harmed by the false and deceptive notices in the first instance. Tr. Vol. 6, pp. 137-138.

Proposed Finding 4. The proposed contribution of $11 million for low-income programs is inadequate to remedy the impact on low-income families from Duke Energy's late payment practices.

The settlement agreement, paragraph 9.A., states "the Company will make a one-time $11,000,000 shareholder contribution to agencies that provide energy assistance to low-income for uses such as those identified in Docket E-7, Sub 795." This contribution partially resolves Mr. Colton's recommendation that Duke Energy should devote 40% of its late payment charge revenue to crisis assistance, and that these funds should not be chargeable to residential ratepayers. Tr. Vol. 6, p. 140. However, Mr. Colton, supported strongly by public witnesses, maintained that the payments for low-income programs should be continuing annual, rather than one-time, payments.[1] By reducing energy consumption provided by the Duke Energy, programs providing services to low-income families also help prevent the payment troubles and shutoffs described above.

[1] It should be noted that the settlement agreement between the Public Staff and the utilities in the Duke Energy - Progress Energy merger case, Dockets No. E-7, Sub 986, and E-2, Sub 998, contained a one-time $15 million contribution for "for purposes such as workforce development and low income energy assistance." As maintained by NC WARN in those dockets, and adopted by the Advocacy Groups herein, the need for programs providing services to low-income families and those on fixed incomes requires consistent annual funding, not one-time contributions.

Proposed Finding 5. The settlement agreement did not resolve differences between Duke Energy and the Public Staff on allocation methodologies. The settlement agreement, paragraph 4, expressly delineates the different allocation methodologies advanced by Duke Energy and the Public Staff, stating "Duke Energy Carolina has based its filing on the Summer Coincident Peak ("SCP") methodology for cost allocation among jurisdictions and among customer classes. The Public Staff advocates the use of the Summer-Winter Peak and Average ("SWPA") methodology for those purposes."

Mr. Floyd's testimony on behalf of the Public Staff discussed the differences between the two methods and the merits, as advanced by the Public Staff, in the SWPA. In his direct testimony and cross-examination, he described the SCP as attempting "to assign costs between customer classes on the basis of each class's contribution to the summer peak for a particular year." Floyd Direct Testimony, pp. 2-4; Tr. Vol. 6, pp. 375. In the test year for the present rate case, the coincident peak occurred in the 17th hour of the day, August 11, and under the SCP, all production plant and expenses would then be allocated based on usage during that one hour.

Mr. Floyd described the SWPA as similar in several ways to the SCP for allocating production plant and expenses. Tr. Vol. 6, pp. 375-377. In his direct testimony, he described the principal differences between the two; "under the SWPA methodology, the fixed costs of production plant are allocated among jurisdictions and customer classes on the basis of a formula that contains two components. The first

component, the "summer/winter peak" component, is based on the demand of the jurisdiction or customer class in question at the time of the utility's summer and winter peaks. The second component, the "average" component, is based on the average demand of the jurisdiction or customer class, i.e., total kilowatt-how (kWh) sales for the year divided by the number of hours in a year. In other words, the first component is based on the demand at particular time, i.e., the peaks, and the second component on the average demand over a year." Floyd Direct Testimony, pp. 2-3. He further states "the SWPA methodology recognizes that some production plant costs are incurred because of the need to provide sufficient capacity during peak periods, while other production plant costs are incurred because of the need to provide low-cost energy at all hours of the day."

Mr. Floyd stated that the Public Staff has had a long history of supporting the SWPA for the reason that all customers contribute to the cost of providing electric utility service, not just those customers that are on the system at the one particular hour. He testified, "we look at all hours of the year because whether or not a customer can be off at the single coincident peak hour does not necessarily represent their energy consumption at the other hours of the year so has to be a balance between the energy demands of customers and the peak demand of customers." Tr. Vol. 6 p. 377.

In the present rate case, the differences between the two methodologies are minimal, with only a 1.6% difference. Tr. Vol. 6, p. 378. Mr. Floyd stated that the differences between the two methodologies were greater earlier in the previous ten years.

Progress Energy and Dominion both use the SWPA methodologies in their

allocations. Tr. Vol. 6, p. 377.

The proposed rates in the settlement agreement were based on the rates established in the 2009 Duke Energy rate case, which used the SCP method. As stipulated in the settlement agreement, all customer classes would receive an identical 7.21% increase so the actual allocation method used in the settlement agreement is a hybrid SCP method. Tr. Vol. 6, p. 374. This continues any inequities between the various customer classes resulting from reliance on the SCP method.

Mr. Floyd responded to one of the Duke Energy witnesses who testified that they used the SCP methodology because all their planning and their integrated resource planning ("IRP") process looks at meeting peak demand, by stating that a meeting peak demand is a portion of planning but the utility provides electric service to its customers of both energy and peak demand. In the IRP, the utility plans for peaking, intermediate, and base load generation. Rate allocation should also reflect the different types of generation, especially given the increasingly costly, capitol-intensive baseload units.

Mr. Floyd testified that "when there is a need for new capacity there are generally three types of generation resources to consider: peaking units, intermediate or cycling units, and base load units. If little energy is required, peaking units are cost-justified due to their lower capital cost as compared to large base load units. However, if much energy is needed, the lower energy cost (in cents/kWh) of capital-intensive base load units make them more desirable." Floyd Direct Testimony, pp. 3-4. As a result, the SCP method's reliance on one hour each year does not reflect the actual "real world" costs of generation throughout the year.

The Advocacy Groups agree that between the two methodologies, the SWPA methodology more fairly allocates costs, because it considers both the energy component as well as peak demand. As pointed out by Advocacy Group witness, Mr. Cook, neither of the allocation methodologies, the SCP and the SWPA, fairly reflects the effects of the significant new growth from new industry, such as the data servers, will have. Power for these new centers with their new demand will primarily come from expensive new baseload units, either from polluting coal or costly nuclear generating plants. Reasonable rates would be better maintained by a full review of the need for baseload, intermediate and peak generating facilities throughout each day for the entire year.

Proposed Finding 6. The proposed rates unreasonably discriminate against existing consumers by providing subsidized rates for new industrial demand, such as the data centers.

Mr. Cook, the Senior Climate and Energy Information Technology (IT) analyst for Greenpeace International, testified on behalf of the Advocacy Groups on the electricity demand of data centers, the rates and incentives being offered by Duke Energy to secure data center investment and the subsidies to the data center rates by residential customers. These data centers are used to house the virtual information, part of the cloud infrastructure. Tr. Vol. 6, pp. 51-52.

Mr. Cook described the rapid increase in the data centers in North Carolina, including Apple Computer, in Maiden, N.C., with a 100-MW facility; Google in Lenoir

for 76 MW; Facebook in Forest City for 40MW; and IBM in the Research Triangle Park for 30 MW. In the eastern United States, they are expected to increase their demand by 22% in the next year alone. Tr. Vol. 6, p. 53.

IT companies choose to locate their data centers in areas where there are (1) a reliable and low-cost source of electricity, (2) reliable and adequate capacity in the telecommunications infrastructure to provide a fast connection to customers, and (3) avoiding risk of disruption (earthquakes, floods, tornadoes, or civil unrest). The data center's need for reliable, continuous electricity requires a high level of redundancy. Tr. Vol. 6, p. 52.

Data centers are actively being sought by Duke Energy as they represent some of the largest consumers of electricity that can be found, with consumption varying very little by season or from economic downturns. In addition to low rates and advantageous tariffs, data centers have secured significant tax and other incentives from North Carolina state and local governments. Tr. Vol. 6, pp. 52-53.

Under the current Duke OPT-H Tariff utilized by the data centers, the charge per kWh is 5.241 cents for peak and 3.12 cents for off-peak usage, and the initial requested amounts were to increase these to 6.0036 cents for peak, a 14.5% increase, and 3.2938 cents for off-peak, a 5.5% increase. The low off-peak increase is key because about 78% of the electricity used by customers under the OPT-H tariff is off-peak. Tr. Vol. 6, pp. 53-54.

In addition to very low kWh prices, data centers benefit from Duke Energy's EC (NC) Economic Development Rider, by which Duke gives new customers discounts on their total electric bills for the first four years - 20% the first year, 15% the second year,

10% the third year, and 5% the fourth year. Additionally, when customers expand to add "new load," they are permitted to apply the four-year discounts, starting again with 20%, to all new load. Tr. Vol. 6, p. 54.

Mr. Cook concluded that the rates and tariffs offered by Duke Energy to the data centers unreasonably discriminate against present customers, forcing them to pay for new and expensive generating facilities that they do not, and may never, need. If Duke Energy sets its rates on the SCP method, a greater overall percentage of the costs of new generating facilities would be borne by the residential customers who consume more power at the summer peak. The data centers, who require the new baseload capacity all year long, would only pay for the percentage they use on the summer peak. Given the tremendous effort to recruit data center facilities to North Carolina and the significant discounts in electricity prices that are reportedly being offered by Duke Energy, all customers, and especially the residential customers, subsidize the data centers. Tr. Vol. 6, p. 56.

In his rebuttal testimony, Duke Energy witness, Mr. Bailey, stated that Mr. Cook's assertion residential customers are subsidizing data centers is baseless because of the differences between "the level of service, load factors, and rate designs of these incredibly disparate customer classes defy any direct comparison." Tr. Vol. 5, pp. 24-27. This criticism is misleading in that Mr. Cook was addressing the SCP allocation methodology which pushes costs onto residential customers who use more of the summer peak, rather than a small group of NEW customers who will consume 1000 MW out of Duke Energy's 17,000 MW demand during the peak period, but will require redundant capital-intensive generation throughout the year. Tr. Vol. 6, pp. 66-67.

CONCLUSION

In light of the above and to make the rates just and reasonable, the Commission should:

1. direct Duke Energy to modify its late payment practices to remedy the complaints raised in the testimony of Mr. Colton;

2. direct Duke Energy to provide an annual payment for low-income programs;

3. approve rates based on the SWPA allocation methodology; and

4. direct Duke Energy, in consultation with the Public Staff and other intervenors, to develop an allocation methodology that fairly reflects the new demand brought on by new industries, such as the data centers, and reflects the need for peaking, intermediate and baseload capacity throughout the year.

Respectfully submitted, this the 9th day of January 2012.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing BRIEF BY NC WARN, NC JUSTICE CENTER AND NC HOUSING COALITION upon each of the parties of record in this proceeding or their attorneys of record by emailing them an electronic copy or by causing a paper copy of the same to be hand-delivered or deposited in the United States mail, postage prepaid, properly addressed to each.

This the 9th day of January 2012.

Attorney at Law