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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM
THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

Appellate Case No. 2019-001900

Duke Energy Carolinas, LLC,……. .....…….Appellant- Respondent,

v.

The South Carolina Office of Regulatory Staff, Hasala Dharmawardena, CMC Recycling, Cypress Creek Renewables, LLC, SC Department of Consumer Affairs, Sierra Club, South Carolina Coastal Conservation League, South Carolina Energy Users Committee, South Carolina Solar Business Alliance, Inc., The South Carolina State Conference of the National Association for the Advancement of Colored People, Upstate Forever, Vote Solar, and Walmart, Inc……...……..Respondents,

of whom,

South Carolina Energy Users Committee is……..Respondent-Appellant.

Appellate Case No. 2019-001904

Duke Energy Progress, LLC……..Appellant,

v.

South Carolina Office of Regulatory Staff, Nucor Steel-South Carolina, Cypress Creek Renewables, LLC, SC Department of Consumer Affairs, Sierra Club, South Carolina Coastal Conservation League, South Carolina Energy Users Committee, South Carolina Solar Business Alliance, Incorporated, The South Carolina State Conference of the National Association for the Advancement of Colored People, Upstate Forever, Vote Solar, and Walmart, Inc.…Respondents.

RETURN OF RESPONDENT
SOUTH CAROLINA OFFICE OF REGULATORY STAFF
TO PETITION FOR REHEARING

The South Carolina Office of Regulatory Staff ("ORS") respectfully submits this return to the Petition for Rehearing filed by Duke Energy Carolinas, LLC, and Duke Energy Progress, LLC (collectively "Duke").

ORS will address each discrete point raised by Duke in the order presented in its petition. As shown herein, Duke does not provide a single valid ground for this Court to reconsider or to change any part of its thorough and well-reasoned opinion. The Court's opinion does not contain any error of law, does not rest upon any factual determination of the Public Service Commission of South Carolina ("PSC") that lacks the support of substantial evidence in the record, and does not overlook any meritorious argument asserted by Duke in the underlying appeal. Rather than adduce a legitimate basis for reconsideration, Duke claims to be entitled as a matter of law to everything it has requested, but – as it has done throughout its appeal – fails to cite any legal authority in support of its claim of entitlement. Duke's petition should be denied.

The opinion does not "change the established basis for cost recovery." (Petition at 2 & part II, at 4-5)

Duke's primary argument is that the exclusion of CAMA-specific costs from South Carolina rates on the grounds that (a) they were required by the law of another state, and (b) they did not provide any benefit to the South Carolina customers, is an arbitrary and capricious "after the fact" departure from established law, grafting "new requirements" onto what Duke contends is the sole criterion for rate recovery – whether the costs at issue were "reasonably and prudently incurred."

This argument highlights the fundamental fallacy in Duke's position on recovery of CAMA costs: It assumes that the only question is whether costs were reasonably and prudently incurred

on property that was used and useful. However, this is *not* the sole criterion for recovery through rates, and never has been. Cost causation allocation between customer classes is a separate and distinct issue from prudency and reasonableness, based on the well-established principle that responsibility for expenses and rate base items are allocated to the customer classes and jurisdictions that caused the cost to be incurred. This principle reflects the basic notion that ratepayers should truly benefit from what they are paying for, and not be required to cover costs that were caused by some other class or group of consumers.

There is nothing "new" in this concept or its application in the jurisdictional context, where a utility incurs costs because of the law of one state and seeks to recover them through the rates charged to customers of another state. To the contrary, it is a common and long-standing part of the ratemaking process. It has been applied for decades by the Federal Energy Regulatory Commission and by federal and state courts across the country, including in Duke's home state of North Carolina, and is embodied in the language of South Carolina Code §§ 58-27-840 and 845(c). *See, e.g., Northern Virginia Electric Cooperative, Inc. v. FERC*, 945 F.3d 1201, 1207 (D.C. Cir. 2019); *Illinois Commerce Comm'n v. FERC*, 576 F.3d 470, 476-78 (7th Cir. 2009); *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 708 (D.C. Cir. 2000); *KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992); *Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305, 1313 (D.C. Cir. 1991); *State ex rel. Utils. Comm'n v. N.C. Power*, 338 N.C. 412, 422, 450 S.E.2d 896, 902 (N.C. 1994) (noting that the risk of inconsistent determinations in two different jurisdictions regarding what costs a utility may recover is "a necessary consequence of doing business in more than one state").

The record in this appeal confirms that this is "common practice." (R. 5086). Duke witnesses admitted that direct allocation of costs between jurisdictions is appropriate at times. (R.

590, 594-595, 667, 4647, 5001, 5005-5006). In keeping with that acknowledgement, Duke itself routinely allocates South Carolina-specific costs to South Carolina ratepayers and North Carolina-specific costs to North Carolina ratepayers, and even did so *in its rate request in this very case, including some costs required by CAMA*. (R. 418, 590, 592, 654, 731, 866, 905, 2391, 4528). Thus, Duke charged the costs associated with South Carolina Act 236 Distributed Energy Resources only to South Carolina ratepayers and costs associated with the North Carolina Renewable Energy and Energy Efficiency Portfolio Standards Act only to North Carolina ratepayers in this case. (R. 843, 5085-86). Duke allocated all costs arising from the North Carolina Clean Smokestacks Act to its North Carolina customers, and that law – like CAMA – causes increased environmental compliance costs for coal burning facilities that generate electricity for both South Carolina and North Carolina; yet Duke – in direct contradiction of its position on CAMA – allocated the costs solely to its North Carolina customers. (R. 866, 5108) The same is true of the North Carolina Competitive Energy Solutions law. (*Id.*). Indeed, when discussing why Duke believed implementation costs stemming from North Carolina's Competitive Procurement of Renewable Energy ("CPRE") Rider should be allocated solely to its North Carolina customers, a witness for Duke testified in 2020 as follows:

> …the CPRE implementation costs are caused solely by the Company's obligation to comply with N.C. Gen. Stat. § 62-110.8 and Commission Rule R8-71. Stated differently, the implementation costs would not have been incurred "but for" the requirements of N.C. Gen. Stat. § 62-110.8 and Commission Rule R8-71…Therefore, *the cost causation principle supports the Company's proposed allocation of CPRE implementation costs to North Carolina retail customers*.[1]

[1] Application of Duke Energy Carolinas, LLC Pursuant to G.S. 62-110.8 and Commission Rule R8-71 for Approval of CPRE Compliance Report and CPRE Cost Recovery Rider, Docket No. E-7, Sub 1231, Rebuttal Testimony of Bryan L. Sykes, p. 5, ll. 1-18, May 28, 2020 (emphasis added).

The only reason Duke did not do the same with the CAMA costs at issue here is that those costs are enormous, as was the public outcry over the conduct of Duke that led to them. Duke was already taking so much political heat in North Carolina as a result of its mismanagement of coal ash, that it felt it had to "spread the pain" between the two states.[2] Obviously, however, Duke's public relations concerns should not dictate the decisions of the PSC or this Court.

The opinion does not treat North Carolina customers unfairly, and there is no evidence that Duke's South Carolina customers derive any concrete benefit from the incremental measures required by CAMA over and above the CCR Rule. (Petition at 2-3 & at 4, fourth bullet)

Duke contends that, "as a result of the Opinion," Duke's North Carolina customers will have to pay their full share of the companies' remediation costs in South Carolina, while Duke's South Carolina customers are unfairly relieved from paying their share of North Carolina costs because of the Court's "failure to recognize the direct benefit to the Companies' South Carolina customers."

The premises of this argument are demonstrably false. First, the decisions of the PSC and of this Court have no impact whatsoever on the rates charged in North Carolina. It is entirely up to the North Carolina authorities to decide what portion, if any, of Duke's South Carolina remediation costs are to be included in the North Carolina rates. Indeed, as noted at oral argument, the North Carolina Supreme Court held that the North Carolina Utilities Commission ("NCUC") had the discretion to exclude from the North Carolina rates up to 50% of the *entirety* of Duke's

[2] As discussed below, there is no merit in Duke's argument that the other laws discussed above are distinguishable from CAMA because they provide for the recovery of costs directly from the customers in their respective states. *See infra* at 16.

coal ash remediation costs (not just the costs required by CAMA) and to require the companies' shareholders to bear that portion of the cost as a matter of "equitable sharing," in light of Duke's history of environmental misconduct. The Supreme Court reversed the NCUC on this ground and ordered it to consider on remand the Public Staff's 50% equitable sharing proposal.[3] *State ex rel. Utils. Comm'n v. Stein*, 375 N.C. 870, 885, 927-33, 851 S.E.2d 237, 247, 273-77 (2020). In effect, Duke is asking this Court to give the South Carolina ratepayers a worse deal than those in the state that enacted the very law whose costs are at issue.

Second, there is not a shred of evidence in the record that the ***incremental*** costs required by CAMA – over and above what was required by the CCR Rule – provide any concrete benefit whatsoever to Duke's South Carolina customers. Duke touts its "system-wide" compliance efforts and "the plain fact that the waters of North and South Carolina are inextricably linked," *see* Petition at 4, but fails to identify one single piece of evidence that the remedial work required by CAMA, which was carried out ***solely on properties in North Carolina***, had any ***additional*** benefit whatsoever to the waters or soil of South Carolina that would not have been equally achieved by the remediation required by the CCR Rule (for which Duke was allowed full recovery in its South Carolina rates).[4] That is because there is no such evidence. If Duke wished to argue that the

[3] The Court's opinion correctly notes that this fact is not a matter of record evidence. It is, however, explicitly stated in the published decision of the North Carolina Supreme Court, which is a matter of public record of which this Court is perfectly free to take notice. Because Duke settled the North Carolina rate case after remand from the Supreme Court, the NCUC never decided how much of the coal ash disposal costs to require Duke's shareholders to bear, but the Supreme Court's opinion expressly held that the NCUC was obligated to exercise its discretion to exclude up to 50% from the rates of Duke's North Carolina customers because of Duke's history of environmental wrongdoing.

[4] The Court's dissenting opinion asserts that there must have been a benefit to South Carolina from remediation undertaken at North Carolina basins located adjacent to the South Carolina border on waters flowing into South Carolina, but this assertion overlooks the precise nature of the question raised by cost allocation: whether the disposal measures mandated by CAMA had any additional ***incremental*** benefit that would not have been realized from the remediation required

CAMA-required remediation measures benefitted South Carolina, it had the obligation to present evidence to support that contention.

Similarly, Duke repeats its fallacious argument that, because South Carolina customers benefitted *from the electricity* generated from coal fired plants, they necessarily benefitted *from the remedial measures required by CAMA*. The fallacy in this argument is obvious. The issue is not who benefitted from the electricity. If that were the question, any cost imposed by North Carolina on the generation or transmission of electricity by Duke would have to be shared by ratepayers in this state; they would be at the mercy of the North Carolina legislature. And if the costs of one state's environmental legislation could be imposed on citizens of another state, the enacting state would not be as politically sensitive to the cost and whether the additional remediation is cost justified. The potential for mischief and inequity inherent in this scenario is readily apparent: Elected officials would always try to spread out the costs of their legislation upon citizens of other states if they could, so that all of the costs would not be imposed on their own constituents.

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by the CCR Rule. To put it differently, the question is whether there is evidence that, *but for* the remediation required *solely as a result of CAMA*, South Carolina would have suffered environmental harm. The record is crystal clear on this point: There is simply no evidence that CAMA provided any added benefit to South Carolina that our state would not have realized from the CCR Rule alone. In passing the CCR Rule, the EPA promulgated national standards that ensured the risks associated with human health and the environment associated with CCRs were "effectively addressed[ed]." 80 Fed. Reg. 21302, 21411. There is nothing in the record to indicate that implementation of the CCR Rule's requirements at Duke's coal ash basins in North Carolina (the entire cost of which Duke was allowed to recover in this case) would not have been sufficient to protect South Carolina against any potential environmental injury from those basins. Moreover, even if there were any such benefit – a hypothetical assumption that is entirely speculative and devoid of any evidentiary support in this record – South Carolina's citizens and their elected representatives could well be of the view that the gargantuan costs of CAMA outweigh any speculative benefit to South Carolina. Those citizens and representatives, however, had no input into CAMA and have no power to bring about a modification or repeal of the law if they believe that its costs outweigh whatever benefit it provides to South Carolina. Accordingly, South Carolina customers should not have to pay for it.

Such concerns are precisely what led Commissioner Whitfield to ask in the PSC hearing, "Where does it end?" (R. 1024, line 23). Duke never answered that question, because there is no answer. That is because the issue is not who benefitted from the electricity, but to whom should the costs of CAMA be assigned. This is exactly why the FERC and the D.C. Circuit Court of Appeals held in the *Northern Virginia Electric Cooperative* case, under cost causation doctrine, that the cost of undergrounding transmission lines required by Virginia legislation should be allocated to Dominion's customers in Virginia and not in North Carolina, even though those costs were incurred for system assets as part of an upgrade of a unified system serving both North Carolina and Virginia customers. *Northern Virginia Electric Cooperative, Inc. v. Federal Energy Regulatory Commission*, 945 F.3d 1201, 1207 (D.C. Cir. 2019).

Duke's North Carolina customers are a distinct class that impose a distinct and substantial cost on the system because of CAMA, which they had political representation in enacting, which they have the political power to modify or repeal if they believe the measures required by the legislation are too costly in relation to the benefits of the legislation, and from which they alone receive benefits that they can evaluate in relation to the costs. The cause of those costs is not the electricity. The cause is the legislation. Duke could have met the federal standard (and was obligated to meet the federal standard) regardless of CAMA, and its customers would still have received the same "benefit from the electricity." Duke would still have had to deal with coal ash disposal under federal law, of course, but those costs are all fully recovered through the PSC's orders on appeal.

The ***additional incremental costs*** at issue in this case would not have been incurred ***but for*** the enactment of CAMA. Duke's South Carolina ratepayers had nothing to do with that; they have no power to modify or repeal the law; and they receive no concrete benefit from it. Under well-

established cost causation allocation doctrine, routinely followed by the PSC, by the courts, by FERC, and by Duke itself in this case and in other cases, the incremental costs of CAMA should not be borne by the South Carolina ratepayers. As to how much of those costs the North Carolina ratepayers should bear, and how much should be borne by Duke and its shareholders, that is a matter for the North Carolina authorities to determine.

Duke is not entitled as a matter of law to earn a return on the deferral of ordinary operating expenses. (Petition at 3 & part V, at 7)

Duke asserts that, when the PSC agrees that a cost may be deferred, "it *must* allow for the recovery of a return on that deferral, regardless of the nature of the underlying expense." Petition at 3 (emphasis added). Duke then goes on to argue that the Commission's failure to do as Duke wished amounts to an "error of law." *Id.* at 7.

Interestingly, however, while asserting that a return on such deferrals is legally mandated, Duke provides absolutely no legal authority to support its contention. It never has, and there is a reason for this. As the record reflects, there is no governing legal standard or accounting principle that establishes that utility has a right to a weighted average cost of capital ("WACC") return on deferred ordinary operating and maintenance expenses.[5] (R. 1081-83, 4924-16) Other jurisdictions that have addressed the issue of recovery of deferred ordinary operating expenses have held that the treatment of the issue is within that jurisdiction's regulatory agency's discretion, and different agencies have taken a variety of approaches to the issue. Thus, an ORS witness

[5] Duke cites 18 C.F.R. pt. 101 in part V of its Petition for Rehearing, but that section of the Code of Federal Regulations simply describes what a regulatory asset is. There is no provision in this part of the Code of Federal Regulations, and Duke cites none, that directs that a utility should receive a WACC return on deferred ordinary operating and maintenance expenses.

testified that the National Association of Regulatory Utility Commissioners ("NARUC") Rate Case and Audit Manual, generally accepted as authoritative in utility ratemaking, does *not* promote the provision of a return on deferred costs, but rather recommends that the regulatory authority examine the deferral to determine, in its discretion, whether a return or rate-base treatment is appropriate. (R. 1062, 4898).

The PSC's resolution of this issue is rational and logical, comports with traditional regulatory accounting for ordinary expenses and capital expenditures, and strikes a fair balance between the ratepayers and the utility. There is no basis for Duke to claim this was an abuse of discretion or error of law. If anything, the PSC's orders are generous to Duke on this point. Even though the costs at issue were outside of the test year *that Duke chose*, the PSC allowed full recovery of all deferred costs (other than CAMA) plus a WACC return on deferred capital costs; it just did not allow Duke to earn a return on deferred ordinary operating expenses.

This result is very similar to what the United States Supreme Court upheld against constitutional challenges in *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), and *Federal Power Comm'n v. Natural Gas Pipeline Co. of Am.*, 315 U.S. 575 (1942), noting in the latter that to allow such a return would unjustly penalize the utility's customers. *See id.* at 593. It is exactly what many state courts, including the North Carolina Supreme Court, have upheld in multiple cases. *E.g., State ex rel. Utils. Comm'n v. Public Staff – North Carolina Utils. Comm'n*, 333 N.C. 195, 424 S.E.2d 133 (1993). And it is exactly what the North Carolina Utilities Commission ordered in connection with deferrals from the 2016 storm costs in Duke's parallel rate case in North Carolina – allowing the deferral and amortization of such costs but disallowing carrying costs on the deferrals. (R. 2189). The North Carolina Supreme Court's decision in that case notes that "nothing in the law … requires a return on such costs to protect investors from being deprived

of the time value of money," *State ex rel. Utils. Comm'n v. Stein,* 375 N.C. 870, 918, 851 S.E.2d 237, 268 (2020) (quoting statement of Public Staff), and reaffirms that this is a matter of regulatory discretion. *Id.*, 375 N.C. at 925-27, 851 S.E.2d at 272-73. To ORS's knowledge, *no court or regulatory agency has held that a utility is entitled as a matter of law to a WACC return on deferred operating expenses*.

Allowing recovery of coal ash remediation costs in South Carolina from Duke's South Carolina customers pursuant to Duke's consent agreements with SCDHEC does not mandate that those customers must also be saddled with North Carolina's CAMA costs. (Petition at 3, first bullet)

Duke suggests that, since it was allowed to recover its remediation costs in South Carolina pursuant to the consent orders entered into with SCDHEC, it must also be allowed to recover from its South Carolina customers its "costs for doing *the same things* … in North Carolina." *Id.* (emphasis added).

There are multiple flaws in this argument. First, as Duke's counsel acknowledged at oral argument, the remedial actions to which Duke agreed with SCDHEC are *not* "the same things" as are required by CAMA. In particular, the timeline for remediation is not accelerated as it is for the CAMA high priority sites, which is a major component of the additional expense resulting from CAMA.

Second, Duke's position again ignores the fundamental premise of cost causation. Duke poses the rhetorical question: "If those costs were reasonable and prudent when incurred in South Carolina, why were they not reasonable and prudent when incurred in North Carolina?" As addressed above, however, the question is not simply whether costs are reasonably and prudently

incurred, as Duke would have it, but also whether in fairness the customers of one jurisdiction should have to pay for costs imposed by the law of another jurisdiction. To the extent that costs are incurred because of action undertaken by agreement with a South Carolina agency, effecting remediation on property located in South Carolina, those costs may appropriately be allocated to the South Carolina rates. If, however, South Carolinians disagree with the measures proposed to be taken in South Carolina or believe that their costs outweigh their benefits, they can exercise influence through their governmental representatives to oppose such measures or have them modified or repealed. This is not true with costs required as a result of North Carolina law. If a Duke customer in South Carolina believes that the CAMA remediation is not necessary at all, or that it is not worth the cost it entails, there is nothing that customer can do.

Third, the North Carolina authorities are not bound by Duke's consent agreements with SCDHEC and have no obligation to include the costs they require in North Carolina rates. As noted above, the North Carolina Supreme Court held that the NCUC had the discretion to exclude up to 50% of Duke's total coal ash remediation costs, which would have included those incurred in South Carolina. Under this ruling, Duke's North Carolina ratepayers would have paid roughly the same proportion of the South Carolina remediation costs as South Carolina's ratepayers will have to pay of Duke's North Carolina remediation costs under the PSC's orders and this Court's decision affirming them. On the other hand, Duke's position would have its South Carolina customers paying a greater portion of the CAMA costs than its North Carolina customers. Nothing in the law requires such a perverse result.

Fourth, Duke's consent agreements with SCDHEC are the result of settlement discussions initiated entirely by Duke, negotiated by Duke, and agreed to by Duke. (*See* R. 540, 4845, 4847, 5995). They were not imposed upon Duke by a South Carolina statute, regulation, or PSC ruling,

do not represent adopted state policy, as Duke admitted below (R. 808), and are simply not comparable to the comprehensive legislation enacted as CAMA. The record shows that Duke rushed to obtain these consent agreements with SCDHEC for its own protection and interests. Specifically, the W.S. Lee Station coal ash basin had a similar type of corrugated metal pipe storm drain as the one that failed at Dan River. (R. 4864). Duke could not afford to have another disaster occur like Dan River, particularly insofar as the criminal plea agreements it had negotiated in North Carolina required that Duke not have any new violations. (R. 5280). A failure at W.S. Lee could have constituted a violation of Duke's plea agreements and allowed prosecution of the company and its officials.[6]

Thus, it was of critical importance to Duke to reach a quick agreement on treatment of its South Carolina ash basins that would insulate it from further liability should something happen in this state like what occurred at Dan River. While it may have been appropriate for the PSC to include those costs in the South Carolina rates, as South Carolina unquestionably benefits from that remediation on this state's own soil, in no way should Duke be allowed to bootstrap these agreements – made at its initiative for its own protection – into an obligation by South Carolina customers to pay for Duke's CAMA costs in North Carolina.

[6] As to Robinson, while this information is not in the record, it is worth noting that in early 2015 (shortly before Duke negotiated that consent agreement with DHEC) it came to light that low-level nuclear waste had been dumped in the Robinson ash basin by Duke's predecessor. *See* "Nuclear waste, arsenic at SC coal plant raise concern," *The State* (Mar. 7, 2015) (available at http://www.thestate.com/2015/03/07/4031773_nuclear-waste-arsenic-at-sc-coal.html?rh=1). Consequently, Duke had a similar incentive to reach a quick agreement with SCDHEC on what remedial action would allow Duke to avoid liability for environmental contamination from that ash basin.

The opinion does not place undue weight on Duke's criminal negligence that resulted in the Dan River spill, and the Court's discussion of the disallowance of the Riverbend remediation costs is correct, logical, and on point. (Petition at 3-4, second bullet)

Duke asserts that the Court "appeared to place great weight on the Dan River spill" and that "it is puzzling" that the Court concluded "that the absence of a spill at the Riverbend plant weighs against any finding of a benefit to South Carolina customers from its closure."

This argument obviously mischaracterizes the Court's opinion and reasoning. The Court took pains to emphasize that the concept of "punishment for Dan River" had no impact upon its decision, and there is nothing in the Court's opinion to suggest that it was based on anything other than the law and the evidence in the record. Duke's suggestion otherwise is, frankly, an insult to the Court. It is unquestionable, however, that the Dan River spill is highly relevant to the background of the case and, most importantly, to the issue of cost causation, as the record reflects that CAMA was passed in response to that catastrophic spill as well as additional evidence of civil negligence and criminal misconduct committed by Duke at multiple coal ash basins over a period of decades leading up to the Dan River disaster.[7] Duke is invested with the responsibility of acting in compliance with the law and good management practices. In this instance, it failed miserably.[8] It would be patently unfair, therefore, to impose the costs required by compliance with CAMA on

[7] Duke did not challenge the PSC's finding that the Dan River spill was an impetus for the enactment of CAMA, and that finding clearly is supported by substantial evidence in the record. (*See, e.g.*, R. 787, 4611, 4769-73).

[8] As the North Carolina Utilities Commission noted: "Declining to acquire and install a relatively inexpensive camera in a decade-old storm water drainage pipe over which the large coal ash impoundment is constructed when engineers repeatedly recommended such installation does not comply with [Duke's] duty to provide safe service. … [Duke's] irresponsible management of its impoundments over a discrete period of time placed its customers at risk of inadequate service and *has resulted in cost increases greater than those necessary to adequately maintain and operate its facilities*." (R. 2376) (emphasis added).

Duke's South Carolina customers. This is neither "punishment" nor unwarranted emphasis, but rather is an integral part of the fundamental, over-arching issue of whether it is "just and reasonable" for Duke to be allowed to recover those costs from its South Carolina ratepayers.

As to Riverbend, the point of the Court's discussion of it was that there was *no evidence* that the remediation required at that coal ash basin by CAMA (which is not required by the CCR Rule) resulted in any benefit to any of Duke's South Carolina customers. The Court was entirely correct: There is simply no proof in the record that the coal ash at the inactive basin at Riverbend had caused or was causing environmental harm in South Carolina or that such environmental harm was imminent. If there were such evidence, it would have provided some basis for a finding of benefit other than mere speculation. There was no such evidence. This is a question of proof – and Duke's failure to meet its burden of proof – not "punishment for Dan River."

The opinion does not err in affirming the Commission's acceptance of Dan Wittliff's cost testimony, when Duke failed to present any alternative calculation. (Petition at 4, third bullet)

Duke argues that because Dan Wittliff admitted that he was unable to make his calculations with great precision, and because there were "clear errors in his testimony," neither the PSC nor the Court should have accepted those calculations, despite the fact that Duke admittedly failed to provide any alternative basis of determining what portion of the remediation costs were incurred solely due to CAMA. This argument boils down to nothing more than an attempt by Duke to retry the case and have the Court make credibility determinations and re-weigh the evidence in Duke's favor, which the Court cannot do under the applicable standard of review. *See, e.g., Southern Bell Tel. & Tel. Co. v. Public Service Comm'n*, 270 S.C. 590, 597-98, 244 S.E.2d 278, 282 (1978).

Duke had the burden of proving what expenses it should be allowed to include in its South Carolina rates. There is no question that CAMA imposes substantial costs that the CCR Rule does not. Duke's own witnesses acknowledged this fact multiple times. (*See, e.g.*, R. 503, 637, 2310, 4544, 4617, 4683-86, 4695, 4697-98, 4876). The issue then becomes one of identification and quantification of those costs. While Duke took pot-shots at Mr. Wittliff's calculations, Duke did not present, or even make any effort to present, the PSC with an alternative calculation of the marginal cost of the CAMA disposal requirements. (R. 941) Again, Duke's own witnesses admitted this. (R. 4694-95).

Thus, Duke intentionally adopted an all-or-nothing approach, taking the position that it was irrelevant that CAMA required additional costs because Duke was entitled to recover all such costs. Duke made a strategic decision not to present the PSC with any alternative calculation of the incremental costs of CAMA over the CCR Rule, should the PSC decide not to allow such costs. Duke should not now be heard to complain that the PSC erred by accepting ORS's calculations, when Duke offered no alternative. As Duke bore the burden of proof, it should not now be heard to contend that the PSC should have figured out, on its own, what in Duke's eyes was the "correct" amount, and that it was error for this Court to affirm the PSC. Duke's strategy misfire cannot be passed off as an error of the Court.

There is no evidence of any concrete benefit to Duke's South Carolina customers from the remediation required by CAMA. (Petition at 4, fourth bullet)

Duke's argument here is addressed above. *See supra* at 5-6.

There is no material distinction between CAMA and other North Carolina and South Carolina statutes for which Duke has allocated costs between the jurisdictions. (Petition at 4, fifth bullet)

Duke contends that other state laws for which it allocated costs directly to its North Carolina or South Carolina customers, *see supra* at 3, are distinguishable from CAMA because those other laws "provide for direct allocation." This argument is quite misleading. All those statutes say is that the utility may recover the costs incurred because of the legislation through general rates or a rider. *Nothing* in any of those statutes provides that recovery is to be restricted to the customers in the state that enacted the legislation, or that recovery may not come from ratepayers in another state receiving electricity from the utility. Thus, there is no meaningful distinction between those statutes and CAMA in the context of cost causation allocation and recovery.

The opinion does not "change the established basis for cost recovery." (Petition part II, at 4-5)

This argument is addressed above. *See supra* at 1-4.

The opinion does not contain any material factual errors. (Petition part III, at 5-6)

Use of total system numbers rather than the South Carolina allocated figures. Duke's argument on this point fails to identify any error in the opinion – Duke simply does not like the way the opinion is written. The opinion addresses both total system numbers as well as South Carolina allocations, and the Court is clear when it is addressing one or the other. Duke fails to demonstrate any error in this regard, much less a material error requiring correction.

John Kerin's Revised Exhibit 10. Duke is correct that Mr. Kerin provided an explanation in his testimony for what Revised Exhibit 10 is intended to reflect. However, that explanation is inconsistent with how the exhibit is labeled and how Duke describes the exhibit in its Petition for Rehearing. The Petition states this revised exhibit reflected actual costs through the end of 2018, rather than the estimates used at the time of the original application. Petition at 5-6. However, the heading on Revised Exhibit 10 states that it is a "Breakdown of Compliance Spend by site, July 1, 2016 through September 30, 2018." (R. 1310-13). The explanation given on one of the pages of Mr. Kerin's testimony that Duke references in its Petition for Rehearing is simply that Revised Exhibit 10 contains "Components of 2015-2018 Recovery Request (summary of costs and regulatory drivers relevant to DE Progress' application)." (R. 704). Later in his testimony, Mr. Kerin referenced the exhibit in response to a question about "ash pond closure costs already incurred *or expected to be incurred* prior to December 2018." (R. 732 (emphasis added)). Accordingly, any confusion about what Revised Exhibit 10 reflected in relation to other evidence before the PSC in this proceeding was caused by Duke itself.[9] The Court's main point in this regard, moreover, was that the PSC's reliance on Mr. Kerin's original exhibit as well as Dr. Wright's *uncorrected* exhibit did not prejudice Duke but rather worked in its favor, and thus does

[9] Further, while Duke sought to impugn Mr. Wittliff and the PSC for relying on Mr. Kerin's original exhibit, this alleged error was not brought up by Duke in a timely fashion. Mr. Wittliff's analysis was included in the pre-filed direct testimony of the ORS. The alleged "error" was not identified in Duke's pre-filed rebuttal testimony, where it should have been raised. It was not mentioned in the live testimony of Duke's witnesses on the issue. Duke did not raise the issue in its cross examination of Mr. Wittliff, nor at all until it filed its motion for reconsideration with the PSC. This issue, thus, was not preserved for appellate review, which is another basis for affirming the PSC's decision. *See, e.g.*, *Herron v. Century BMW*, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011) ("[A] party may not raise an issue for the first time in a petition for rehearing."); *Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (holding unpreserved an issue first broached by the utility in its petition for rehearing to the PSC).

not provide any basis for reversal of the PSC. Again, Duke fails to show why this point is material to the Court's decision or calls for reconsideration. This is a non-issue.

Failure to provide an alternative calculation of CAMA costs. The Court was entirely correct in pointing out that Duke chose to take an all-or-nothing approach to the recovery of CAMA costs. *Duke's own witnesses admitted as much at the hearing*. (R. 4694-95); *see also supra* at 14-15. It was not incumbent upon the Commission, or upon this Court, to calculate what portion of the CAMA costs would remain after considering Duke's attacks on specific aspects of Mr. Wittliff's analysis. That was Duke's responsibility, and Duke did not meet it.

The opinion does not err in finding that Duke failed to preserve its Commerce Clause argument for appeal. (Petition part IV, at 6-7)

Duke acknowledges, as it must, that it did not raise its Commerce Clause challenge until after the PSC rendered its decision, but goes on to say that the issue "was not ripe until the Commission ruled." With all due respect, this argument is utterly without merit. The recovery, or not, of the CAMA costs was the primary issue in the PSC proceedings, and the possibility that the PSC might rule against Duke on this issue was well known to all of the parties long before the Commission ruled. If Duke wished to assert that denial of those costs would violate the dormant Commerce Clause, it was incumbent on Duke to raise the issue with the Commission in a timely manner. Duke cannot wait to see how the Commission would rule and then attempt to raise the argument.

In addition, the argument is specious on its merits. The decision of the PSC is an example of federalism in practice, not economic protectionism in violation of the dormant Commerce Clause. It does not impose any burden on Duke because it is based in another state. It does not

impose any burden on the interstate transmission of electricity. Any burden on Duke or its transmission of electricity into South Carolina from CAMA is a result of the North Carolina law as construed and applied by the North Carolina regulatory and judicial authorities, not the PSC's decision. In deciding that those costs should not be imposed upon Duke's South Carolina customers, the PSC was acting fully within its constitutional authority to set rates for retail sales of electricity in South Carolina. *See, e.g., FERC v. Electrical Power Supply Ass'n*, 136 S. Ct. 760, 767 (2016) (referring to regulation of rates for retail sale of electricity in state as "a zone of exclusive state jurisdiction").

In other words, the costs required by CAMA are solely the result of Duke's operations in North Carolina and operate solely upon its property in that state. The North Carolina legislature chose, after the Dan River disaster, to embrace very costly ash disposal measures at the ash basins located in that state. This is a choice that North Carolina is free to make. But it cannot impose the costs of its policy decision on the citizens of another state, and the Commerce Clause does not compel South Carolina to help pay for the costs of North Carolina's policy choice.

Likewise, the PSC's decision is not an attempt to discriminate against interstate commerce, but rather is a decision about what rates Duke may charge in South Carolina to South Carolina customers for retail electricity sold in South Carolina. The PSC did not hold that a utility that generates electricity outside the state and sells it in South Carolina is subject to some burden that utilities who generate and sell electricity entirely in-state are not subject to. It simply decided that South Carolina ratepayers do not have to pay for costs required solely as a result of another state's law. This is federalism, not a violation of the Commerce Clause: "[T]he framers' distrust of economic Balkanization was limited by their federalism favoring a degree of local autonomy. … The essence of our federal system is that within the realm of authority left open to them under the

Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal." *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 338(2008).

Duke is not entitled as a matter of law to earn a return on the deferral of ordinary operating expenses. (Petition part V, at 7)

This argument is addressed above. *See supra* at 8-10.

Conclusion

As the Court's opinion notes, a highly deferential standard of review governs this appeal. The Court's decision in *Southern Bell Tel. & Tel. Co. v. Public Service Comm'n*, 270 S.C. 590, 244 S.E.2d 278 (1978), sets forth a good exposition of the principle and the reasons for it. Rate making is prospective, and the rates set last only until the next rate case. While the PSC's role is quasi-judicial in some respects, in conducting a ratemaking proceeding the PSC is acting in a legislative capacity under authority delegated to it by the General Assembly. "The prescribing of rates is a legislative act. The commission is an instrumentality of the state, exercising delegated powers. Its order is of the same force as would be a like enactment by the Legislature." *Bluefield Waterworks & Improvement Co. v. Public Service Comm'n of West Va.*, 262 U.S. 679, 683 (1923). Acting under this delegation of authority, the PSC is akin to a "jury of experts" designated by the legislature to make policy decisions on utility rates, *Southern Bell*, 270 S.C. at 597, and "thus the role of a court reviewing such decisions is very limited." *Patton v. S.C. Pub. Serv. Comm'n*, 280 S.C. 288, 291, 312 S.E.2d 257, 259 (1984).

In the setting of rates, the PSC is called upon to consider a multitude of factors, often (as is the case here) with a voluminous and complex record presenting complicated economic and

accounting issues, and to seek to fairly balance the interests of the utility's shareholders and ratepayers. But, there is one over-arching issue: As applied in this case, is it *just and reasonable* to require Duke's South Carolina ratepayers to pay for the North Carolina-mandated costs Duke seeks to impose upon them? The record reflects that many of these individuals struggle to make ends meet. Each month, they must decide whether to purchase needed medications or pay their electricity bill. There are farms that have been in families for generations, that survive on the narrowest of margins, and that would be lost if Duke were to be given all that it claims it is "entitled" to have. This is not mere rhetoric – it is a matter of record evidence. (R. 198-221, 238-43, 265-71, 277-79, 4047-48, 4306-08; *see also* Brief of *Amicus Curiae* South Carolina Farm Bureau Federation).

What Duke seeks from this Court is not just and reasonable. Its South Carolina customers should not have to pay nearly *one billion dollars* because the North Carolina legislature decided, as a matter of North Carolina state policy, that it wanted to require very costly remedial environmental measures over and above the requirements of federal law. In our system of federalism, North Carolina does not have the authority to make South Carolina subsidize North Carolina's policy choice. And neither does Duke.

Duke's petition for reconsideration should be denied.

Respectfully submitted,

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December 9, 2021