

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

**Proceeding on Motion of the Commission
as to the Rates, Charges, Rules and Regulations
of Consolidated Edison Company of New York,
Inc., for Electric Service**

CASE 13-E-0030

**Proceeding on Motion of the Commission
as to the Rates, Charges, Rules and Regulations
of Consolidated Edison Company of New York,
Inc., for Gas Service**

CASE 13-G-0031

**Proceeding on Motion of the Commission
as to the Rates, Charges, Rules and Regulations
of Consolidated Edison Company of New York,
Inc., for Steam Service**

CASE 13-S-0032

**PUBLIC UTILITY LAW PROJECT OF NEW YORK, INC.
STATEMENT OPPOSING JOINT PROPOSAL AND,
ALTERNATIVELY, SUPPORTING MODIFICATION**

The Public Utility Law Project of New York, Inc. (“Project”) welcomes the opportunity to submit this statement opposing the Joint Proposal (“JP”) filed in this case on December 31, 2013. The JP recommends resolution of the concurrent Consolidated Edison Company of New York, Inc. (“Con Edison”) electric, gas, and steam rate cases by the Public Service Commission (“PSC” or “Commission”) based on rates, terms and conditions of service described in the JP. Alternatively, the Project seeks modifications to the JP, principally to reduce rates generally, to improve rates and assistance for low-income customers, and to address certain additional items discussed below. The Joint Proposal is subject to PSC scrutiny for consistency with Commission ratemaking, social, environmental and economic policies. All rates, terms and conditions must be just and reasonable as a condition of approval.

A. Customer Rates and Bills Can and Should be Reduced

Preliminarily, we note that the JP is being characterized, perhaps in a good faith effort to simplify its complex terms, as a rate “freeze”. That is not really accurate, as some have noted.¹ The Joint Proposal calls for a Year 1 electric decrease of \$76.2 million, which, however, would not be passed through to customers to reduce their current bills. Rather, charges based on current rates would continue, with the over-collection of \$76.2 million retained by Con Edison in Year 1, and then used to defray a Year 2 increase of \$124 million. Charges based on current rates would continue in Year 2. After expiry of the two year plan base rates would be \$48 million higher than today, even if Con Edison does not file in January 2015 for new rates to be effective in 2016. Also at the end of the two years, Con Edison would retain approximately \$30 million of the over-collection, as a deferred liability owed to customers, which presumably would be applied for customer benefit in some future proceeding after the rate plan ends.

The JP for gas rates covers the three-year period January 2014 through December 2016. It posits a reduction in annual revenues of \$55 million in Year 1, ending December 2014. But that rate reduction also would not be implemented for the immediate benefit of customers. Rather, the \$55 million over-collection will be held by Con Edison and will not be used to reduce customer bills. The JP proposes gas rate increases of \$39 million and \$57 million in the rate years ending December 2015 and 2016, respectively. Customer bills will not reflect these increases during the rate plan. Instead, the over-collections in Year 1 and Year 2 would be used to offset the Year 3 increases through December 31, 2016. Gas rates will be \$41 million higher

¹ *AARP: Devil's in Details of Con Ed Rate Deal*, Jan. 2, 2013, available at <http://t.co/cmUmwZCra>

at the end of the plan and the company will hold approximately \$41 million for customers, due to the over-collection, as deferred liabilities owed to customers.

On its face, without adjustments which we discuss below, the JP shows that electric bills can be reduced \$76 million and gas bills reduced \$55 million in Year 1. Customers are having increasing difficulty paying bills based on Con Edison's high residential rates. They owe Con Edison large amounts of money and may be paying high interest on loans and late charges. Even a slight reduction would be felt by customers who often run out of money at the end of the month. Allowing Con Edison to over-collect \$131 million in Year 1 (\$76 million electric and \$55 million gas), and hold that customer money as a deferral for future use is not a defensible policy when so many customers need relief from Con Edison's high rates now. The JP recommendation to plateau charges at a high level that is not affordable to many customers, when lawful, reasonable alternatives exist to reduce them should be rejected.

One reasonable alternative to reduce rates, evident on the face of the Joint Proposal, would be to implement the decreased rates for Year 1 and not approve the multi year aspects of the proposal. If it chose, Con Edison could file for new rates in a new case where its foundation for a Year 2 increase would be based on fresher rate case quality data.²

It is expected that proponents will argue that "levelization" is good because it promotes rate stability. Con Edison, however, does not and will not have stable rates under the JP. That is because Con Edison is allowed to flow through many cost changes monthly in the Monthly Supply Charge (MSC) which is the wholesale spot market price of electricity, and the Monthly

² Con Edison's electric rate case filing in this case is based on "Revenues, Operation and Maintenance ("O&M") expenses and Other Operating Deductions from the historic period of the twelve months ended June 30, 2012 ("Historic Year") through the twelve months ending December 31, 2014 ("Rate Year").... Con Edison Accounting Panel Direct Testimony at 5.

Adjustment Charge (MAC), which in combination can cause major variation in prices from month to month. Under the MAC, Con Edison customers are put at risk of unpredictable cost increases in 37 areas. See Con Edison Tariffs, Rule 26. Additional Delivery Charges and Adjustments, 26.1 Monthly Adjustment Clause at

<http://www.coned.com/documents/elecPSC10/GR25-Forms.pdf>

Sometimes monthly rate adjustments, for example in power supply costs, dwarf the amount of the over-collections which under the JP will be held by Con Edison in the name of rate stability.

See Monthly MAC Statements at <http://www.coned.com/rates/elec.asp>. In the context of a utility with fixed rates, arguments to retain over-collections for stability could be advanced seriously, but it makes no sense for a utility like Con Edison where customers are subjected to monthly rate increases driven by dozens of costs allowed to be immediately passed through.

Lowering rates instead of retaining over-collections will provide at least some reduction in customer bills, and could be made more significant in combination with additional reductions as discussed below.

The testimony of Project witness William D. Yates shows that rates can be significantly lowered by reducing the return on shareholders' equity ("ROE"). Revenues are much higher than necessary to attain the ROE that would be set if the traditional methodology, followed by Staff's witness and approved by the Commission in other cases, were followed in this case, instead of the JP ROE. Revenues might be reduced even more if UIU's post-hearing recommendations were adopted. And, of course, revenues would be higher if Con Edison's testimony were credited. There was no Recommended Decision of the Administrative Law Judges to resolve the conflicting testimony over the ROE. Many aspects of the Joint Proposal might be viewed as a compromise among parties regarding estimates of revenues, deliveries,

expenses, programs, and so forth. The ROE, however, is not a factor that can or should be deemed acceptable simply because it falls within the range of positions taken in litigation. Rather, the ROE adopted must be supported by a finding based on evidence that the selected ROE is indeed the right ROE. *N. Carolina Utilities Commission v. Cooper*, (N.C. Sup. Ct. No. 268A12 2012), attached. Rates are designed so as to allow the utility a fair chance to recover its reasonable expenses and to earn a fair return on its shareholders' capital investment. Rates designed to generate an ROE that is too low or too high are unreasonable, and any unreasonable rate is illegal. As the record stands at this point, there is no testimony that the ROEs recommended in the Joint Proposal for gas, electric, and steam service are correct.

In the absence of evidence on the issue, the ALJs should make their independent recommendation of a fair ROE based on the hearing record. Given the RDM and other reconciliations, and the 37 cost items allowed to be adjusted in the electric MAC, Con Edison's risks are lowered, and its ROE should reflect that lower risk.³ The Project recommends adoption of the Staff position after the hearings.

Savings from a lowered ROE added to the Year 1 reductions for electric and gas could result in a significant million reduction of rates, and customer bills, in the Rate Year. The difference between the Staff ROE and the JP ROE amounts to \$132,790,000. See Testimony of Project witness William D. Yates. As discussed below, removal of certain expenses could permit further rate reductions.

³ "If you own Con Edison's stock it gives you a revenue stream that is more than two-and-a-half times that of a 10-year Treasury and, unlike Treasuries, you can expect that revenue stream to be increased, not kept at the same level. Most importantly, Con Edison actually has some upside because it provides power to one of the fastest-growing areas in the United States and it also can supplant expensive oil provided by others with cheaper natural gas." Jim Cramer, *Con Edison is the New Treasury*, June 1, 2012, available at

Con Edison's response to PULP IR 91 is that the JP provides for variable management pay (performance bonuses) of \$23,549,000 for electric and \$4,481,000 for gas. These have not previously been paid for by customers. There is no explanation in the JP why the cost of these items should be added to rates. Also, the JP gives no assurance that any of the performance pay will go to reinforce and improve customer assistance and customer protections. For all we know from the JP, customers will be paying for bonuses to managers who cut costs, for example, by limiting customer assistance. Accordingly, rates can and should be reduced by these amounts.

There is no mention of continuation of Con Edison's austerity program in the JP. As the testimony of William D. Yates indicates, hundreds of thousands of Con Edison customers are behind in their bill payments and many are threatened with service termination every month. Con Edison should continue austerity measures and rates should be reduced to reflect that. The response of Con Edison to PULP IR 92 was that \$13.2 million for electric and \$2 million for gas was assumed in the historic test year data as austerity reductions.

The testimony of Project witness William D. Yates also quantifies the magnitude of potential overearnings due to the "dead band" in the earnings sharing provisions of the JP. The amount of excess earnings above the JP's ROE (which is \$132,790,000 above that recommended in Staff testimony) allowed in addition, before any sharing is potentially \$148,484,000. See Testimony of Project witness William D. Yates. There is no reason for any dead band when excess earnings are subject to refund under PSL 66(20).⁴ Either the multi-year features of the

<http://www.thestreet.com/story/11565155/1/cramer-con-ed-is-the-new-treasury.html> .

⁴ "20. Notwithstanding any general or special law, rule or regulation, the commission shall have the power to provide for the refund of any revenues received by any gas or electric corporation which cause the corporation to have revenues in the aggregate in excess of its authorized rate of return for a period of twelve months. The commission

plan should be rejected outright, or the earnings sharing should begin at the point of a properly set ROE, with no “dead band” in which the utility can keep 100% of its excess earnings.

B. Con Edison’s Rates are Not Affordable to its Low Income Customers, Requiring More Significant Improvement of the Low-Income Rates and Low-Income Customer Assistance

i. Con Edison Collections Data Show that Many Con Edison Customers are in Arrears and Are Losing Ground.

Con Edison may argue that while its rates are high, its customers use less due to the urban environment and smaller living units, and bills are smaller in comparison to other utilities. But in fact, many Con Edison customers are facing hardship and are behind in making timely payments, incurring late charges, threats of termination, and in some cases, actual termination of service for bill collection purposes. Furthermore, detailed trend analysis shows that the problem is generally getting worse, not better. This is demonstrated in the testimony of Project witness William D. Yates.

ii. Eligibility for the Electric Low Income Rate Should Include Medicaid Households.

Testimony of Project witness Nancy Brockway demonstrates why the Commission should reject the omission of Medicaid recipients from eligibility for the electric low-income rate.

may initiate a proceeding with respect to such a refund after the conclusion of any such twelve month period.” NY PSL 66(20).

iii. The Low-Income Rates Should be Enhanced to Better Address the Affordability Problem

Testimony of Project witness Nancy Brockway demonstrates why the Commission should enhance the low-income rate reductions and require efforts to assure fullest possible participation in the low-income rate programs by eligible Con Edison customers.

iv. Con Edison Should Provide More Assistance to Low-Income Customers to Prevent Shutoffs.

Testimony of Project witness Nancy Brockway demonstrates why the Commission should require more assistance to Con Edison's low income customers, for example, to assist them in obtaining service, obtaining public assistance, and avoiding shutoffs.

C. Other Matters

i. The ALJs Should Reject Con Edison's Objections to the Project's Request for Admissions.

In its Rebuttal Testimony Con Edison claimed that it terminates service only as a last resort and in compliance with HEFPA. Staff also opposed the Project's efforts to focus performance metrics on HEFPA compliance and reduced reliance on service interruption as a bill collection measure.

The Project issued a Request for Admissions identifying a situation where Con Edison threatened shutoff to a household after the customer died, without opening a new account for an adult household member. In prior discovery, Con Edison maintained that it follows HEFPA and will open a new account in that situation and mail the final bill to the deceased customer's address. In the instance identified, Con Edison would not open a new account for a widow until she made arrangements to pay arrears on the deceased customer's account, part of which had

been disputed, and threatened termination if \$200 was not paid the day after Christmas. The Request asked Con Edison to admit that the widow went to the Metro Tech customer service center, which under a prior Commission order was to have had in person customer service assistance, and she was referred to a house phone to the call center and threatened with termination of service. On two occasions dealing with two employees, she was denied the opportunity to apply for service, and she was not provided a denial notice.

Con Edison rejected the Request for Admissions, inter alia, on the grounds that it involved a specific customer situation. According to news reports, however, Con Edison commented on a specific customer situation in the recent tragic death of three children in a fire that occurred at premises where power was off. See testimony of Nancy Brockway. The objections to the Request for Admissions should be overruled, and the matters deemed admitted.

iv. The Commission and Con Edison Should Stop Promoting ESCO Service to Low Income Customers Pending an Analysis of the Impact of ESCO Charges on Customer Arrears.

For years the Commission and Con Edison have promoted ESCO service vigorously as a way that customers might save money by shopping for alternative energy suppliers, and have at various times subsidized switching, promoted switching at every non-emergency customer contact, and promoted switching in so-called referral programs. The opportunity to save money on utility service is very attractive to customers on low or fixed incomes without significant savings, because the cost of utilities is a high proportion of their income, and many often run out of money for food or other necessities before their next paycheck, Social Security, or assistance payment arrives. High pressure telephone and door to door sales may have induced many low-income customers searching for savings to incur greater debt to Con Edison.

Con Edison refused to provide a comparison of the charges billed to its customers who take ESCO service with what they would pay had they not switched to an ESCO. Con Edison should know the information because it owns the collectible, which it purchases from the ESCO, and collects it on its bills. It also should be able to calculate the difference between an ESCO bill and a full service bill because HEFPA requires it to have that capability when determining the amount necessary to restore service to an ESCO customer whose service has been suspended. HEFPA requires the utility to base the amount necessary to restore service on either the bills that included ESCO charges or what the utility would have charged for full bundled service, whichever is less.⁵ Niagara Mohawk provided such data in 2012 in its rate case, and it revealed that ESCO customers generally paid significantly more, that many of them received termination notices, and that many of them are low-income customers. See Testimony of William D. Yates.

Con Edison provided a response to a Project discovery request to analyze the bill of one ESCO customer whose bill contained a shutoff threat. The result was that the customer was being charged \$52 more than if she had remained a full service gas customer and almost \$20 more for electric service. This result is not inconsistent with amount of higher charges found in the Niagara Mohawk data. If we assume that the results of the Niagara Mohawk data are similar

⁵ “(d) Such suspension shall end upon the occurrence of any of the conditions identified in paragraphs (a) through (e) of subdivision one of section thirty-five of this article, upon the expiration of one year after such termination of commodity service, or upon the receipt of payments by or on behalf of the customer to the terminating utility such that the amount paid by such customer to the terminating utility plus the amount previously paid the terminating utility plus any other charges paid to the utility providing distribution service during the period when such customer's arrears accrued is equal to or greater than the amount such customer would have paid if the entire utility service had been obtained from the utility providing distribution services during such period.” PSL 32(5).

to what Con Edison results would be, the amount of additional charges due to ESCO service may be adding significantly to the burdens of low-income customers. The Commission should conduct a further inquiry to ascertain whether ESCO service charges, purchased by Con Edison, are significantly adding to hardship, increased arrears, threatened terminations and shutoffs.

CONCLUSION

The Joint Proposal should not be approved for the reasons stated here and in the Testimony of Project witnesses William D. Yates and Nancy Brockway. Alternatively, a one-year plan with rate and bill reductions should be adopted.

Regardless of the duration of the plan, it is possible to provide bill reductions if Con Edison does not keep over-collections, and more significant bill reductions could be made if the ROE is lowered, austerity measures are continued, and customers do not pay for management performance pay bonuses.

The ROE in the JP has no support in the record or in the JP. The ALJs should make their own findings and recommendations to the Commission based on the record evidence as to the appropriate ROE. The Commission should not accept an ROE compromise that no witness has testified is the correct ROE, and which is substantially higher than the ROE level testified to by Staff witnesses, who appear to have followed Commission precedent in their methodology. Con Edison's many true-ups and automatic adjustment formulas reduce its risk and so its ROE should be set at the low end of Staff's proposal.

If the multi-year plan is accepted, the "dead band" prior to any sharing of excess earnings with customers should be rejected. There is no basis to plan for Con Edison to keep 100% of excess earnings beyond a properly determined ROE.

Improved low-income rates should be adopted, and Medicaid customers should be eligible for the electric low-income rate. Other modifications made to the two-year plan consistent with the Project's recommendations contained in its witnesses' testimony. The Commission should direct further inquiry into the extent to which ESCO arrears are contributing to low-income Con Edison customer hardships and require Con Edison to provide more information on the extent to which the ESCO charges it purchases and bills for exceed what its charges would be for full bundled service.

Respectfully submitted,



Gerald A. Norlander, Esq.
Executive Director
Public utility Law Project
Of New York, Inc.
PO Box 10787
Albany, NY 12201
Tel. (58) 281-5991
Email gnorland44@gmail.com

Attachment:

North Carolina v. Cooper decision regarding necessity of ROE findings

IN THE SUPREME COURT OF NORTH CAROLINA

No. 268A12

FILED 12 APRIL 2013

STATE OF NORTH CAROLINA ex rel. UTILITIES COMMISSION; DUKE ENERGY CAROLINAS, LLC, Applicant; PUBLIC STAFF-NORTH CAROLINA UTILITIES COMMISSION, Intervenor

v.

ATTORNEY GENERAL ROY COOPER and THE CITY OF DURHAM, NORTH CAROLINA, Intervenors

On direct appeal as of right by intervenor Roy Cooper, Attorney General, pursuant to N.C.G.S. §§ 7A-29(b) and 62-90(d) from a final order of the North Carolina Utilities Commission issued on 27 January 2012 in Docket No. E-7, Sub 989. Heard in the Supreme Court on 13 November 2012.

K&L Gates LLP, by Kiran H. Mehta; Heather Shirley Smith, Deputy General Counsel, and Kendrick Fentress, Associate General Counsel, Duke Energy Carolinas, LLC; and Law Office of Robert W. Kaylor, by Robert W. Kaylor, for applicant-appellee Duke Energy Carolinas, LLC.

Robert P. Gruber, Executive Director, by Antoinette R. Wike, Chief Counsel, and William E. Grantmyre, Staff Attorney, for intervenor-appellee Public Staff-North Carolina Utilities Commission.

John F. Maddrey, Solicitor General; Phillip K. Woods, Special Deputy Attorney General; Margaret A. Force, Assistant Attorney General; and Kevin Anderson, Senior Deputy Attorney General, for intervenor-appellant Roy Cooper, Attorney General.

AARP Foundation Litigation, by Julie Nepveu, pro hac vice; and M. Jason Williams, P.A., by M. Jason Williams, for AARP, amicus curiae.

JACKSON, Justice.

Opinion of the Court

In this case we consider whether the order by the North Carolina Utilities Commission (“the Commission”) approving a 10.5% return on equity¹ (“ROE”) for Duke Energy Carolinas, LLC (“Duke”) contained sufficient findings of fact to demonstrate that it was supported by competent, material, and substantial evidence in view of the entire record. Because we conclude that the Commission failed to make the necessary findings of fact to support its ROE determination, we reverse the Commission’s order and remand this case to the Commission so that it may enter sufficient findings of fact.

On 1 July 2011, Duke filed an application with the Commission requesting authority to increase its North Carolina retail electric service rates to produce additional annual revenues of \$646,057,000, an increase of approximately 15.2% over then current revenues. The application requested that rates be established using an ROE of 11.5%. The Commission entered an order on 28 July 2011, declaring this matter to be a general rate case and suspending the proposed rate increase pending further investigation. The Commission scheduled six public hearings to receive public witness testimony in multiple locations throughout Duke’s service territory. The Commission also scheduled an evidentiary hearing for

¹ ROE is the return that a utility is allowed to earn on its capital investment, which is realized through rates collected from its customers. The ROE affects profits to the utility’s shareholders and has a significant impact on what customers ultimately pay the utility. The higher the ROE, the higher the resulting rates that customers will pay to the utility. *See State ex rel. Utils. Comm’n v. Carolina Util. Customers Ass’n*, 323 N.C. 238, 245, 372 S.E.2d 692, 696 (1988).

Opinion of the Court

29 November 2011. The Attorney General of North Carolina and the Public Staff–North Carolina Utilities Commission intervened in this matter as allowed by law.

On 28 November 2011, the Public Staff and Duke filed an Agreement and Stipulation of Settlement with the Commission that “provide[d] for a net increase of \$309,033,000” for annual revenues and an allowed “ROE of 10.5%.” The Settlement addressed all issues between Duke and the Public Staff, but was contested by some of the other parties, including the Attorney General.

By the time the evidentiary hearing began on 29 November 2011, the Commission already had heard testimony from a total of 236 public witnesses. Many of these customers opposed the proposed rate increase and discussed the hardship that it would impose on the average residential customer in light of current economic conditions. At the evidentiary hearing the Commission heard more live testimony and also received prefiled testimony regarding the proposed ROE.

Specifically, Duke presented the testimony of Robert Hevert, President of Concentric Energy Advisors, Inc., a company that provides financial and economic advisory services to energy and utility clients across North America. Hevert initially recommended an ROE range of 11% to 11.75% and a specific ROE of 11.5%; however, in his rebuttal testimony Hevert lowered his recommended range to 10.75% to 11.5% and decreased his recommended ROE to 11.25%. Hevert testified

Opinion of the Court

that his analysis was based upon market data and the ROE requirements of investors. In particular, Hevert stated that he factored into his analysis the effect of macroeconomic conditions in the capital markets. Hevert's analysis primarily used discounted cash flow² ("DCF") modeling, but also factored Duke-specific risks into the equation to produce a final recommended range and particular ROE. Hevert verified that when determining a reasonable ROE, he did not specifically consider factors such as the unemployment or poverty rates in Duke's service area, the impact of his recommendation on the company's fixed income customers or on cities and counties as ratepayers, or its effect on job creation in the region. Hevert further stated that although he reviewed "other witnesses testimony," he did not review any correspondence, petitions, or comments filed by customers. Hevert also testified that he was unfamiliar with the specific statutory requirements for establishing a fair and reasonable ROE in North Carolina and did not know whether the Commission was required to consider the effect of economic conditions on consumers when setting an ROE.

The Public Staff presented the testimony of Ben Johnson, Ph.D., President of Ben Johnson Associates, Inc., a consulting firm that specializes in public utility regulation. Johnson recommended an ROE range of 8.68% to 9.79% and a specific

² DCF modeling is an econometric method for estimating ROE whereby "the proper rate of return is determined by adding to the common stock's current yield a rate of increase which investors will expect to occur over time." *State ex rel. Utils. Comm'n v. Pub. Staff-N.C. Utils. Comm'n*, 322 N.C. 689, 693-94, 370 S.E.2d 567, 570 (1988).

Opinion of the Court

ROE of 9.25%. Johnson based his ROE analysis upon two approaches. First, Johnson followed the comparable earnings approach, which “estimate[s] the long-run cost of equity as being equivalent to the level of returns being earned, on average, by firms throughout the economy” and then adjusts for risk differences between such firms. Second, Johnson followed a market analysis approach, which included a DCF analysis along with other econometric analyses. Johnson’s testimony focused on the potential effect of a rate increase on Duke’s investors and did not include any analysis of economic conditions in Duke’s service area and their impact on customers. Although Johnson included an overview of general economic trends in his prefiled direct testimony, Johnson explained that his calculations did not consider the economic impact on Duke’s customers when he determined ROE, adding that such considerations are “beyond the scope of [his] work” and are within the purview of other participants in the process. Johnson stated that “[t]he focus of [his] testimony was more on how investors are dealing with economic conditions and less so on how customers are dealing with those same economic conditions.” Johnson elaborated that he “was not doing a specific calculation of whether, say, a five percent rate increase is more acceptable than seven and what the impact might be.” Nonetheless, Johnson agreed that the impact of economic conditions on customers is an appropriate analysis that should be undertaken by the Commission.

The Carolina Utility Customers Association, Inc. (“CUCA”), a coalition of industrial energy customers, presented the testimony of Kevin O’Donnell, President

Opinion of the Court

of Nova Energy Consultants, Inc., who recommended a specific ROE of 9.5%. O'Donnell recommended an ROE range of 8.75% to 9.75% based upon a DCF analysis and an ROE range of 8.5% to 9.5% based upon the comparable earnings approach. O'Donnell's testimony contained no analysis of economic conditions in Duke's service area and their impact on customers.

The Commercial Group, an ad hoc group of Duke's commercial energy customers, presented the testimony of Steve Chriss, Senior Manager for Energy Regulatory Analysis for Wal-Mart Stores, Inc., and Wayne Rosa, Energy and Maintenance Manager for Food Lion, LLC. Chriss and Rosa declined to recommend an ROE range or specific ROE, but did testify that the 11.5% ROE that Duke initially requested exceeded both Duke's currently authorized return and recently authorized returns across the country which averaged 10.32%. Chriss and Rosa did testify that rate increases directly affect retailers and their customers and that a rate increase "is a serious concern" given current economic conditions. Chriss and Rosa did not discuss the fairness of the proposed ROE given the impact of changing economic conditions on customers, but requested that the Commission "consider these impacts thoroughly and carefully in ensuring that any increase in [Duke's] rates is only the minimum amount necessary."

The Attorney General did not present any ROE evidence.

Opinion of the Court

On 27 January 2012, the Commission issued an order, granting a \$309,033,000 annual retail revenue increase for Duke and approving an ROE of 10.5%—the same revenue increase and ROE agreed to in the Stipulation. In support of these conclusions, the Commission summarized—but did not weigh—the testimony of Hevert, Johnson, O'Donnell, and Chriss. The Commission also acknowledged that it was required to consider whether the ROE is reasonable and fair to customers, stating:

[T]he Commission is required to consider the economic effects of its ROE decision on a public utility's customers pursuant to G.S. 62-133(b)(4). In particular, G.S. 62-133(b)(4) states, in pertinent part, that in fixing rates the Commission must fix a rate of return on the utility's investment that "will enable the public utility by sound management to produce a fair return for its shareholders, considering changing economic conditions and other factors, including, but not limited to...to compete in the market for capital funds on terms that are reasonable and that are fair to its customers and to its existing investors." One of the "terms" on which a public utility competes in the market for capital funds is the utility's authorized ROE. Thus, the Commission must consider whether that term is reasonable and fair to the utility's customers.

But the Commission cited only the following evidence regarding this factor:

Public Staff witness Johnson testified in depth concerning the economic downturn, including the unemployment rate. In addition, the Commission received extensive testimony from public witnesses concerning the impact of current economic conditions on Duke's customers. Therefore, the Commission has ample evidence to consider in determining whether the proposed ROE of 10.5% is fair to Duke's customers.

Ultimately, the Commission concluded that the 10.5% ROE set forth in the

Opinion of the Court

Stipulation is “just and reasonable to all parties in light of all the evidence presented.” The Commission noted that, while an ROE of 10.5% had not specifically been recommended by any particular expert witness, it fell within the “range” between the Public Staff’s initial position of 9.25% and Duke’s requested ROE of 11.25%. The Commission further noted that the 10.5% ROE was within the range of ROEs recommended by the witnesses. The Attorney General appealed the Commission’s order to this Court as of right pursuant to subsection 7A-29(b) of the North Carolina General Statutes.

Subsection 62-79(a) of the North Carolina General Statutes “sets forth the standard for Commission orders against which they will be analyzed upon appeal.” *State ex rel. Utils. Comm’n v. Carolina Util. Customers Ass’n (CUCA I)*, 348 N.C. 452, 461, 500 S.E.2d 693, 700 (1998). Subsection 62-79(a) provides:

(a) All final orders and decisions of the Commission shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings and shall include:

- (1) Findings and conclusions and the reasons for bases therefor upon all the material issues of fact, law, or discretion presented in the record, and
- (2) The appropriate rule, order, sanction, relief or statement of denial thereof.

N.C.G.S. § 62-79(a) (2011). “The purpose of the required detail as to findings, conclusions and reasons as mandated by this subsection is to provide the appellate court with sufficient information with which to determine under the scope of review the questions at issue in the proceedings.” *CUCA I*, 348 N.C. at 461, 500 S.E.2d at

Opinion of the Court

700.

This Court previously has recognized that “[t]he decision of the Commission will be upheld on appeal unless it is assailable on one of the statutory grounds enumerated in [N.C.G.S. §] 62-94(b).” *Id.* at 459, 500 S.E.2d at 699 (citation omitted). Subsection 62-94(b) provides:

(b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission’s findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional provisions, or
- (2) In excess of statutory authority or jurisdiction of the Commission, or
- (3) Made upon unlawful proceedings, or
- (4) Affected by other errors of law, or
- (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
- (6) Arbitrary or capricious.

N.C.G.S. § 62-94(b) (2011). This Court has summarized its role pursuant to subsection 62-94(b) as follows:

This Court’s role under section 62-94(b) is not to determine whether there is evidence to support a position the Commission did not adopt. Instead, the test upon appeal is whether the Commission’s findings of fact are supported by competent, material and substantial evidence in view of the entire record. Substantial

Opinion of the Court

evidence [is] defined as more than a scintilla or a permissible inference. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The Commission's knowledge, however expert, cannot be considered by this Court unless the facts and findings thereof embraced within that knowledge are in the record. Failure to include all necessary findings of fact is an error of law and a basis for remand under section 62-94(b)(4) because it frustrates appellate review.

CUCA I, 348 N.C. at 460, 500 S.E.2d at 699-700 (alteration in original) (citations and internal quotation marks omitted).

In the case *sub judice* the Attorney General argues that the Commission's order was legally deficient because it was not supported by competent, material, and substantial evidence, and did not include sufficient conclusions and reasoning. Specifically, the Attorney General contends that by merely adopting the ROE contained in the nonunanimous Stipulation, the Commission failed to undertake an independent analysis and reach its own conclusion regarding the ROE. In addition, the Attorney General contends that the Commission failed to consider changing economic conditions and their impact on consumers in determining the ROE.

“What constitutes a fair rate of return on common equity is a conclusion of law that must be predicated on adequate factual findings.” *Id.* at 462, 500 S.E.2d at 701. This Court previously has set forth the procedure that the Commission must follow when making an ROE determination:

In finding essential, ultimate facts, the Commission must consider and make its determination based upon all

Opinion of the Court

factors particularized in section 62-133, including “all other material facts of record” that will enable the Commission to determine what are reasonable and just rates. The Commission must then arrive at its “*own independent conclusion*” as to the fair value of the applicant’s investment, the rate base, and what rate of return on the rate base will constitute a rate that is just and reasonable both to the utility company and to the public.

Id. In reaching this conclusion, the Commission may consider partial, as well as unanimous stipulations. “[A] stipulation entered into by less than all of the parties as to any facts or issues in a contested case proceeding under chapter 62 should be accorded full consideration and weighed by the Commission with all other evidence presented by any of the parties in the proceeding.” *Id.* at 466, 500 S.E.2d at 703.

Specifically,

[t]he Commission must consider the nonunanimous stipulation along with all the evidence presented and any other facts the Commission finds relevant to the fair and just determination of the proceeding. The Commission may even adopt the recommendations or provisions of the nonunanimous stipulation as long as the Commission sets forth its reasoning and makes “its own independent conclusion” supported by substantial evidence on the record that the proposal is just and reasonable to all parties in light of all the evidence presented.

Id. Nonetheless, “only those stipulations that are entered into by all of the parties before the Commission may form the basis of informal disposition of a contested proceeding under section 62-69(a), *id.*, and such is not the case here.

Two cases previously decided by this Court provide useful guidance on the

Opinion of the Court

application of these principles. In *CUCA I* this Court concluded that “the Commission failed to adduce ‘its own independent conclusion’ as to the appropriate rate of return on equity.” *Id.* at 467, 500 S.E.2d at 703. In its order, the Commission approved the same ROE that was contained in a nonunanimous stipulation without weighing all the available testimony. *Id.* This Court noted that:

The stipulated 11.4% rate should have been considered and analyzed by the Commission along with all the evidence regarding proper rate of return, including the testimony of Mr. O'Donnell on behalf of CUCA that 10.55% was the appropriate return on equity. The only other evidence supporting the 11.4% rate was the rebuttal testimony of Mr. Lurie in defense of the stipulation that the stipulated rate was “just and reasonable.”

Id. at 466-67, 500 S.E.2d at 703. This Court then determined that “[i]n light of the facts that Mr. Lurie’s initial recommendation was 13.34% and that no other evidence supported the 11.4% rate, it is clear that the Commission adopted wholesale, without analysis or deduction, the 11.4% rate from the partial stipulation, as opposed to considering it as one piece of evidence to be weighed in making an otherwise independent determination.” *Id.* at 467, 500 S.E.2d at 703.

In contrast, two years later this Court concluded that the Utilities Commission “adduced its own independent conclusion as to the appropriate rate of return on equity” and held that “this conclusion [was] fully supported by substantial evidence in view of the entire record.” *State ex rel. Utils. Comm’n v. Carolina Util.*

Opinion of the Court

Customers Ass'n (CUCA II), 351 N.C. 223, 235, 524 S.E.2d 10, 19 (2000). This Court noted that “[a] thorough review of the record . . . reveal[ed] that the Commission’s 11.4% rate of return on common equity conclusion c[ame] from the direct testimony and exhibits of Public Staff witness Hinton.” *Id.* at 233, 524 S.E.2d at 17. This Court then determined that the Commission “independently analyz[ed] the testimony of [the applicant company’s] witness Andrews, CUCA witness O’Donnell, and Public Staff witness Hinton before reaching its conclusion that 11.4% was the appropriate cost of common equity.” *Id.* Specifically, this Court noted that “the Commission accepted Public Staff witness Hinton’s recommendation of 11.4% based on the credibility and objectivity of his PSNC-specific DCF analysis” “[a]fter weighing the conflicting evidence of the expert witnesses.” *Id.* at 235, 524 S.E.2d at 19 (emphasis added).

Here although the 10.5% ROE contained in the nonunanimous Stipulation fell within the range of ROEs recommended by the witnesses at the evidentiary hearing, in contrast to *CUCA II*, none of the witnesses specifically recommended an ROE of 10.5% based upon their calculations. Johnson did testify that the stipulated ROE “was not unreasonable”; however, he also recommended a different ROE of 9.25%. In addition, in contrast to *CUCA II*, it does not appear that the Commission weighed any of the testimony presented at the evidentiary hearing. Instead, it appears that the Commission merely recited the witnesses’ testimony before reaching an ROE conclusion in its order. Notably absent from the Commission’s

Opinion of the Court

order is any discussion of why one witness's testimony was more credible than another's or which methodology was afforded the greatest weight. *See CUCA II*, 351 N.C. at 233-35, 524 S.E.2d at 17-19.

Without sufficient findings of fact as to these issues, we cannot say that the Commission "ma[de] 'its own independent conclusion' . . . that the propos[ed] [ROE] [wa]s just and reasonable to all parties in light of all the evidence presented." *CUCA I*, 348 N.C. at 466, 500 S.E.2d at 703. Instead, it appears that "the Commission adopted wholesale, without analysis or deduction," the 10.5% stipulated ROE, "as opposed to considering it as one piece of evidence to be weighed in making an otherwise independent determination." *Id.* at 467, 500 S.E.2d at 703. Accordingly, the Commission's order must be reversed and this case remanded to the Commission so that it can make an independent determination regarding the proper ROE based upon appropriate findings of fact that balance all the available evidence.

As guidance on remand, we further note that in making its ROE determination the Commission failed to make findings of fact regarding the impact of changing economic conditions on customers. "In fixing the rates to be charged by a public utility for its service, the Commission must . . . comply with the requirements of [Chapter 62 of the North Carolina General Statutes], *more specifically*, [N.C.]G.S. [§] 62-133." *Id.* at 457, 500 S.E.2d at 698 (quotation marks

Opinion of the Court

omitted). Section 62-133 states that the Commission must, *inter alia*:

- (4) Fix such rate of return on the cost of the property ascertained pursuant to subdivision (1) of this subsection as will enable the public utility by sound management to produce a fair return for its shareholders, considering *changing economic conditions* and other factors, including, but not limited to, the inclusion of construction work in progress in the utility's property under sub-subdivision b. of subdivision (1) of this subsection, as they then exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise, and to compete in the market for capital funds on terms that are reasonable and that are *fair to its customers* and to its existing investors.

N.C.G.S. § 62-133(b)(4) (2011) (emphases added). “In finding essential, ultimate facts, the Commission must consider and make its determination based upon *all factors* particularized in section 62-133, including ‘all other material facts of record’ that will enable the Commission to determine what are reasonable and just rates.” *CUCA I*, 348 N.C. at 462, 500 S.E.2d at 701 (emphasis added).

The Attorney General argues that section 62-133, in conjunction with Chapter 62 as a whole, mandates that the Commission consider the impact of changing economic conditions on customers when determining ROE. We agree.

“The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent.” *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990). This Court

Opinion of the Court

previously has recognized that the legislature's "twin goals" in enacting section 62-133 were to "assur[e] sufficient shareholder investment in utilities while simultaneously maintaining the lowest possible cost to the using public for quality service." *CUCA I*, 348 N.C. at 458, 500 S.E.2d at 698. In addition, this Court has stated that "[t]he primary purpose of Chapter 62 of the General Statutes is not to guarantee to the stockholders of a public utility constant growth in the value of and in the dividend yield from their investment, but is to assure the public of adequate service at a reasonable charge." *State ex rel. Utils. Comm'n v. Gen. Tel. Co. of the Se.*, 285 N.C. 671, 680, 208 S.E.2d 681, 687 (1974). Moreover, this Court has explained that "[i]n its delegation of rate-making authority to the Commission, the legislature has established an elaborate procedural, hearing, and appeals process that contemplates the full consideration of *all* evidence put forth by each of the parties certified via the statute to have an interest in the outcome of contested proceedings." *CUCA I*, 348 N.C. at 463, 500 S.E.2d at 701 (emphasis added). "Once such considerations are afforded to all parties in a contested case, the Commission is required to embody its findings in an order sufficiently detailing the reasons for its determinations on *all* material and controverted issues of fact, law or discretion presented in the record." *Id.* (emphasis added) (citing N.C.G.S. § 62-94(b)).

It is undisputed that section 62-133 dictates that the Commission consider "changing economic conditions" when making an ROE determination. *See* N.C.G.S. § 62-133(b)(4). Although subdivision 62-133(b)(4) does not specifically reference

Opinion of the Court

“impact on customers,” subsection 62-133(a) does emphasize that fairness to customers is a critical consideration in rate cases by including a directive that “the Commission shall fix such rates as shall be fair both to the public utilities *and to the consumer.*” *Id.* § 62-133(a) (2011) (emphasis added). This is consistent with this Court’s recognition of the customer-driven focus of Chapter 62 as a whole. *See Gen. Tel. Co.*, 285 N.C. at 680, 208 S.E.2d at 687. This Court previously has recognized that Chapter 62 “is a single, integrated plan. Its several provisions must be construed together so as to accomplish its primary purpose.” *Id.* at 680, 208 S.E.2d at 687. Given the legislature’s goal of balancing customer and investor interests, the customer-focused purpose of Chapter 62, and this Court’s recognition that the Commission must consider *all* evidence presented by interested parties, which necessarily includes customers, it is apparent that customer interests cannot be measured only indirectly or treated as mere afterthoughts and that Chapter 62’s ROE provisions cannot be read in isolation as only protecting public utilities and their shareholders. Instead, it is clear that the Commission must take customer interests into account when making an ROE determination. Therefore, we hold that in retail electric service rate cases the Commission must make findings of fact regarding the impact of changing economic conditions on customers when determining the proper ROE for a public utility.

For the foregoing reasons, we reverse the Commission’s order and remand this case to the Commission with instructions to make an independent

Opinion of the Court

determination regarding the proper ROE based upon appropriate findings of fact that weigh all the available evidence.

REVERSED AND REMANDED.

Justice BEASLEY did not participate in the consideration or decision of this case.