

BEFORE THE
PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

APPLICATION OF
DUKE ENERGY PROGRESS, LLC FOR AUTHORITY TO ADJUST AND INCREASE ITS
ELECTRIC RATES AND CHARGES

DOCKET NO. 2022-254-E
SURREBUTTAL TESTIMONY OF
ERIC BORDEN

COAL ASH REMEDIATION COST RECOVERY
SOUTH CAROLINA DEPARTMENT OF CONSUMER AFFAIRS

December 22, 2022

1 **I. INTRODUCTION**

2 **Q. Please state your name, title, and business address.**

3 A. My name is Eric Borden. I am a Principal Associate at Synapse Energy Economics
4 (“Synapse”), located at 485 Massachusetts Avenue, Suite 3, Cambridge, MA 02139.

5 **Q. Have you previously filed testimony in this docket?**

6 A. Yes. My direct testimony was filed on December 1, 2022.

7 **Q. What is the purpose of your surrebuttal testimony?**

8 A. The purpose of my testimony is to respond to claims Duke Energy Progress (“DEP,”
9 “Duke,” or “Company”) made in its rebuttal testimony in response to my direct testimony
10 and recommendations. These are related to the recovery of coal combustion residual
11 (“CCR” or “coal ash”) remediation costs.

12 **Q. Please summarize which specific arguments you respond to in this surrebuttal
13 testimony and your response to these arguments.**

14 A. I discuss the following issues and arguments further below:

- 15 • DEP argues that past environmental violations and/or health hazards caused by the
16 utility’s coal ash are irrelevant to remediation cost recovery considerations because
17 the Company is required to comply regardless of cause. I disagree - the costs to fix
18 a problem cannot be divorced from the cause of the problem itself just because
19 current federal regulations may mandate compliance action.
- 20 • DEP states that its record of environmental handling of coal ash has been “very
21 good.”¹ This is a clear overstatement and at odds with the Company’s record of
22 numerous instances of unauthorized coal ash releases described in my direct
23 testimony,² including Duke’s own guilty plea to environmental compliance
24 violations in federal court.

¹ Rebuttal Testimony of Jessica Bednarcik at 42.

² Direct Testimony of Eric Borden at 10-12.

- 1 • DEP claims aspects of my testimony are irrelevant because I do not directly address
2 prudence. While I agree that I did not provide an opinion on whether the utility’s
3 CCR costs were reasonably and prudently incurred, my testimony is highly relevant
4 to the Commission’s deliberations on coal ash related cost recovery. Specifically, I
5 provided substantial evidence that prudence, in addition to other factors that impact
6 cost recovery considerations, must be closely examined by the Commission based
7 on DEP’s history of environmental harm from its coal ash sites.³
8

9 **Q. How does DEP respond to your arguments that the Commission should consider**
10 **partial or full disallowances based on the Company’s record of potential**
11 **environmental and health hazards caused by the utility’s coal ash ponds?**

12 A. Duke has three primary arguments. First, it believes that historical issues regarding the
13 environmental and/or health impacts of its handling of coal ash are irrelevant to this case,
14 because “the costs of closing the ash basins at issue [...] are driven by the requirements
15 of the federal CCR Rule.”⁴ Second, the Company appears to claim its actions have not
16 caused health or environmental harms, stating “studies conducted by both the Company
17 and DEQ did not reveal any “danger” to the residents”⁵ and the Company’s
18 “environmental record [...] is very good.”⁶ Third, the Company states that since I am not
19 a “prudence witness” my testimony on these issues is not “relevant to this proceeding.”⁷

20 **Q. Are potential environmental or health harms caused by Duke’s coal ash facilities**
21 **relevant to the assessment of coal ash removal costs?**

22 A. Yes. While I understand that interpretation of the federal CCR rule is an issue to be
23 considered in this case, Duke seemingly ignores the portions of my testimony that discuss
24 the proper way to assess incurred costs, including determinations of what is “just and

³ *Ibid.*

⁴ Rebuttal Testimony of Marcia Williams at 28.

⁵ Rebuttal Testimony of Jessica Bednarcik at 40.

⁶ Rebuttal Testimony of Jessica Bednarcik at 42.

⁷ Rebuttal Testimony of Steven Fetter at 10.

1 reasonable” and “prudent.”⁸ One simply cannot ignore the history of Duke’s handling of
2 coal ash when assessing the reasonableness of coal ash remediation costs. As stated in the
3 NARUC “Coal Ash Law and Commercialization” paper:

4 Just and reasonable and prudence principles have two implications in the coal ash
5 context:

- 6
7 1. Was the utility reasonable in its historic actions relating to coal ash ponds?
8 2. Was the utility reasonable in how they have chosen to comply with federal and
9 state regulations relating to treatment of coal ash ponds going forward?⁹

10
11 According to Duke’s logic, if the utility commits an offense, and it pays a penalty, future
12 remediation costs should be paid by ratepayers. This is illogical and unreasonable. If the
13 Commission finds that Duke has indeed caused environmental and/or health damages
14 through its handling of coal ash facilities in the past, and that this was imprudent or
15 unreasonable, it *must* consider whether, or to what extent, ratepayers should shoulder the
16 burden of ensuring coal ash facilities are safe, in compliance with a federal law or not. If
17 a drunk driver were to hit an oncoming vehicle with his car, injuring the driver of the
18 other vehicle, would it be fair to ask the injured victim to pay for the driver’s sobriety
19 classes? I think not. Indeed, based on the Company’s history I present in testimony,¹⁰ it is
20 entirely plausible that Duke’s coal ash facilities should have been removed, remediated,
21 or else built to higher environmental standards (i.e., liners) *years ago*, regardless of any
22 federal or state mandate to do so. Using the federal law as a pretext to argue that
23 historical compliance can’t be considered by the Commission does not accurately reflect

⁸ Direct Testimony of Eric Borden at 8-9.

⁹ National Association of Regulatory Utility Commissioners (NARUC), *A Comprehensive Survey of Coal Ash Law and Commercialization*, January 2020, <https://pubs.naruc.org/pub/A6923B2D-155D-0A36-31AA-045B741819EC>, p. 81.

¹⁰ Direct Testimony of Eric Borden at 10-13.

1 the Commission’s responsibility to protect ratepayers from paying for unreasonable
2 expenditures.

3 **Q. Does DEP accurately represent its historical record of coal ash handling?**

4 A. No. This is seen most clearly in Ms. Bednarcik’s statements that “historical compliance
5 by the Company has been and continues to be robust”¹¹ and that the Company’s
6 “environmental record [...] is very good.”¹² It is not possible to reconcile these
7 statements with the Company’s coal ash management history. Indeed, the Company
8 *pleaded guilty* in 2015 to criminal conduct stemming from unauthorized discharges of
9 coal ash into surrounding bodies of water at multiple sites.¹³ This included the release of
10 around 39,000 tons of ash and 27 million gallons of ash pond water from the Dan River
11 steam station.¹⁴

12 **Q. Do you agree with DEP that you are not a “prudence witness?”**

13 A. I am not clear how the Company defines the term “prudence witness,” and I did not use
14 this term in my direct testimony. I do agree that I provided no opinion on the prudence of
15 DEP’s CCR remediation expenditures.¹⁵ However, in my direct testimony, I describe the
16 historical record and make recommendations to the Commission regarding *its* assessment

¹¹ Rebuttal Testimony of Jessica Bednarcik at 42.

¹² Rebuttal Testimony of Jessica Bednarcik at 42.

¹³ Direct Testimony of Eric Borden at 12; *United States of America v. Duke Energy Business Services LLC, Duke Energy Carolinas, LLC, Duke Energy Progress, Inc*, No. 5:15 CR-62-H; 5:15 CR-67-H; 5:15 CR-68-H (North Carolina 2015). Available at <https://www.justice.gov/file/438651/download>

¹⁴ Department of Interior, *Dan River Coal Ash Spill*, https://www.cerc.usgs.gov/orda_docs/CaseDetails?ID=984. While no costs for the cleanup of this particular ash basin are sought by DEP, this spill speaks to the contradictory nature of the Company’s statements. Additionally, my direct testimony discusses numerous issues and violations at several coal ash basins – see Direct Testimony of Eric Borden at 11-12.

¹⁵ Direct Testimony of Eric Borden at 9. In response to the question “Do you agree that Duke’s CCR costs have been reasonably and prudently incurred?” I said “I do not provide an opinion on this matter. However, I believe that a full or partial disallowance should, at minimum, be considered by the Commission based on publicly known information about these sites.”

1 of the prudence of DEP's actions. This is evident in the discussion of factors the
2 Commission should consider in its deliberations, discussion of Duke's past behavior, and
3 my conclusion that "past history of material hazardous impacts warrant consideration in
4 cost recovery applications like this one."¹⁶ While I do not provide an opinion on the
5 percentage or amount of CCR remediation costs that should be disallowed, my testimony
6 addresses issues highly relevant to the Commission as it considers the level of cost
7 recovery appropriate for CCR remediation costs. Therefore, my testimony is relevant to
8 this docket.

9 **Q. Why didn't you recommend a specific disallowance amount, if you found sufficient**
10 **evidence for the Commission to consider partial or full disallowances?**

11 A. The goal of my testimony was to outline alternative options for the Commission in
12 addressing CCR remediation costs. A partial or total disallowance is only two of these
13 options. To calculate a specific disallowance number requires extensive analysis that was
14 beyond the scope of my engagement with the Department. Further, the Commission's
15 decision will be based on the whole record, including but not limited to my testimony. I
16 expect that additional facts, evidence, and analysis presented in hearings and summarized
17 in briefing will illuminate the degree to which Duke's actions were imprudent, and the
18 level of disallowances that must be levied to ensure just and reasonable rates.

19 **Q. Does this conclude your testimony?**

20 A. Yes, it does.

¹⁶ Direct Testimony of Eric Borden at 8-9; 10-13.