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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AUGUST 5, 2026

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

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OF
NORTH CAROLINA

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SUPREME COURT OF NORTH CAROLINA

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FILED 22 MAY 2026 (FIRST HALF)

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Enforceability—employment agreement—ownership interest provision—void for indefiniteness—In an action to enforce an employment agreement provision, under which plaintiff sought to exercise an option to purchase ten percent of the company after five years of employment (with the remaining ninety percent to be owner-financed over a period of years after that), the decision of the North Carolina Business Court granting summary judgment to defendants—based on its determination that the agreement between the parties was illusory—was modified and affirmed. The agreement could not be enforced due to it being void for indefiniteness where the ownership provision was not severable from its sub-division parts and where the agreement lacked material terms regarding the parties' respective rights and obligations, including those necessary for enforcement and, more particularly, a price or formula upon which a price could be calculated. **Langley v. Autocraft, Inc., 404.**

Enforceability—provision of employment agreement—equitable defenses—quasi-estoppel—mend the hold—In an action to enforce an employment agreement provision, under which plaintiff sought to exercise an option to purchase ten percent of the company after five years of employment (with the remaining ninety percent to be owner-financed over a period of years after that), where the parties' agreement was void for indefiniteness, plaintiff's arguments in the alternative for relief pursuant to equitable principles of quasi-estoppel and mend the hold were unavailing. Since the ownership provision lacked material terms of enforcement, there was no meeting of minds regarding the parties' purported obligations and, thus, the agreement's indefiniteness precluded relief on a quasi-estoppel basis. The doctrine of mend the hold did not apply where defendants' counterclaim—in which they asserted that plaintiff owed a fiduciary duty to the company—was a separate claim stated in the alternative and did not constitute a new justification for nonperformance that would trigger the doctrine. **Langley v. Autocraft, Inc., 404.**

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DISCOVERY

Misappropriation of trade secrets—spoliation of evidence—widespread deletion of electronic data—scope of adverse inference—In a complex business

case in which an insurance agency and its holding company (plaintiffs) sued several former employees (defendants) for multiple claims including misappropriation of trade secrets (specifically, client lists), although the Business Court properly granted plaintiffs' motion for adverse inference—based on evidence that defendants intentionally destroyed or failed to preserve electronic data and materials despite being aware of the litigation and having been sent cease-and-desist letters with a preservation notice—that court failed to identify where and how the inference would be drawn. The Supreme Court remanded the issue of spoliation for the Business Court to fulfill its discretionary function by clarifying with greater precision the application of the inference as to each claim. **Rel. Ins., Inc. v. Pilot Risk Mgmt. Consulting, LLC, 415.**

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Computer Fraud and Abuse Act—"exceeds authorized access"—post-employment computer access—remand for adverse inference consideration—In a complex business case in which an insurance agency and its holding company (plaintiffs) sued several former employees (defendants) for multiple claims involving the alleged misappropriation of client lists, the Business Court erred by granting summary judgment in favor of defendants on three of plaintiffs' computer trespass claims made pursuant to the federal Computer Fraud and Abuse Act. With regard to one defendant, there was sufficient evidence that she "exceed[ed] authorized access" by accessing a vendor portal post-employment and after plaintiffs sent her a cease-and-desist letter. For another defendant, there was a genuine issue of material fact regarding whether, when he took client expiration lists prior to resigning from employment with plaintiffs, he knowingly violated an established company rule. For a third claim, although plaintiffs failed to sufficiently support their allegation that all defendants emailed confidential documents to their personal email accounts and took screenshots of confidential information from their work computers prior to resigning, the matter was remanded for the Business Court to fulfill its discretionary function regarding the application of a previously-granted adverse inference (based on defendants' extensive spoliation of evidence) to this claim. **Rel. Ins., Inc. v. Pilot Risk Mgmt. Consulting, LLC, 415.**

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Business Court—issuance of clarifying order—summary dismissal of claims—lack of written basis—In a complex business case in which an insurance agency and its holding company (plaintiffs) sued several former employees (defendants) for multiple claims including misappropriation of trade secrets, after both parties filed cross-motions for summary judgment and the Business Court entered an initial summary judgment order, the presiding Business Court Judge erred by issuing a "Clarifying Order" a few weeks later—which modified the first order by granting defendants' summary judgment motion pursuant to Civil Procedure Rule 56—without legal analysis or legal basis as required by N.C.G.S. § 7A-45.3. The court's order summarily granting summary judgment was reversed and the matter was remanded for entry of a written, reasoned opinion as to defendants' motion. **Rel. Ins., Inc. v. Pilot Risk Mgmt. Consulting, LLC, 415.**

Judicial standards—censure recommendation adopted—factual findings supported—The Supreme Court accepted the Judicial Standards Commission's recommendation for the censure of respondent (a superior court judge) for violations

of Canons 1, 2A, and 5F of the Code of Judicial Conduct—which amounted to conduct that was prejudicial to the administration of justice, brought the judicial branch into disrepute, and constituted willful misconduct in office. The Commission's findings were supported by clear and convincing evidence, including that respondent had asked a court employee in his jurisdiction to put forth to the senior resident superior court judge respondent's deficient motions to withdraw as an attorney from cases and continued to appear as an attorney while a sitting judge, but also that respondent was otherwise cooperative with the Commission's investigation, eventually took appropriate remedial measures, and had no prior disciplinary history with the Commission. **In re J.C., 388.**

TRADE SECRETS

Client lists—definition of "trade secret"—six-factor inquiry—summary judgment improper—In a complex business case in which an insurance agency and its holding company (plaintiffs) sued several former employees (defendants) for multiple claims including misappropriation of trade secrets (specifically, client lists) under both federal and state law, the Business Court erred by determining at the summary judgment stage that two client lists (one containing names and addresses of clients serviced by one defendant; the other containing clients and their associated insurance policy renewal dates for various types of policies) did not qualify as protectable trade secrets. With regard to the two compilations, even if certain information about individual clients could be obtained publicly, there was a genuine issue of material fact regarding the lists' public availability, the extent to which other employees and those involved in the business knew about or could recreate the lists, the extent of measures taken to safeguard the lists' secrecy, the lists' value to plaintiffs, and the time and effort taken to acquire the information contained in each list. **Rel. Ins., Inc. v. Pilot Risk Mgmt. Consulting, LLC, 415.**

Misappropriation—prima facie case—statutory criteria—absence of consent—remand for adverse inference consideration—In a complex business case in which an insurance agency and its holding company (plaintiffs) sued several former employees (defendants) for multiple claims including misappropriation of trade secrets (specifically, client lists) under both federal and state law, a prima facie case of misappropriation under N.C.G.S. § 66-155(2) requires a claimant to show not only that a specific opportunity to acquire a trade secret existed but also that the opportunity occurred absent consent or authority of the owner. Here, plaintiffs' evidence did not demonstrate that a production analysis document taken by one of the defendants had been obtained or used without defendants' consent or authority. However, where the Business Court had granted plaintiffs' motion for adverse inference due to extensive spoliation of evidence by defendants, the trade secret claim regarding the production analysis document was reversed and remanded for the Business Court to fulfill its discretionary function regarding the application of the adverse inference to this claim. **Rel. Ins., Inc. v. Pilot Risk Mgmt. Consulting, LLC, 415.**

UNJUST ENRICHMENT

Business dispute—solicitation of employees and clients by former employees—lack of conferring of a benefit—In a complex business case in which an insurance agency and its holding company (plaintiffs) sued several former employees (defendants) for multiple claims, the decision of the Business Court to grant

summary judgment in favor of defendants on plaintiffs' claim for unjust enrichment was affirmed, although on alternative grounds. Where the basis of plaintiffs' claim was that defendants wrongfully retained plaintiffs' confidential information, clients, and employees, there was no evidence that plaintiffs conferred a benefit on defendants, a necessary element of an unjust enrichment claim, since defendants acted without plaintiffs' permission. **Rel. Ins., Inc. v. Pilot Risk Mgmt. Consulting, LLC, 415.**

UTILITIES

General rate case—different returns on equity authorized based on similar evidence—not arbitrary and capricious—In a pair of general rate cases where the Utilities Commission approved rate increases for Duke Energy Progress, LLC (DEP) and Duke Energy Carolinas, LLC (DEC) under the performance-based regulation set forth in N.C.G.S. § 62-133.16—enacted to provide an alternative to traditional ratemaking with the aim of reducing the carbon emissions of electric public utilities—the Commission's authorization of a return on equity (ROE) (the return earned on a utility's capital investment by charging rates to customers) of 9.8% for DEP and 10.1% for DEC was upheld. Although DEP and DEC presented substantially similar evidence, it was not arbitrary and capricious for the Commission to approve a higher ROE for DEC than it did for DEP. The Commission's ROE decisions involved the exercise of discretion and the application of subjective judgment to voluminous, complex, and sometimes contradictory evidence. Additionally, the customer interest portion of the DEC order demonstrated that the Commission duly considered that issue before approving DEC's ROE. The Commission followed the law and based its decision on competent, material, and substantial evidence. **State ex rel. N.C. Utils. Comm'n v. Carolina Indus. Grp. for Fair Util. Rates II, 455.**

General rate case—performance-based regulation—electric vehicle charging—In a pair of general rate cases where the Utilities Commission approved rate increases for Duke Energy Progress, LLC (DEP) and Duke Energy Carolinas, LLC (DEC) under the performance-based regulation set forth in N.C.G.S. § 62-133.16 (the PBR statute)—enacted to provide an alternative to traditional ratemaking with the aim of reducing the carbon emissions of electric public utilities—the Commission's approval of the exclusion of revenue generated by residential electric vehicle (EV) charging from DEP's and DEC's decoupling mechanisms, which attempt to eliminate the incentive of electric public utilities to encourage greater energy consumption in order to increase revenue and are required in PBR applications, was upheld. The PBR statute allows such exclusions, and the Commission's approval of the estimation of revenue attributable to EV charging under existing residential schedules, rather than requiring DEC and DEP to develop rate schedules or riders specifically for EV charging, was permitted by the statute's plain language. Further, findings regarding the reasonableness of the costs was supported by competent, material, and substantial evidence. **State ex rel. N.C. Utils. Comm'n v. Carolina Indus. Grp. for Fair Util. Rates II, 455.**

General rate case—performance-based regulation—fuel cost allocation—In a pair of general rate cases where the Utilities Commission approved rate increases for Duke Energy Progress, LLC (DEP) and Duke Energy Carolinas, LLC (DEC) under the performance-based regulation set forth in N.C.G.S. § 62-133.16—enacted to provide an alternative to traditional ratemaking with the aim of reducing the carbon emissions of electric public utilities—the Commission's prohibition on the utilities'

continued use of the equal percentage fuel cost allocation method in fuel rider proceedings governed by N.C.G.S. § 62-133.2 was upheld. While section 62-133.2 includes a detailed definition of "cost of fuel and fuel-related costs," the statute leaves to the Commission's discretion how to allocate the cost adjustment among a utility's customer classes, and nothing in the record evidence indicated that the Commission acted (1) under a misapprehension of law regarding the applicability of the cost causation principle to fuel rider proceedings or (2) in an arbitrary and capricious manner. Instead, the Commission's findings of fact were supported by competent, material, and substantial evidence. **State ex rel. N.C. Utils. Comm'n v. Carolina Indus. Grp. for Fair Util. Rates II, 455.**

General rate case—performance-based regulation—future capital projects—hazardous tree removal—In a general rate case where the Utilities Commission approved rate increases for Duke Energy Carolinas, LLC (DEC) under the performance-based regulation set forth in N.C.G.S. § 62-133.16 (the PBR statute)—enacted to provide an alternative to traditional ratemaking with the aim of reducing the carbon emissions of electric public utilities, including by allowing a multiyear rate plan (MYRP) to be approved with second- and third-year rate increases based upon certain cost projections—where DEC identified capital spending projects for hazardous tree removal in its application but later reduced its cost estimates, the revised cost estimates were "known and measurable" as required by the PBR statute where that phrase was understood to apply to projected (future) capital investments. Moreover, there was no legal error in the Commission's assumption that hazardous tree removal could qualify as a capital spending project for MYRP purposes even though some project costs might be classified as maintenance expenses under accounting rules promulgated by the Federal Energy Regulatory Commission, which were mandatory for DEC to employ. Further, record evidence established that the Commission's decision rested on competent, material, and substantial evidence. **State ex rel. N.C. Utils. Comm'n v. Carolina Indus. Grp. for Fair Util. Rates II, 455.**

General rate case—performance-based regulation—interclass subsidization—In a pair of general rate cases where the Utilities Commission approved rate increases for Duke Energy Progress, LLC (DEP) and Duke Energy Carolinas, LLC (DEC) under the performance-based regulation set forth in N.C.G.S. § 62-133.16 (the PBR statute)—enacted to provide an alternative to traditional ratemaking with the aim of reducing the carbon emissions of electric public utilities—the Commission's approval of a 10% reduction in the utilities' interclass subsidies was upheld. The PBR statute required adherence "to the greatest extent practicable" with: (1) the cost causation principle (establishing a causal link between a customer class, its use of the electric system, and the costs incurred by the public utility) and (2) the minimization of interclass subsidies (where a customer class pays more than its share of the utility's cost to produce power for all customers); the 10% reduction in interclass subsidies was an appropriate balance of those directives with gradualism—adjusting rates incrementally to avoid "rate shock" to customers, a mandatory consideration under the PBR statute—and was supported by competent, material, and substantial evidence in the entire record. **State ex rel. N.C. Utils. Comm'n v. Carolina Indus. Grp. for Fair Util. Rates II, 455.**

SCHEDULE FOR HEARING APPEALS DURING 2026

NORTH CAROLINA SUPREME COURT

Appeals will be called for hearing on the following dates, which are subject to change.

February 10, 11, 12, 17, 18, 19
April 14, 15, 16, 21, 22, 23
September 8, 9, 10, 15, 16, 17
November 10, 12, 17, 18, 19

BRADLEY HOME, CARING FOR WAKE COMMUNITY AND THE CAROLINAS, INC. D/B/A BRADLEY HOME (MHL #092-319) AND D/B/A BRADLEY HOME EXTENSION-KIMBERLY HOUSE (MHL #092-412)

v.

N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, MENTAL HEALTH LICENSURE & CERTIFICATION SECTION

No. 220PA24

Filed 22 May 2026

Administrative Law—contested case petition—timeliness—Civil Procedure Rule 6(e)—inapplicable

After a corporation (petitioner) filed a petition for a contested case sixty-three days after the North Carolina Department of Health and Human Services (NCDHHS) mailed notice of its decision to revoke petitioner's licenses to operate two mental health facilities, the Office of Administrative Hearings properly dismissed the petition as untimely. Petitioner, citing an administrative code provision (26 N.C. Admin. Code 3.0116) stating that "time computations in contested cases" are governed by Rule 6 of the Rules of Civil Procedure, contended that its petition was timely because NCDHHS gave notice by mail and, therefore, the prescribed sixty-day deadline (under N.C.G.S. § 150B-23(f)) for filing the petition was extended by an additional three days under Rule 6(e). However, because a contested case does not exist until it is commenced through the filing of a petition, the sixty-day deadline did not constitute a time limitation "in" a contested case; consequently, Rule 6(e) did not apply. Further, Rule 6(e) only applies to "service" of papers, which does not include delivery of an agency decision before any judicial or quasi-judicial proceeding has commenced.

On discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of a divided panel of the Court of Appeals, 294 N.C. App. 637 (2024), reversing an order entered on 5 October 2023 by Judge Bryan Collins in Superior Court, Wake County, and remanding the case for dismissal. Heard in the Supreme Court on 28 October 2025.

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, by Matthew W. Wolfe and E. Bahati Mutisya, for petitioner-appellant.

Jeff Jackson, Attorney General, by Kerry M. Boehm, Assistant Attorney General, for respondent-appellee.

DIETZ, Justice.

In 2021, the North Carolina Department of Health and Human Services notified Petitioner Bradley Home of the agency's decision to revoke two licenses to operate mental health facilities. This notification triggered a 60-day "time limitation" for Bradley Home to challenge the agency's decision through a contested case in the Office of Administrative Hearings. *See* N.C.G.S. § 150B-23(f).

Bradley Home filed a petition for a contested case 63 days later—three days beyond the 60-day limitation period. *See id.* Bradley Home contends that the petition nevertheless was timely because DHHS used the mail to send notice of its decision. Bradley Home points to a portion of the administrative code stating that "time computations in contested cases" are governed by Rule 6 of the Rules of Civil Procedure. *See* 26 N.C. Admin. Code 3.0116. Relying on Rule 6(e), which states that three days are added to any prescribed period if service is done by mail, Bradley Home argues that it had three extra days to file its petition, making it timely. N.C.G.S. § 1A-1, Rule 6(e).

The Court of Appeals correctly rejected this argument on multiple grounds, including that the code provision cited by Bradley Home applies only to "time computations *in contested cases*." 26 N.C. Admin. Code 3.0116 (emphasis added). The time limitation to *commence* a contested case is not a time deadline "in a contested case" because the contested case does not exist until it is commenced. *See* N.C.G.S. § 150B-23. In other words, this time limitation is no different from a statute of limitations in a civil case; both are time deadlines that exist outside the legal proceeding and, as a result, are not governed by the Rules of Civil Procedure. N.C.G.S. § 1A-1, Rules 1, 3.

Moreover, Rule 6(e) only applies to "service" of papers. The definition of service in the Rules of Civil Procedure does not cover delivery of an agency decision before any judicial or quasi-judicial proceeding is commenced. The agency decision is no different from a letter terminating a contract or any other document giving rise to a legal claim. Delivery of these pre-suit documents is not service and is not governed by the Rules of Civil Procedure. Those rules apply only after the legal proceeding commences. Accordingly, we hold that Rule 6(e) of the Rules of Civil Procedure does not apply to the time deadline at issue in this case and affirm the decision of the Court of Appeals.

Facts and Procedural History

Petitioner Bradley Home is a North Carolina corporation that operates two mental health facilities in the Raleigh area. The North Carolina Department of Health and Human Services licenses and inspects care facilities like those operated by Bradley Home. *See* N.C.G.S. §§ 122C-21, 122C-23 (2025). When necessary, DHHS is authorized to "deny, suspend, amend, or revoke a license" of any facility not complying with applicable health and safety laws. N.C.G.S. § 122C-24(a).

After an investigation, DHHS revoked Bradley Home's licenses for its two facilities. DHHS mailed notice of the revocation decision by certified mail on 3 August 2021. The notice included a section informing Bradley Home that it could challenge the revocation "by filing a petition for a contested case hearing with the Office of Administrative Hearings within sixty (60) days of mailing of this letter."

Bradley Home filed a petition for a contested case on 5 October 2021, 63 days after DHHS mailed the notice. DHHS later moved to dismiss on the ground that Bradley Home's petition was untimely. *See* N.C.G.S. § 150B-23(f).

In response, Bradley Home argued that DHHS notified it of the decision by mail and therefore Rule 6(e) of the Rules of Civil Procedure extended the deadline by three days. This, according to Bradley Home, meant it had 63 days to commence the contested case and that it timely filed the petition on the last day of that 63-day time period.

The ALJ rejected this argument and dismissed the petition as untimely. The ALJ explained that the portions of the administrative code applying Rule 6(e) in contested cases did not apply because they governed only during "litigation," and "until a complaint or petition is filed, there is no litigation."

Bradley Home then petitioned for judicial review. The trial court reversed the ALJ's dismissal. The trial court reasoned that Rule 6(e) applied to the 60-day limitation period based on a provision of the administrative code stating that the "time computations in contested cases before the Office of Administrative Hearings shall be governed by G.S. 1A-1, Rule 6." 26 N.C. Admin. Code 3.0116.

DHHS appealed the trial court's decision. The Court of Appeals reversed in a divided opinion. The majority held that 26 N.C. Admin. Code 3.0116, the code provision referenced by the trial court, applied only "in contested cases." *Bradley Home v. N.C. Dep't of Health & Hum. Servs.*, 294 N.C. App. 637, 644–45 (2024). The majority reasoned that the

60-day statutory limitation period in section 150B-23(f) is not one "in a contested case" because it is the time period to *commence* a contested case. *Id.* The dissent disagreed, explaining that the agency's notice of an adverse decision can be "fairly categorized" as a contested case even before any petition is filed with the Office of Administrative Hearings. *Id.* at 649–50 (Tyson, J., dissenting).

Given the disagreements in the lower courts and the lack of authority from this Court on the question, we allowed Bradley Home's petition for discretionary review.

Analysis

In most legal disputes between a person and a state agency, the Administrative Procedure Act governs the procedure to adjudicate the dispute. Under the APA, a legal challenge to agency action begins when aggrieved parties "commence an administrative proceeding," known as a "contested case." N.C.G.S. § 150B-22(b). This contested case "shall be commenced by paying a fee in an amount established in G.S. 150B-23.2 and by filing a petition with the Office of Administrative Hearings." *Id.* § 150B-23(a).

In most cases, including this one, the "time limitation" to commence a contested case under the APA is 60 days. *Id.* § 150B-23(f). The 60-day period "commences when notice is given of the agency decision to all persons aggrieved" by that decision. *Id.* Notice is "given" under the statute in one of three ways: "by personal delivery, electronic delivery, or by the placing of the notice in an official depository of the United States Postal Service wrapped in a wrapper addressed to the person at the latest address given by the person to the agency." *Id.*

Notably for this case, with respect to the third method—mailing the agency decision—notice is given as soon as the decision is placed in the mail. *Id.* In other words, "under Section 150B-23(f), a petitioner is deemed to have notice of a final agency decision as soon as the agency places the decision in the mail, even if it takes several days for the petitioner to receive it." *Krishnan v. N.C. Dep't of Health & Hum. Servs.*, 274 N.C. App. 170, 173 (2020).

Filing a petition for a contested case within the 60-day time limitation period is mandatory because a person's right to administrative and judicial review of state agency action is not inherent—it is created by statute. *See* N.C.G.S. § 150B-22. Therefore, "compliance with statutory provisions is necessary to avail oneself of this right." *House of Raeford Farms, Inc. v. State ex rel. Env't Mgmt. Comm'n*, 338 N.C. 262, 267

(1994). For this reason, we have held that parties "are not entitled to OAH review" if they fail "to comply with N.C.G.S. § 150B-23(f)'s 60-day time limitation." *Id.* Indeed, in the Court of Appeals, where these administrative appeals are far more common, there is a long line of case law affirming the dismissal of contested cases for failure to file within the 60-day limitation period, even if the filer missed the deadline by only a few days. *See, e.g.*, *Smith v. Daniels Int'l*, 64 N.C. App. 381, 382 (1983); *Gummels v. N.C. Dep't of Hum. Res.*, 98 N.C. App. 675, 678 (1990).

In this case, the parties agree that Bradley Home did not file its petition for a contested case within 60 days. Nevertheless, Bradley Home contends that its petition is timely. It supports this contention by citing a series of statutes, regulations, and rules of procedure.

First, Bradley Home points out that when DHHS issued its final decision, it chose to notify Bradley Home by mail, although it could have used one of the other methods, such as electronic delivery or personal delivery. *See* N.C.G.S. § 150B-23(f).

Next, Bradley Home points to two provisions in the administrative code applying the North Carolina Rules of Civil Procedure in contested cases. The first provision states that the Rules of Civil Procedure "shall apply in contested cases in the Office of Administrative Hearings." 26 N.C. Admin. Code 3.0101. The second provision states that "time computations in contested cases before the Office of Administrative Hearings shall be governed by G.S. 1A-1, Rule 6." 26 N.C. Admin. Code 3.0116.

Finally, Bradley Home turns to the North Carolina Rules of Civil Procedure and, specifically, to Rule 6(e). *See* N.C.G.S. § 1A-1, Rule 6(e). That subsection provides that when a filing is served by mail and there is a "prescribed period" after service to take some action, "three days shall be added to the prescribed period." *Id.*

Combining these three provisions together, Bradley Home argues that it had 63 days, not 60 days, to file its contested case petition because the agency chose to notify it of the final decision by mail and that, in turn, means Rule 6(e) added three additional days to the 60-day period.

There are several glaring flaws in this reasoning. First, and most importantly, it ignores the actual language of these provisions. As the Court of Appeals majority correctly held, the administrative code states that the Rules of Civil Procedure "shall apply *in contested cases* in the Office of Administrative Hearings." 26 N.C. Admin. Code 3.0101 (emphasis added). The 60-day limitation period at issue is not a time deadline *in a contested case*. Instead, it is the time deadline to *commence* a

contested case by filing the petition. *See* N.C.G.S. § 150B-23(a). In other words, the existence of an adverse agency decision is not what creates a contested case; the aggrieved party must choose to file a petition, "at which time the dispute *becomes* a 'contested case.' " *Id.* § 150B-22(b) (emphasis added). Until the petition is filed, no contested case exists. *See Empire Power Co. v. N.C. Dep't of Env't, Health & Nat. Res.*, 337 N.C. 569, 594 (1994).

Notably, this is consistent with civil actions governed by the Rules of Civil Procedure. N.C.G.S. § 1A-1, Rules 1, 3. No civil action exists until it "is commenced by filing a complaint with the court." *Id.* § 1A-1, Rule 3(a). As a result, time deadlines that apply *before* a civil action is commenced, such as statutes of limitations, are not governed by the Rules of Civil Procedure. *See id.* The same is true for the 60-day "time limitation" to commence a contested case. *Id.* § 150B-23(f).

Second, Rule 6(e) of the Rules of Civil Procedure applies to "*service* of a notice or other paper." *Id.* § 1A-1, Rule 6(e) (emphasis added). The immediately preceding rules discuss "service." *See id.* § 1A-1, Rules 4, 5. Service refers to the delivery of the initial summons as well as other legal filings in the case, such as pleadings, discovery requests, and motions. *Id.* These filings all have a connection to the *judicial* proceeding. When a state agency notifies an impacted person about the agency's decision, by contrast, that is not a form of service for any judicial or quasi-judicial proceeding. It is an act of the executive branch administering the law. Interested persons receiving the notice can simply accept it; they are under no obligation to contest the agency's decision. Thus, delivery of that agency decision is not "service," just as delivering a contract termination letter that constitutes a breach is not "service" under the Rules of Civil Procedure. Even if the delivery of some document or notice gives rise to a legal claim, "service" under the Rules of Civil Procedure is not implicated until a complaint is filed asserting the legal claim. *See id.* § 1A-1, Rules 3, 4. Simply put, "service" is for actions *in* the judicial proceeding, not for actions that *could* eventually lead to a judicial proceeding.

Finally, applying the Rules of Civil Procedure to section 150B-23 could render the enabling portions of the administrative code unconstitutional. Our rules of interpretation require us to avoid this outcome. *See State ex rel. Comm'r of Ins. v. N.C. Fire Ins. Rating Bureau*, 291 N.C. 55, 70 (1976); *Delconte v. State*, 313 N.C. 384, 402 (1985). Specifically, other provisions of the APA expressly identify when and how the Rules of Civil Procedure and Rules of Evidence apply to contested cases. *See* N.C.G.S. §§ 150B-28, 150B-29, 150B-33. For example, the APA permits

depositions "in lieu of other evidence when taken in compliance with the Rules of Civil Procedure" and permits parties to "engage in discovery pursuant to the provisions of the Rules of Civil Procedure." *Id.* § 150B-28(a). The APA also permits "prehearing motions that are authorized by G.S. 1A-1, the Rules of Civil Procedure." *Id.* § 150B-33(b)(3a).

Thus, there is clear statutory authority for the provisions of the administrative code applying the Rules of Civil Procedure *within* a contested case. *See* 26 N.C. Admin. Code 3.0101. By contrast, there is no authorization, either in section 150B-23(f) or anywhere else, to apply the Rules of Civil Procedure to statutory deadlines governing conduct *outside* the contested case.

State agencies cannot promulgate regulations without legislative authority to do so. *See In re N.C. Auto. Rate Admin. Off.*, 278 N.C. 302, 314 (1971); *Motsinger v. Perryman*, 218 N.C. 15, 20–21 (1940). Thus, were we to interpret these code provisions as Bradley Home suggests, it could create a claim that the provisions are ultra vires and unconstitutional. *See Motsinger*, 218 N.C. at 21. This further confirms that we should interpret these provisions to apply only *in* a contested case, not to the time limitation to *commence* that contested case. *See Delconte*, 313 N.C. at 402.

We close by addressing one of Bradley Home's arguments that caused some confusion in the lower courts. Bradley Home argued that Rule 6(e) must apply to the statutory 60-day time limitation in section 150B-23(f) because courts have previously concluded that another section of that rule, Rule 6(a), applies to this same statutory period. Rule 6(a) states that, for time periods seven days or longer, if the last day "is a Saturday, Sunday or a legal holiday when the courthouse is closed for transactions," the deadline is extended "until the end of the next day which is not a Saturday, Sunday, or a legal holiday when the courthouse is closed for transactions." N.C.G.S. § 1A-1, Rule 6(a).

In the trial court, Bradley Home cited a Court of Appeals case in which the 60-day statutory period in section 150B-23(f) ended on a weekend and the Court of Appeals calculated the deadline as the next business day. *See Gummels*, 98 N.C. App. at 678. The trial court focused on this case authority and made this the centerpiece of its reasoning: "If Rule 6(a) applies to the timeliness of petitions of contested case hearing, Rule 6(e) must apply as well."

The problem is that *Gummels* applied Rule 6(a) because of an entirely separate statute addressing computation of time for state laws. That statute codified the common law rule that "if the last day of a period

of limitation for *commencing an action* falls on a Sunday or on a legal holiday, the period is extended and the action may be commenced on the following secular or business day." *Hardbarger v. Deal*, 258 N.C. 31, 33 (1962) (emphasis added).

After enacting the Rules of Civil Procedure, the General Assembly amended the statute to reference Rule 6(a): "The time within which an act is to be done, as provided by law, shall be computed in the manner prescribed by Rule 6(a) of the Rules of Civil Procedure." N.C.G.S. § 1-593. Importantly, the General Assembly did not apply Rule 6(e) to these time computations as well. The legislature chose only to apply Rule 6(a). This underscores that Rule 6(e) does not apply in this case. If the General Assembly intended for that rule to apply, it would have said so in *this* statute, which expressly governs the computation of time for statutes like section 150B-23(f).

In sum, we hold that the provisions of Rule 6(e) of the Rules of Civil Procedure do not apply to the statutory limitation period to commence a contested case. Accordingly, the ALJ properly dismissed Bradley Home's petition for a contested case because it was untimely.

We acknowledge that this dismissal may seem harsh to Bradley Home. But, as we noted above, our state's appellate precedent contains many examples of litigants whose petitions were similarly dismissed for missing this same deadline by only a few days. *See*, *e.g.*, *Smith*, 64 N.C. App. at 382; *Gummels*, 98 N.C. App. at 678.

The public expects courts to apply statutory rules "uniformly to all litigants who appear before them." *Martin v. Pope*, 257 N.C. App. 641, 645 (2018). Enforcing a time deadline often can seem harsh "to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced." *United States v. Locke*, 471 U.S. 84, 101 (1985). Here, consistent with a long line of cases where litigants did not comply with this mandatory deadline, the disposition required by law is to dismiss the case. *See House of Raeford Farms*, 338 N.C. at 267.

Conclusion

We affirm the decision of the Court of Appeals.

AFFIRMED.

COSTANZO v. CURRITUCK COUNTY

[389 N.C. 366 (2026)]

GERALD COSTANZO, BRYAN DAGGOT, JOHN DUMBLETON, PHILIP SCHNEIDER, CLARA SCHNEIDER, MARGARET BINNS, MOHAN NADKARNI, GREGORY A. WANDER, RONALD BUCHANAN, STACEY MCCONNELL, GARY S. MILLER, JEFFREY P. FUSSNER, WILLIAM T. COLLINS, REX LUZADER, ELIZABETH SCHWEPPE, GERRILEA ADAMS, RICHARD J. CHOWN, PATRICIA C. CHOWN, GARY GOSNELL, MARY MAGNER, MICHAEL C. BRIGATI, ROBERT RICHARDSON, MARYANN DUMBLETON, AND COROLLA CIVIC ASSOCIATION

v.

CURRITUCK COUNTY, NORTH CAROLINA; THE CURRITUCK COUNTY TOURISM DEVELOPMENT AUTHORITY; THE CURRITUCK COUNTY BOARD OF COMMISSIONERS; AND DANIEL F. SCANLON II, CURRITUCK COUNTY MANAGER AND BUDGET OFFICER, BOTH IN HIS OFFICIAL CAPACITY AND IN HIS INDIVIDUAL CAPACITY

No. 101PA24

Filed 22 May 2026

Counties—expenditures—scope of authority—net proceeds of occupancy tax—"tourism-related expenditures"—public safety services

Pursuant to the plain language of a legislative enabling statute that allows Currituck County to collect a room occupancy tax and spend the net proceeds from that tax on "tourism-related expenditures," the county's decision to use the occupancy tax revenues to enhance certain public safety services (including police, fire, and emergency response services) was within its discretionary authority, not taken in bad faith, not arbitrary or capricious, and not in disregard of the law. The county commissioners made a reasoned decision that the expenditures were necessary to promote and develop tourism based on the substantial population increase during peak tourist season and related year-round costs to provide public safety services during that period. Therefore, the trial court properly granted summary judgment in favor of defendants (the county and its tourism development agency) on plaintiffs' (county property owners) action for declaratory judgment; the decision by the Court of Appeals to the contrary was reversed and the matter was remanded for proceedings consistent with the holding of the Supreme Court.

Justice BARRINGER concurring.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 293 N.C. App. 15 (2024), reversing in part and vacating in part an order entered on 28 December 2021

by Judge Wayland J. Sermons, Jr. in Superior Court, Currituck County. Heard in the Supreme Court on 17 February 2026.

Dowling PLLC, by Troy D. Shelton, for plaintiff-appellees.

Womble Bond Dickinson (US) LLP, by Christopher J. Geis, for defendant-appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Mitchell Armbruster & Dana E. Simpson, for North Carolina Travel and Tourism Coalition, North Carolina Restaurant and Lodging Association, North Carolina Hospitality Alliance, North Carolina Vacation Rental Managers Association, and Vacation Rental Managers Association, amici curiae.

EARLS, Justice.

The legislature enables some counties and municipalities to exact an occupancy tax, or a tax on the proceeds of room or lodging rentals. These enabling statutes typically also limit how the resulting revenues can be spent. In Currituck County, occupancy tax revenues may only be spent on "promot[ing] travel and tourism" as well as "tourism-related expenditures." *See* An Act to Allow an Increase in the Currituck County Occupancy Tax and to Change the Purposes for Which the Tax May Be Used, S.L. 2004-95, § 2, 2003 N.C. Sess. Laws (Reg. Sess. 2004) 115, 115–16 [hereinafter Act of 2004]. The latter is defined as those expenditures that, "in the judgment of the Currituck County Board of Commissioners, are designed to increase the use of" various county facilities "by attracting tourists or business travelers to the county." *Id.* at 116.

Defendant Currituck County, through its Board of Commissioners, decided to spend occupancy tax revenues on certain public safety services—including law enforcement, emergency medical services, and fire response, predominately tied to the heavily touristed beach destination of Corolla along the northern Outer Banks. In the Commission's view, these expenditures are tourism-related because Currituck County's population doubles during peak season and the County incurs substantial year-round costs to provide adequate public safety services during that period. The Commissioners believe that tourists and business travelers visit the County because it has a reputation for being safe and family-friendly and that tourists would be deterred from visiting the County if

it were unable to provide sufficient police, fire, and emergency response services to protect them during their visit.

Plaintiffs, property owners in Currituck County as well as a civic association containing other such property owners, challenge that decision. In their view, because public safety services are not a literal tourist attraction, the County is not authorized to spend occupancy tax revenue on such services. They sought a declaratory judgment to that effect and an injunction prohibiting the County from making such expenditures.

The legal issue presented is whether the Commissioners reasonably determined that these expenditures are tourism-related. The trial court determined that they did relate to tourism and granted summary judgment to the County on this claim. After the property owners appealed, the Court of Appeals reversed the lower court and ruled in favor for the property owners.

On discretionary review, we conclude that Currituck County's occupancy tax statute does not prohibit the County from spending revenues on enhanced public safety services related to area tourism. The County could—and here, did—reasonably conclude that the challenged public safety spending is tourism-related because tourists are not likely to visit Currituck if they believe it is unsafe and because substantial tourism-related population changes greatly increase the demand for public safety services in the area and at a year-round cost. We therefore reverse the decision of the Court of Appeals and remand this matter for further remand to the trial court to enter summary judgment for the County on this claim and for further proceedings on the remaining claims consistent with this opinion.

Protecting public safety is among the most important responsibilities North Carolinians entrust to their democratically elected officials. Doing so while promoting economic growth and fairly allocating the tax burden across the community is an ongoing challenge for many elected officials. Here the legislature vested the County, through its Commissioners, with the responsibility to decide how to spend limited occupancy tax funds to attract tourists to their area. The County did not abuse its discretion under the statutes by concluding that adequate public safety services related to robust area tourism are appropriate uses of these funds.

I. Background

A. The Legislature Enables Currituck County to Enact an Occupancy Tax

Through a series of local acts, the legislature enables more than two hundred counties and municipalities to exact a room occupancy tax. *See generally* N.C. Gen. Assembly, *Occupancy Tax Overview: Updated Through 2024 Regular Session*, https://webservices.ncleg.gov/ViewDocSiteFile/56369 (last visited May 11, 2026). These local acts follow a common structure: the statutes set a maximum tax rate, ranging from one percent to eight percent. *E.g.*, An Act Relating to NASCAR Hall of Fame Financing, S.L. 2005-68, § 1, 2005 N.C. Sess. Laws 106, 107. They also define how revenues may be allocated. Authorized uses are as narrow as a particular museum, *see id.*, or as broad as "any public purpose," *e.g.*, An Act to Authorize Cleveland County to Levy a Room Occupancy and Tourism Development Tax, ch. 173, § 1(e), 1989 N.C. Sess. Laws 391, 393. The statutes also designate a governing board tasked with spending the occupancy tax revenues. *E.g.*, An Act to Authorize Franklin County and the Cities of Eden and Reidsville to Levy a Room Occupancy and Tourism Development Tax and to Amend the Durham and Rockingham Occupancy Taxes, S.L. 2005-233, pt. I, § 1.2, 2005 N.C. Sess. Laws 544, 544–45 (authorizing, *inter alia*, the Franklin County Board of Commissioners to appoint members to the Tourism Development Authority and requiring that those members include individuals affiliated with businesses that collect occupancy tax revenues and individuals who are currently active in promoting tourism); An Act . . . Modifying the Method of Appointment of Members and Officers to Certain Local Tourism Development Boards . . . , ch. 540, pt. II, § 4, 1995 N.C. Sess. Laws 2009, 2012–13 (modifying, *inter alia*, Haywood County's Tourism Development Authority membership to consist of three persons who own or operate "hotels, motels, or other accommodations" greater than twenty units, three persons operating facilities with less than twenty units, and three "tourist-oriented" business members).

Although these statutes have some commonalities, the details of each tax system vary significantly. For example, sometimes the relevant governing board is a Tourism Development Authority (TDA), which could include representatives from specific industry groups like the local Chamber of Commerce, Board of Realtors, or Hospitality Association. *E.g.*, An Act to Repeal the Carteret County Occupancy Tax Law and to Authorize Carteret County to Levy a New Occupancy and Tourism Development Tax, S.L. 2001-381, § 8(b), 2001 N.C. Sess. Laws 1242, 1249–50 [hereinafter Act of 2001]. Other times, the governing body

is composed exclusively of independently elected local government officials. *E.g.*, An Act to Authorize Davie County to Levy a Room Occupancy and Tourism Development Tax, ch. 928, § 1, 1989 N.C. Sess. Laws 276, 277–78 (vesting "Davie County" with authority to use and distribute the occupancy tax revenues).

The revenue allocation restrictions vary too. Some occupancy tax revenues are limited to "promot[ing] travel and tourism" and "tourism-related expenditures." *E.g.*, An Act to Authorize the Town of Franklin to Levy a Room Occupancy and Tourism Development Tax, S.L. 2004-105, § 1(c), 2003 N.C. Sess. Laws (Reg. Sess. 2004) 129, 129. Others are allocated to municipalities within the county or for specific purposes such as "beach nourishment." *E.g.*, An Act to Authorize Dare County to Levy an Occupancy Tax, ch. 449, § 1(e), 1985 N.C. Sess. Laws 380, 381–82; An Act . . . to Authorize Dare County to Levy an Additional One Percent Occupancy Tax . . ., S.L. 2010-78, § 7, 2009 N.C. Sess. Laws (Reg. Sess. 2010) 320, 325. This variation underscores that the particular language the legislature used in each statute is important and that the legislature did not intend a "one-size-fits-all" approach to boosting tourism throughout the state.

Relevant here, one occupancy tax statute covers North Carolina's northeastern most county of Currituck. The county runs from the mainland to the northern Outer Banks barrier islands. It has approximately 28,100 year-round residents, including 1,159 full-time residents on Corolla. In the summer, tourists cause Currituck's population to double to around 60,000, most of whom stay on Corolla. These tourists book hotels or motels, or rent vacation homes or other lodgings, at costs reaching up to thousands to tens of thousands of dollars a week in peak summer months. Tourists engage in a variety of activities, from visiting the beach, eating at restaurants, observing wild horses, playing a round of golf, or exploring neighboring areas. The number of tourists visiting the county has increased nearly every year.

The occupancy tax statute enables Currituck County's Board of Commissioners to levy up to a six percent tax on lodging and similar accommodation rentals. *See* An Act to Authorize Currituck County to Levy a Room Occupancy and Tourism Development Tax, ch. 209, § 1, 1987 N.C. Sess. Laws 277, 277 [hereinafter Act of 1987]; An Act to Authorize Currituck County to Levy an Additional One Percent Occupancy Tax and to Use the Proceeds of the Additional Tax for the Currituck Wildlife Museum, ch. 155, § 1, 1991 N.C. Sess. Laws 269, 269; Act of 2004, § 1, 2003 N.C. Sess. Laws (Reg. Sess. 2004) at 115. But should the County choose to levy a tax, the first three percent of such revenues may only be used

on "tourism-related expenditures, including beach nourishment." Act of 1987, § 1(a), 1987 N.C. Sess. Laws at 277; Act of 2004, § 2, 2003 N.C. Sess. Laws (Reg. Sess. 2004) at 115. Two-thirds of the next three percent of the tax proceeds must be spent "to promote travel and tourism." Act of 2004, § 2, 2003 N.C. Sess. Laws (Reg. Sess. 2004) at 115–16. The remainder of that next three percent must also go to "tourism-related expenditures." *Id.* In all then, two-thirds of the occupancy tax proceeds must be spent on tourism-related expenditures and one-third must be spent on promoting travel and tourism.

The statute further defines these categories of expenditures. "[P]romoting travel and tourism" is defined narrowly as "advertis[ing] or market[ing] an area or activity, publish[ing] and distribut[ing] pamphlets and other materials, conduct[ing] market research, or engag[ing] in similar promotional activities that attract tourists or business travelers to the area." *Id.* at 116. A "[t]ourism-related expenditure" is, in turn, defined as "[e]xpenditures that, in the judgment of the Currituck County Board of Commissioners, are designed to increase the use of lodging facilities, meeting facilities, recreational facilities, and convention facilities in a county by attracting tourists or business travelers to the county." *Id.* The category specifically "includes tourism-related capital expenditures and beach nourishment." *Id.*

The statute also required that the county, when levying the tax, create a "Tourism Development Authority." *Id.* § 3 at 116. That body is charged with promoting travel and tourism to the county and with "expend[ing] the net proceeds of the tax levied under this act for the purposes provided in Section 1 of this act." *Id.* at 117. In turn, the voting members of the Currituck County TDA are the County Commissioners, and the nonvoting member is the county's designated ex officio "travel and tourism representative." *Id.*; *see also* An Act to Increase the Membership of the Currituck County Tourism Development Authority from Six to Eight Members, S.L. 2008-54, § 1 2007 N.C. Sess. Laws (Reg. Sess. 2008) 98, 98 (expanding the size of Currituck's TDA when the county expanded to seven commissioners). By separate statute, commissioners are elected by the entire county and are responsible for acting for and on behalf of the county. N.C.G.S. §§ 153A-11, -12 (2025); An Act to Amend Chapter 652, Session Laws of 1949, Relating to the Nomination and Election of Members of the Currituck County Board of Commissioners so as to Provide that the District Candidates Shall Be Elected By a Vote of the People of the County as a Whole, ch. 706, §§ 1–2, 1961 N.C. Sess. Laws 893, 893. Thus, the County Commissioners, sitting as the TDA, are responsible for allocating the occupancy tax revenues consistent

with the statute's enumerated purposes and with boosting tourism to the area.

B. Property Owners Challenge Currituck County's Occupancy Tax Expenditures

For several annual budget cycles, the County, through the Board of Commissioners, has expended occupancy tax revenues on various public safety services. These costs included law enforcement personnel and equipment, emergency medical services personnel, a paid fire district (instead of an all-volunteer fire response service), beach lifeguards, and repairing and maintaining coastal roads. Most expenditures are targeted to the County's most popular tourist destination of Corolla. The Commissioners voted to make such expenditures after public budget workshops, where they discussed the details of the budget items, and upon recommendation of officials like the county manager and local sheriff.

Plaintiffs are property owners who collect and remit occupancy tax proceeds to Currituck County and a civic association whose members include other such property owners (collectively, the property owners). On 7 May 2019, they brought an action for declaratory judgment against the County, the county's Tourism Development Authority, the Board of Commissioners, and the county manager. The property owners claimed that occupancy tax funds were improperly allocated to the county's general fund, that the funds were unlawfully used for public safety services and equipment, and that the funds were unlawfully used for general economic development and other nonqualifying projects, as well as loans for construction of a water treatment facility and to fund special service districts. Their complaint also alleged a constitutional violation based on the same theories. In addition to a declaratory judgment, the property owners sought injunctive relief to prohibit the County from using occupancy tax proceeds for unlawful purposes and to require the County to return improperly transferred funds to the TDA. The property owners also requested that the court issue "standards" that would constrain the Board's "judgment" when spending tax proceeds.

Later, on defendants' Rule 12(b)(6) motion, the trial court dismissed the property owners' constitutional claim and dismissed the Currituck County Board of Commissioners and county manager as defendants. The remaining defendants were the County itself and the TDA (together, the County). After discovery, on 24 June 2021, the property owners moved for partial summary judgment as to their second claim, that the statute bars the County from using occupancy tax proceeds for public

safety services and equipment. On 19 November 2021, the County cross-motioned for summary judgment on all of the property owners' claims. In so moving, both sides agreed that there are no genuine issues of material fact.

The trial court ultimately denied the property owners' partial motion for summary judgment on their second claim and granted summary judgment for the County on all claims. The property owners timely appealed.

C. The Court of Appeals Decision

On direct appeal, the Court of Appeals reversed the trial court's denial of partial summary judgment for plaintiffs and would have remanded the matter for entry of partial summary judgment in favor of the property owners. *See Costanzo v. Currituck County*, 293 N.C. App. 15, 24–25 (2024). The court also vacated the trial court's grant of summary judgment for the County on all remaining claims. *Id.* at 25. The Court of Appeals majority opinion concluded that public safety expenditures like police protection and emergency services were not authorized expenditures under Currituck's occupancy tax statute, based on the statute's history. *Id.* Specifically, the Court of Appeals observed that an earlier version of the occupancy tax statute defined "tourist related purposes" for which funds may be used as including "police protection [ ] and emergency services." *Id.* at 16–19 (quoting Act of 1987, § 1(e), 1987 N.C. Sess. Laws at 279). A later amendment removed those two items. *Id.* The court reasoned that, by removing these more specific mentions of occupancy tax uses, the legislature intended to narrow the approved uses of occupancy tax proceeds and implicitly bar the County from spending funds on law enforcement and EMS. *Id.* at 21–22. Thus, the Court of Appeals concluded that the County lacked discretion to spend the funds on those services.

Judge Hampson concurred in a separate opinion. Although he concluded that the statute does permit general public safety services to qualify as "tourism-related expenditures," in his view, the County failed to exercise its judgment consistent with the statute because the Board of Commissioners never made a finding on the record that the expenditures on public safety services were related to tourism. *Id.* at 25 (Hampson, J., concurring). He interpreted the record to mean that the County was simply disbursing the occupancy tax revenues from the TDA fund to the county's general fund without ever "exercising its judgment to determine it was expending those funds for tourism-related activities." *Id.* at 26. This "misapprehension of the law," Judge Hampson concluded, was an abuse of discretion and grounds to deny the County's motion for summary judgment on this claim. *Id.*

The County sought discretionary review from this Court, which we allowed on 25 June 2025. The petition for discretionary review presented two issues, namely, whether local government officials have discretion to determine that spending on public safety services is necessary to attract tourists to their county and what standard of review applies to that determination. We now reverse the decision of the Court of Appeals.

II. Analysis

A. Legal Standard

A county is an agency of the State and thus is subject to the powers, "express and implied, [that] are conferred [on it] by statutes." *Lanvale Props., LLC v. County of Cabarrus*, 366 N.C. 142, 150 (2012) (quoting *Martin v. Bd. of Comm'rs*, 208 N.C. 354, 365 (1935)). In particular, when the legislature authorizes a county to exact a tax, the county may only exercise that taxing power within statutory limits. *See Stam v. State*, 302 N.C. 357, 360 (1981). The meaning and scope of a statute is a question of law reviewed de novo. *See Cohane v. Home Missioners of Am.*, 387 N.C. 1, 7 (2025).

The "principal goal of statutory construction is to accomplish the legislative intent," and the General Assembly's intent "may be found first from the plain language of the statute." *Beavers v. McMican*, 385 N.C. 629, 634 (2024) (cleaned up); *see also Quality Built Homes Inc. v. Town of Carthage*, 369 N.C. 15, 19 (2016) (noting that we first turn to the "plain language of the enabling statute" to "determin[e] the extent of legislative power conferred upon a municipality"), *superseded by statute on other grounds*, N.C.G.S. § 160A-314(a) (2017). When interpreting a municipal enabling statute, we "presume that the legislature acted with care and deliberation," *Bowers v. City of High Point*, 339 N.C. 413, 420 (1994), and we consider the scope of a particular enabling act in context of the broader municipal regulatory scheme, *see Lanvale Props.*, 366 N.C. at 156. Where a statute clearly and unambiguously authorizes a locality to act, the statute must be given "its plain and definite meaning." *Id.* at 154 (quoting *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 811 (1999)); *accord Durham Land Owners Ass'n v. County of Durham*, 177 N.C. App. 629, 634 ("[W]here the plain meaning of the statute is without ambiguity, it 'must be enforced as written.' " (quoting *Bowers*, 339 N.C. at 419–20, *quoted in Bellsouth Telecomms., Inc. v. City of Laurinburg*, 168 N.C. App. 75, 82–83 (2005))), *disc. rev. denied*, 360 N.C. 532 (2006).

Moreover, even when local officials act within the discretion afforded to them by statute, they still cannot act in bad faith, in an arbitrary or capricious manner, or in disregard of the law. *Pue v. Hood*, 222 N.C. 310, 315 (1942). A bad faith act may be one made in "wanton disregard of public good" or with intent to "squander public funds." *Barbour v. Carteret County*, 255 N.C. 177, 181–82 (1961). An arbitrary or capricious act is one "done without adequate determining principle" or "without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles." *In re Hous. Auth.*, 235 N.C. 463, 468 (1952) (cleaned up). Arbitrary and capricious actions are not necessarily made in bad faith but in the context of a discretionary act, do "ordinarily denote abuse of discretion." *Id.* The burden is on the complaining party to show that the public officials have failed to act "in good faith and in accord with the spirit and purpose of" the law. *See Painter v. Wake Cnty. Bd. of Educ.*, 288 N.C. 165, 178 (1975). "[T]he courts will not hesitate to afford prompt and adequate relief" where an officer abuses their discretion in this manner and thereby impairs "personal or property rights." *Pue*, 222 N.C. at 315.[1]

When, however, local officials act within these guardrails, courts should not second-guess their decisions. Specifically, we will not pass on the wisdom of otherwise lawful actions by local officials, including such actions by democratically elected county commissioners. *Barbour*, 255 N.C. at 181. Within our constitutional structure, "[c]ourts cannot substitute their judgment for that of the county officials honestly and fairly exercised." *Id.*

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1. For clarity, note that arbitrary and capricious review is not the same as hypothetical rational basis review, the doctrine that applies to federal substantive due process challenges to economic regulations among other things. The two are conceptually distinct. For example, a regulation that prohibits an optician from fitting lenses to a face without a prescription from an ophthalmologist or optometrist can survive hypothetical rational basis review because courts can conceive of a reason the regulation is rationally related to a legitimate government purpose. *See Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 486, 487–88 (1955). But if the same regulation is the product of a coin-flip, it cannot be said to be the result of reasoned decision making and would be vulnerable to challenge as arbitrary and capricious. *E.g.*, *In re Hous. Auth.*, 235 N.C. at 469–70 (concluding that evidence at trial was sufficient to support a jury verdict that Housing Commissioners acted arbitrarily or capriciously when they failed to consider the negative consequences of exercising eminent domain over one location and failed to consider other alternatives to accomplish the same public benefits with fewer harmful effects).

B. Application

1. The Statutory Scope of Discretion

The first issue is whether Currituck County's occupancy tax statute categorically bars the County from spending revenues on general public safety services that are tied to area tourism. That is, did the County have discretion under the statute to make these allocations?

Our analysis begins with the plain language of the relevant enabling statute and specifically its limits on how the tax revenues can be used. *See Quality Built Homes Inc.*, 369 N.C. at 19. The statute creates two categories of allowed expenditures: those that "promote travel and tourism" and those that are "tourism-related." Act of 2004, § 2, 2003 N.C. Sess. Laws (Reg. Sess. 2004) at 115–16. "Tourism-related expenditures" are, in turn, those that "in the judgment of the Currituck County Board of Commissioners" will increase facilities use "by attracting tourists or business travelers to the county." *Id.* at 116.

The word "judgment" appears to authorize Commissioners to use some measure of their own opinion or assessment. *See, e.g.*, *Judgment*, Webster's Third New International Dictionary 1223 (2002) (defining "judgment" as "the action of judging," or "the mental or intellectual process of forming an opinion or evaluation by discerning and comparing"); *Perkins v. Ark. Trucking Servs., Inc.*, 351 N.C. 634, 638 (2000) ("[C]ourts may look to dictionaries to determine the ordinary meaning of words within a statute."). An exercise of judgment can involve "mentally establishing a relation between two or more terms." *Judgment*, Webster's Third New International Dictionary at 1223. The statute also sets the purpose for which that judgment must be exercised: "to attract tourists or business travelers" in a manner that will "increase the use of lodging facilities, meeting facilities, recreational facilities, and convention facilities in a county." Act of 2004, § 2, 2003 N.C. Sess. Laws (Reg. Sess. 2004) at 116. So, in an ordinary meaning sense, the statute vests decision-making authority in a specific body—the Board of Commissioners—and sets the purpose for which the Board must exercise that judgment—attracting tourists. The legislature tasked the Commissioners specifically with discerning the relationship between the expenditures and the attraction of tourists.

The Commissioners' essential decision-making role is underscored by other parts of the same statute. *See Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 215 (1990) (noting that statutory words and phrases must be interpreted in context). The statute charges the TDA with expending occupancy tax revenues, and it specifies that the voting

members of the TDA are the County Commissioners. Act of 2004, § 3, 2003 N.C. Sess. Laws (Reg. Sess. 2004) at 116–17. Thus the TDA and the County Commissioners are the same. This structure appears to be fairly unusual among occupancy tax statutes. Other occupancy tax statutes vest decision-making authority in bodies composed of representatives from specific business industries or a variety of local officials. *E.g.*, Act of 2001, § 8(b), 2001 N.C. Sess. Laws at 1249–50; An Act . . . to Alter the Composition of the Dare County Tourism Board, S.L. 2002-141, § 9, 2001 N.C. Sess. Laws (Reg. Sess. 2002) 552, 554–55 (requiring Dare County's TDA to consist of six board members from specific towns, one county commissioner, and representatives from local industry groups and the county at large).

That local TDAs contain different types of members across occupancy tax statutes strongly suggests that the legislature deliberately chose the composition of those bodies and intended for designated representatives to bring their distinctive perspectives to bear on what will attract tourists in that area. *See Bowers*, 339 N.C. at 420 ("[We] presume that the legislature acted with care and deliberation."); *Lanvale Props.*, 366 N.C. at 156 (interpreting the scope of a municipality's power within the context of other municipal enabling statutes). And practically speaking, the Commission is well positioned to make a reasoned decision on this matter because the Currituck County Board of Commissioners is elected by the entire county and is responsible for acting for and on behalf of the county. As the record shows, Commissioners have historically had personal experience with area tourism and are deeply familiar with the community they serve. This comparison with other occupancy tax statutes thus further supports that the legislature intended to vest the Commissioners, sitting as the TDA, with limited discretion to decide which expenditures will attract tourists to Currituck County.

As to what qualifies as a "tourism-related expenditure[ ]," the statute lists two examples: "capital expenditures and beach nourishment." Act of 2004 § 2, 2003 N.C. Sess. Laws (Reg. Sess. 2004) at 116. The term "beach nourishment" is defined in detail in the statute. *Id.*[2] But "capital

2. "Beach nourishment" is defined as: "The placement of sand, from other sand sources, on a beach or dune by mechanical means and other associated activities that are in conformity with the North Carolina Coastal Management Program along the shorelines of the Atlantic Ocean of North Carolina and connecting inlets for the purpose of widening the beach to benefit public recreational use and mitigating damage and erosion from storms to inland property." Act of 2004, § 2, 2003 N.C. Sess. Laws (Reg. Sess. 2004) at 116. The term also includes costs associated with qualifying for state or federal projects, planting vegetation, and providing enhanced public beach access. *Id.*

expenditures" are not defined. Nor does this list appear to be exclusive: the definitional provision "includes" those examples but is not expressly limited to them. In fact, the statute does not expressly forbid any types of expenditures. *See id.* There is little indication in this language that the legislature intended to categorically prohibit certain types of expenditures that Commissioners otherwise judge will attract tourists to a given area.

The property owners take a different view of this definitional provision. They argue that the definition of "tourism-related expenditures" encompasses only literal tourist attractions, such as Beaufort's pirate invasion weekend, Morehead City's Big Rock fishing tournament, Kitty Hawk's aviation history museum, and Carolina Beach's beach music festival. But the challenge with this interpretation is that the legislature knew how to explicitly and closely limit occupancy tax revenues to particular uses—and indeed did so in other parts of the statute. For example, the one-third category for "promoting travel and tourism" authorizes spending only on advertising, marketing, pamphlet distribution, and "similar promotional activities that attract tourists," etc. *See id.* The "beach nourishment" component of a "tourism-related expenditure" is similarly defined in great detail. *Id.* The legislature could have likewise provided in detail that "tourism-related expenditures" are "festivals, competitions, and similar tourist attractions." Instead, the legislature opted for a more open-ended definition—that the designated decision makers use their judgment to discern which expenditures will increase facilities uses by attracting tourists. We generally presume the legislature's choice of words was purposeful and we thus should interpret the statute in a manner that gives effect to all of its provisions. *See State v. Coffey*, 336 N.C. 412, 417–18 (1994). Applying that principle here, we should presume that the legislature purposefully balanced the narrower, delineated list of expenditures in one category with the less precisely defined, discretion-based standard in the other category. That might make practical sense to the extent it introduced flexibility for local experts to assess the needs and opportunities for developing tourism in their area. Such expenditures may include festivals and competitions, consistent with the property owners' view, but the statute does not limit the County to only those types of tourism-related expenditures.

The property owners, like the Court of Appeals majority, further invoke statutory history. *See Costanzo*, 293 N.C. App. at 21, 25.[3] They

3. For clarity, by "statutory history," we mean the development of a statute over time via amendments and earlier enactments, for example. That source of statutory

point out that Currituck's 1987 occupancy tax statute specifically authorized tax proceeds to be spent on "tourist related purposes, including construction and maintenance of public facilities and buildings, garbage, refuse, and solid waste collection and disposal, *police protection, and emergency services*." Act of 1987 § 1(e), 1987 N.C. Sess. Laws at 279 (emphasis added). The 2004 amendments omitted this particular list of approved uses and replaced it with the "judgment"-based definition. *See* Act of 2004 § 2, 2003 N.C. Sess. Laws (Reg. Sess. 2004) at 115–16. The property owners thus argue that, by deleting "police protection[ ]and emergency services," the legislature intended to forbid occupancy taxes from being used on those services. Further support for this conclusion, the property owners argue, is found in the title of the 2004 session law amendments: "An Act to Allow an Increase in the Currituck County Occupancy Tax and to Change the Purposes for Which the Tax May Be Used." *See also Costanzo*, 293 N.C. App. at 21.

This reasoning is unpersuasive. As a general matter, where the language of the statute is clear, it "is determinative and forecloses reference to other interpretive tools." *State v. Borum*, 384 N.C. 118, 125 (2023). That is, we should generally not draw inferences based on suspicions about what the legislature really meant by certain amendments where those inferences contradict the current statute's plain language. But even looking at statutory history, it is difficult to agree with the Court of Appeals that by omitting a particular list of "tourist related purposes," the legislature intended to deauthorize those as "tourism-related expenditures."

Namely, in 2004, the legislature amended the statute to omit *all* of the illustrative examples in subsection 1(e) of the 1987 statute, not just some of them. Generally speaking, examples in a statute can operate to "limit the scope of words that might otherwise be subject to wider interpretation." *Happel v. Guilford Cnty. Bd. of Educ.*, 387 N.C. 186, 208 (2025); *id.* at 209 (discussing the *noscitur a sociis* canon of interpretation that "a word is better understood by considering the meanings of neighboring words"); *Cooper v. Berger*, 371 N.C. 799, 810 (2018) (discussing the canon of *expressio unius est exclusio alterius* that "when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list" (quoting *Evans v. Diaz*, 333 N.C.

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interpretation is distinct from legislative history, or evidence of deliberations or intentions from the legislative process such as remarks from floor debates or committee reports. *See generally* Anita S. Krishnakumar, *Statutory History*, 108 Va. L. Rev. 263, 265–66 (2022); *Hanson v. Charlotte-Mecklenburg Bd. of Educ.*, 387 N.C. 445, 445–46 (2025) (Newby, C.J., concurring).

774, 779–80 (1993))). By the same token, deleting examples can open the original term up to wider interpretation. Thus, the legislature's choice to omit a particular list of authorized expenditures and replace it with a different definition may represent its intent to omit the limiting function of the earlier examples.

Latin maxims aside, common sense helps us reach the same conclusion. If a person's spouse says, "We can go anywhere you want for lunch, including Cook Out or Bojangles," the person may reasonably conclude that that their spouse is not offering to go to the downtown steakhouse because it is not a fast-food restaurant. But if the following month, their spouse says, "Let's do lunch wherever you want downtown," the person may reasonably conclude that the steakhouse is fair game—as is any fast-food spot downtown. The purpose of eliminating certain examples depends on the context, including any other changes between the two statements.[4]

Finally, the 2004 session law's title is not to the contrary. The 2004 statute made other changes to Currituck's occupancy tax revenue laws consistent with its title. The 2004 revisions eliminated the County's ability to spend twenty-five percent of occupancy tax revenue on "any lawful purpose"—including costs that the County concedes it now believes are outside of the scope of "tourism-related expenditures" such as school textbooks or county administrative staff salaries. In addition to stripping the County of such carte blanche, the 2004 revisions further limited one-third of the expenditures to the more narrowly targeted "promot[ing] travel and tourism" category. Simply put, it is true that the 2004 amendments changed "the purposes for which the tax may be used" and did not also bar expenditures on public safety services impacted by heavy area tourism. The 2004 amendments need not have the significance the property owners ascribe in order that the statute's title make sense.

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4. The property owners relatedly argued that the legislature's choice to replace "tourist related purposes" with "tourism-related expenditures" represented "a major change in language" that "shows an intent to change the law and prohibit the future use of occupancy tax dollars on general public services to offset the costs of visiting tourists." This argument is similarly unavailing. Even if there are some contexts where using one or the other term would connote substantially different meanings, this context does not appear to be one of them. The two terms appear to serve functionally similar purposes of describing the objectives for which the funds may be used, which cuts against ascribing strong significance to the change in phrasing. *See Cohane*, 387 N.C. at 10 (noting that the presumption of consistent usage does not attach when two terms are effectively synonymous in context). In any event, the latter term has a different technical definition that controls. *See State v. Coker*, 312 N.C. 432, 435 (1984).

As a matter of statutory interpretation, then, we disagree with the property owners that Currituck's occupancy tax statute categorically bars the County from using its limited discretion to spend such tax revenues on public safety services tied to heavy area tourism.

2. The County's Exercise of Its Limited Discretion

Even where a statute affords local officials the discretion to act, those officials may not exercise that discretion in an arbitrary or capricious manner, in bad faith, or in disregard of the law. *See Pue*, 222 N.C. at 315; *Barbour*, 255 N.C. at 181–82; *In re Hous. Auth.*, 235 N.C. at 468. The second legal issue presented is whether the County appropriately exercised its discretion in this case.

Here the parties agree there are no genuine issues of material fact, and the record at summary judgment supports that the County did exercise its limited discretion consistent with the statute and in good faith. The County appeared to understand the relevant legal standard and reasonably determine that public safety services tied to heavy area tourism were appropriate expenditures to attract tourists.

First, the Commissioners seemed to have an adequate understanding of the statutory limitations on "tourism-related expenditures." For example, the Commissioners testified that the statute required them to decide, "in our opinion . . . or judgment," whether a cost is "tourism-related." They had to draw from their own experience and understanding to assess "what is needed to support tourism" and "what will entice [tourists] to come here." In the Commissioners' views, knowing how to entice tourists requires understanding "everything [the tourists] do and say and enjoy on vacation," including the variety of reasons tourists may visit the area and what will "enhance their experience" during their stay. The statute, they testified, requires some "correlation" between the expenditure and attracting tourism. One commissioner explained that "new textbooks" at the local high school would not qualify, because such an expenditure is "not an occupancy tax, travel and tourism thing." Another explained that the statute's language is clear that the funds are "not designed for residents." A third elaborated that he recalled turning down "a request or a budget amendment" if the Commissioners were not satisfied it met "what we felt like was tourism-related." A fourth explained that the Commission had to use "our best judgment . . . to increase and to make Corolla, the mainland, Carova, Knotts Island, anywhere in the county a great place to visit and make them want to come back again."

The Commissioners also reasonably determined that the challenged public safety spending was related to tourism and would attract tourists. The Commissioners thought that enticing tourists required "providing a safe environment with ample resources" to support this population. Part of what attracts tourists to their area, the Commissioners believed, is that it is "family oriented" and that the beach area is "clean and safe" and worth the cost of renting a place to stay there during peak season. The Commissioners determined that tourists would not visit a place they believe is unsafe. As one commissioner put it, "[I]t just makes common sense that if we don't have fire protection, if we don't have police protection, people are not coming to an area that they don't feel is safe." She elaborated, "I wouldn't think people would come to Currituck County . . . if they felt like they were not going to be safe, that there was not adequate facilities here for them . . . if something were to happen." Another echoed this sentiment: "[Y]ou're not going to take your family . . . to a destination if it's not safe."

Existing services were also, in the Commissioners' view, insufficient to support the tourist population. Again, the County's 28,000 year-round population doubles to about 60,000 during tourist season when most tourists flock to Corolla. Commissioners testified that protecting the tourist population requires significantly more public safety personnel than the County would have otherwise. More people means a greater risk of accidents, drownings, heatstrokes, physical altercations, and other safety risks. As one commissioner put it, "[W]e have to have more [s]heriffs or EMS because of the influx of the tourists on our county." Per another, "The whole county is affected by the tourist season" for various reasons, including that tourists must travel through the mainland of the County to reach the beach. The Commissioners based their judgment on their own experiences in the tourism industry and on input and data from other local officials, including county professionals such as the tourism director and EMS departments as well as the independently elected sheriff. As with beach lifeguards, EMS services ready to respond to life-saving ocean rescues, paid fire responders, and sheriff's deputies all contribute to keeping beaches and vacationers safe and attract tourists to the Currituck area, the Commissioners explained. Recognizing that communities must be safe for tourists to want to visit and return can hardly be said to be whimsical or lacking in understanding of surrounding facts or controlling principles. *See In re Hous. Auth.*, 235 N.C. at 468. Indeed, the Commissioners seemed to approach their application of discretion under the statute with a healthy dose of common sense.

The Commissioners further judged that, even though tourists mainly flock to Currituck from early spring to the middle of fall, "it is not

practical to hire, train, and pay [the necessary personnel] for only half the year," particularly for important and skilled jobs like law enforcement and medical services. The County thus incurs year-round costs to protect public safety during peak season. Striving to hire competent people to do important jobs to keep people safe, within the practical realities of the employment market, is certainly not unreasonable, arbitrary, capricious, or an act of bad faith.

These mid-litigation justifications are consistent with contemporaneous evidence of the County's decision making. The property owners' own evidence cited the county manager's remarks at the County's annual budget presentations. Those remarks indicated that EMS and law enforcement received occupancy tax funds because of "summer traffic," the "influx of population" during the "summer season," and the "up-tick [in] population." Evidence showed that at least once during discussions, Commissioners expressed concerns with occupancy tax revenues covering sheriff's vehicles for off-road areas. But upon clarification that the vehicles were required for beach law enforcement—because traditional police cruisers like Dodge Chargers cannot safely maneuver across sandy beaches—the amendment was approved.

Moreover, these mid-litigation explanations were confirmed by how the funds were actually spent. Eighty percent of occupancy tax revenue was spent on Corolla, the undisputed primary driver of area tourism. The occupancy tax funds went to law enforcement, EMS, fire protection, beach lifeguards, and repairing and maintaining coastal roads. Funds also went to tourist destinations like the Whalehead Club and Maritime Museum. Commissioners also apparently endeavored to diversify the County's tourism economy and spent occupancy tax revenues on mainland tourist attractions such as a veteran's park, the Historic Jarvisburg Colored School Museum, and upgrades to the local airport. In summary, the Commissioners' later testimony is consistent with contemporaneous evidence of their decision making and the actual use of funds. The property owners thus fell short of their burden to show that the Commissioners abused their discretion under the statute. *See Painter*, 288 N.C. at 178.

Finally, the Commissioners did not abuse their discretion by failing to make simultaneous, on-the-record findings regarding how each expenditure would attract tourists. The plain statutory language imposes no formal findings requirement. Although such record-keeping may be prudent, the evidence adduced during discovery is sufficient to show that the Commissioners exercised reasoned and good faith judgment in determining that adequate public safety spending would help attract tourists to the area.

III. Conclusion

The County did not abuse its discretion, act in an arbitrary or capricious manner, or disregard the law by concluding that increased spending on public safety services impacted by heavy area tourism qualifies as tourism-related expenditures. The trial court properly entered summary judgment for the County on this claim, and the Court of Appeals erred when it reversed. We reverse the decision of the Court of Appeals and remand this matter for further remand to the trial court to enter summary judgment for the County on the property owners' second claim and for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Justice BARRINGER concurring.

I concur with the majority's determination that Currituck County officials have the discretion to appropriate occupancy tax revenue to spend on public safety services. However, I write separately to express my concern at the lack of record evidence demonstrating that this discretion is actually being exercised.

The local act gives the Currituck County Board of Commissioners (Commissioners) the exclusive authority to make a "judgment" on whether a certain manner of spending will "attract[ ] tourists or business travelers to the county." An Act to Allow an Increase in the Currituck County Occupancy Tax and to Change the Purposes for Which the Tax May Be Used, S.L. 2004-95, § 2, 2003 N.C. Sess. Laws (Reg. Sess. 2004) 115, 116. Thus, if the Commissioners determine that appropriating occupancy tax revenue to public safety services will attract visitors, this determination will be upheld unless it is so unreasoned as to constitute an abuse of discretion. *See Little v. Penn Ventilator Co.*, 317 N.C. 206, 218 (1986) ("The abuse of discretion standard of review is applied to those decisions which necessarily require the exercise of judgment.").

Before this Court, plaintiffs allege that, prior to the filing of their lawsuit, the county appropriated occupancy tax revenue without even a cursory discussion of whether the appropriation was tourism-related. Instead, plaintiffs claim that the occupancy tax revenue was routinely dumped directly into the county's general fund, rendering those funds practically untraceable. Disturbingly, defendants did not even attempt

to refute this accusation. This lack of transparency in government is extremely troubling.

Although the Commissioners have the power to exercise judgment as to whether an appropriation is tourism-related, they are required to actually *exercise* this judgment. *See State v. Ashe*, 314 N.C. 28, 34 (1985) (stating that when a statute gives a decisionmaker "discretion" to make a decision, that decisionmaker "must exercise its discretion"). Best practice would be for the Commissioners to appropriate the occupancy tax revenue to identifiable, discrete projects *only after* making clear findings that they believed those projects were tourism-related. To do any less is to invite legal challenges from a citizenry rightfully dismayed by its government operating in the shadows.

Transparency in government is critical. Democratic institutions are undermined "when the transactions of . . . rulers may be concealed."[1] It is "a fair presumption that secrecy means impropriety." Woodrow Wilson, *The New Freedom: A Call for the Emancipation of the Generous Energies of a People* 114 (1913).

I share in plaintiffs' exasperation at the lack of transparency exhibited here. Citizens and taxpayers deserve better. *See Philip Morris USA, Inc. v. N.C. Dep't of Revenue*, 386 N.C. 748, 764 (2024).

1. Patrick Henry, Speech on the Federal Constitution at the Virginia Ratifying Convention (Monday, 9 June 1788), *in* 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 179 (Washington, Jonathan Elliot ed., 2nd ed. 1836).

HILL v. EWING

[389 N.C. 386 (2026)]

MARY A. HILL
v.
RENEE P. EWING, CURTIS E. EWING, HERMAN T. EWING, NATHANIEL V. EWING, AND MONICA Y. EWING, THE HEIRS OF ANNIE MARIE EWING, AND CORA LEE BRANHAM, HERMAN BRANHAM, ROSLYN BRANHAM PAULING, LARUE BRANHAM, AND LEROY BRANHAM, THE HEIRS OF ANNIE BRANHAM, BRIGHT & NEAT INVESTMENT LLC, THOMAS RAY, CLARISSA JUDIT VERDUGO GAXIOLA (AKA CLARISSA J. VERDUGO), AND GEOFFREY HEMENWAY

No. 14A25

Filed 22 May 2026

Appeal pursuant to N.C.G.S. § 7A-30(2) (2023) from the decision of a divided panel of the Court of Appeals, 296 N.C. App. 624 (2024), affirming an order entered on 3 April 2023 by Judge David H. Strickland in Superior Court, Mecklenburg County, dismissing plaintiff's claims against defendant Geoffrey Hemenway for failure to state a claim upon which relief can be granted. Heard in the Supreme Court on 16 April 2026.

The Odom Firm, PLLC, by Martha C. Odom and Thomas L. Odom Jr., for plaintiff-appellant.

Alexander Ricks, PLLC, by Amy P. Hunt and Miller F. Capps, for defendant-appellee Geoffrey Hemenway.

No brief for defendant-appellees Renee P. Ewing, Curtis E. Ewing, Herman T. Ewing, Nathaniel V. Ewing, Monica Y. Ewing, Cora Lee Branham, Herman Branham, Rosyln Branham Pauling, Larue Branham, Leroy Braham, Bright & Neat Investment LLC, Thomas Ray, and Clarissa Judit Verdugo Gaxiola (aka Clarissa J. Verdugo).

PER CURIAM.

AFFIRMED.

IN RE B.M.T.

[389 N.C. 387 (2026)]

IN THE MATTER OF THE ADOPTION OF B.M.T., A MINOR

No. 32PA23-2

Filed 22 May 2026

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 292 N.C. App. 26 (2024), affirming an order entered on 16 September 2021 by Judge Teresa H. Vincent in District Court, Guilford County. Heard in the Supreme Court on 16 April 2026.

Bagwell Holt Smith P.A., *by Michael S. Harrell*, *for petitioner-appellants.*

Kathryn S. Lindley for respondent-appellee.

RIGGS, Justice.

Having considered the opinion of the Court of Appeals, the record and briefs, and the oral arguments before us, we conclude that petitioner-appellants' petition for discretionary review was improvidently allowed.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

IN RE J.C.

[389 N.C. 388 (2026)]

IN RE INQUIRY CONCERNING A JUDGE, NO. 25-148

SEAN A. COLE, RESPONDENT

No. 86A26

Filed 22 May 2026

Judges—judicial standards—censure recommendation adopted—factual findings supported

The Supreme Court accepted the Judicial Standards Commission's recommendation for the censure of respondent (a superior court judge) for violations of Canons 1, 2A, and 5F of the Code of Judicial Conduct—which amounted to conduct that was prejudicial to the administration of justice, brought the judicial branch into disrepute, and constituted willful misconduct in office. The Commission's findings were supported by clear and convincing evidence, including that respondent had asked a court employee in his jurisdiction to put forth to the senior resident superior court judge respondent's deficient motions to withdraw as an attorney from cases and continued to appear as an attorney while a sitting judge, but also that respondent was otherwise cooperative with the Commission's investigation, eventually took appropriate remedial measures, and had no prior disciplinary history with the Commission.

Justice BERGER concurring.

This matter is before this Court pursuant to N.C.G.S. §§ 7A-376 and -377 upon a recommendation by the Judicial Standards Commission entered on 18 March 2026 that Respondent Sean A. Cole, a Judge of the General Court of Justice, Superior Court Division, Judicial District 10, be censured for conduct in violation of Canons 1, 2A, and 5F of the North Carolina Code of Judicial Conduct for conduct prejudicial to the administration of justice that brings the judicial office into disrepute and willful misconduct in office in violation of N.C.G.S. § 7A-376. This matter was calendared for argument in the Supreme Court on 16 April 2026 but determined on the record without briefs or oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure and Rule 2 of the Rules of Procedure in the Supreme Court in Judicial Standards Cases.

No counsel for Judicial Standards Commission or respondent.

PER CURIAM.

The issue before the Court is whether Superior Court Judge Sean A. Cole, respondent, should be censured for violations of Canons 1, 2A, and 5F of the North Carolina Code of Judicial Conduct—violations which amounted to conduct prejudicial to the administration of justice, which brought the judicial office into disrepute and constituted willful misconduct in office in violation of N.C.G.S. § 7A-376.

I. Recommendation of the Judicial Standards Commission

A. Findings of Fact

The recommendation of the North Carolina Judicial Standards Commission (Commission) contained the following stipulated findings of fact:

> 1. Respondent filed as a Democratic candidate for Superior Court Judicial Seat 10C by the December 15, 2023, state-wide filing deadline. On November 5, 2024, Respondent won in a contested election against the incumbent, Judge Rebecca "Becky" Holt, who had filed as a Republican.
>
> 2. Before being elected to the superior court bench, Respondent was a solo practitioner who represented plaintiffs in personal injury and related cases. Respondent usually carried a caseload of approximately forty cases but wound down to approximately twenty-five cases by the time the election occurred. Beyond decreasing his caseload, Respondent failed to make sufficient plans for winding down his law practice or transferring his remaining cases should he prevail in his election.
>
> 3. On November 26, 2024, Respondent spoke with the Commission's Executive Director, Ms. Brittany Pinkham, and received guidance on how to transition from his solo practice to the superior court bench.
>
> 4. On December 25, 2024, Respondent emailed a Secondary Employment Form to the Administrative Office of the Courts' ("AOC") Human Resources department listing his law practice as his secondary employment. Respondent indicated in his email, "Just for clarification, I'm not taking any new clients, and

am just planning to keep the firm open until I have resolved some outstanding liens and disbursed all money held in trust," which he anticipated being done by June 2025. On December 27, 2024, Respondent received additional advice from Ms. Pinkham regarding this Secondary Employment Form, where she again advised him not to do additional legal work after taking his oath of office.

5. Despite the advice he had been given, Respondent nonetheless took his judicial oath of office on January 1, 2025, to start the clock on earning time for his judicial retirement even though he still had twelve outstanding cases remaining in his solo practice where he was still listed as counsel of record in court filings and on the eCourts Portal.

6. During the week of January 13, 2025, Respondent had a case appearing on the Wake County Superior Court Civil Trial Calendar in which he was still counsel of record. Respondent asked District 10 Court Manager Kellie Myers and District 10 Senior Resident Superior Court Judge Paul Ridgeway for advice and was advised by both that he needed to stop practicing law. Nonetheless, Respondent proceeded to file alias and pluries summonses and a motion to continue for the case and contemplated appearing at calendar call.

7. During the week of January 27, 2025, Respondent attended the New Superior Court Judges' Training at the University of North Carolina School of Government where he again received training from the Commission regarding his obligations under the Code of Judicial Conduct, including his duty not to practice law and to properly wind up his law practice.

8. On Sunday, February 2, 2025, at 7:52 pm, Respondent sent Ms. Pinkham a text message requesting permission to file a complaint in a case ("the Complaint Case") on behalf of a client whose statute of limitations had "creeped up on [him]" and then "almost immediately" withdraw and transfer the matter to alternate counsel. Ms. Pinkham responded that Respondent could file the complaint, given the circumstances, as long that

he did not collect additional fees and "immediately" withdrew. That same evening, Ms. Pinkham received a phone call from Commission Chair Jeff Carpenter regarding the feasibility of her advice to Respondent. As such, Ms. Pinkham spoke with Respondent by phone the next day, expressed the Commission's concerns regarding him continuing to practice law, and stressed the need for him to "immediately" withdraw from the Complaint Case if another attorney was not in a position to file the complaint for him. Respondent and Ms. Pinkham spoke multiple times over the next several weeks regarding the Complaint Case, where the need for Respondent to wind up the matter was stressed and he was told that he was acting outside of the scope of his February 2, 2025, advisory opinion given that he had not withdrawn from the matter "immediately" as he had said. During these conversations, Respondent mentioned other cases that made it clear that the Complaint Case was not the only case he still had pending as counsel.

9. On February 11, 2025, Commission staff had former Commission member and current State Bar Councilor and District 3 Senior Resident Superior Court Judge Jeff Foster, who similarly wound down a solo legal practice before taking the bench, reach out to Respondent to counsel him regarding winding up his law practice generally and facilitating his withdrawal from the Complaint Case. Ms. Pinkham wrote Respondent a follow-up advisory opinion the next day.

10. Throughout February 2025, Respondent filed alias and pluries summonses, motions to withdraw, and voluntary dismissals in multiple cases while actively communicating with Ms. Pinkham about the Complaint Case. Further, on Friday, February 28, 2025, Respondent visited a client in the Franklin County Jail.

11. On March 13, 2025, Ms. Pinkham received an inquiry from the Assistant AOC Director's Office about whether Respondent was allowed to be assigned to court, as they had received reports that Respondent was actively practicing law and, when individuals

> expressed concern about his practice, had indicated that he was doing so with the Commission's permission. The Assistant AOC Director's Office removed Respondent from court temporarily to allow him to finish winding up his law practice.
>
> 12. On March 18, 2025, after being notified of the initiation of the Commission's formal investigation into his failure to wind up his law practice, Respondent requested that District 10 Court Assistant Shanda Smallwood have Judge Ridgeway sign his motion to withdraw in one of his cases as counsel despite her informing him that the motions failed to comply with the local rules. Ms. Smallwood felt pressured by Respondent in this interaction.
>
> 13. Respondent finally withdrew from the Complaint Case on March 27, 2025.
>
> 14. Respondent finally resolved his other outstanding cases as counsel on April 8, 2025.

(Alteration in original.)

B. Conclusions of Law

Based upon the foregoing findings of fact, the Commission made the following conclusions of law:

> 1. Canon 1 of the Code of Judicial Conduct sets forth the broad principle that "a judge should uphold the integrity and independence of the judiciary." To do so, Canon 1 requires that a "judge should participate in establishing, maintaining, and enforcing, and should personally observe, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved."
>
> 2. Canon 2A of the Code of Judicial Conduct generally mandates that "a judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

3. Canon 5F of the Code of Judicial Conduct mandates that "a judge should not practice law."

4. Upon the Commission's independent review of the stipulated facts concerning Respondent's conduct related to his law practice, the Commission, by a 6–1 vote of the hearing panel concludes that Respondent:

   a. failed to participate in establishing, maintaining, and enforcing, and personally observe, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved[ ] in violation of Canon 1 of the Code,

   b. failed to respect and comply with the law and conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary in violation of Canon 2A of the Code, and

   c. practiced law while serving as a judge in violation of Canon 5F of the Code.

5. The Commission further concludes, and accepts Respondent's admission, by a 6–1 vote of the hearing panel, that the facts establish Respondent engaged in willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of N.C. Gen. Stat. § 7A- 376(b). *See also* Code of Judicial Conduct, Preamble ("a violation of this Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute."). *Id.*

6. The North Carolina Supreme Court defined "willful misconduct in office" as "improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly and, generally in bad faith. It is more than a mere error of judgment or an act of negligence." *In re Edens*[,] 290 N.C. 299, 305 (1976). The Supreme Court further

held in *In re Nowell*, 293 N.C. 235 (1977), while willful misconduct in office necessarily encompasses "conduct involving moral turpitude, dishonesty, or corruption," it also can be found based upon "any knowing misuse of the office, whatever the motive." *Id.* at 248. The Supreme Court further held "these elements are not necessary to a finding of bad faith. A specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority constitutes bad faith." *Id.*

7. In reaching this conclusion, the Commission weighed the Respondent's conduct of failing to adequately plan for and wind down his law practice despite advice by multiple entities versus his cooperation with the Commission, the remedial measures taken by Respondent to prioritize his judicial responsibilities, and his positive reputation as an attorney.

8. The Commission was concerned with Respondent's decision to take his oath of office on January 1, 2025, despite having twelve outstanding cases and receiving advice to the contrary. When coupled with Respondent's continued conduct once a sitting judge, such as having a case appear on the Superior Court trial calendar where Respondent still appeared as attorney of record in Respondent's own jurisdiction, requesting permission from Commission staff to file a complaint on behalf of a client due to Respondent allowing the statute of limitations to lapse prompting concern from Commission staff, Respondent filing numerous summons, motions to withdraw, and voluntary dismissals on multiple cases while in active communication with Commission staff, Respondent asking an employee in the District 10 judge's office to put forth his deficient motions to withdraw to Senior Resident Superior Court Judge Paul Ridgeway, and withdrawing from his outstanding cases four

months after taking the bench, the Commission was troubled by the impact that Respondent's conduct had on the public's confidence in the integrity and impartiality of the judiciary.

9. However, the Commission acknowledged that Respondent otherwise was cooperative with the Commission's investigation, took appropriate remedial measures to ensure the prioritization of his judicial responsibilities, and has no prior disciplinary history with the Commission as well as a positive record of service in the legal profession and community.

10. In considering these factors, the Commission determined that more severe punishment was needed for Respondent; however, the Commission also acknowledged that the conduct at issue did not rise to the level of previous public disciplines that resulted in suspensions without pay. *See In re Badgett*, 362 N.C. 202 (2008) (where the respondent judge was suspended for sixty[ ] days for failing to disclose a landlord-tenant relationship with a local attorney and attempting to pressure the elected DA into signing a remittal of disqualification, then threatened to sue and was generally rude to area attorneys after receiving notice of his investigation by the Commission); *In re Hartsfield*, 365 N.C. 418 (2012) (where the respondent judge was suspended for forty-five days for transferring traffic court cases onto her docket and disposing of them in contradiction to the DA's office's policy); *In re* [*Chapman*], 371 N.C. 486 ([2018]) (where the respondent judge was suspended for thirty days for delaying his order in a family law case for over five years); *In re Brooks*, 377 N.C. 146 (2021) (where the respondent judge was suspended for thirty days for serving as the executor for two former clients' estates who were not his family members, collecting substantial fees, then failing to report his extra-judicial income); *In re Foster*, 385 N.C. 675 (2024) (where the respondent judge

was suspended for one hundred twenty days for (1) calling an out[-]of[-]county magistrate's office and attempting to bully a magistrate into reducing her son's bond by misleading her and without disclosing their familial relationship and (2) bullying a magistrate and ADA out of their administrative courtroom for her own use, causing more than one hundred cases to be continued unnecessarily).

11. As a result, the Commission concludes, and Respondent agrees, that a censure in this matter would be most appropriate given the Supreme Court's prior public disciplinary opinions.

12. The North Carolina Supreme Court in *In re Crutchfield*, 289 N.C. 597 (1975)[,] first addressed sanctions under the Judicial Standards Act and stated that the purpose of judicial discipline proceedings "is not primarily to punish any individual but to maintain due and proper administration of justice in our State's courts, public confidence in its judicial system, and the honor and integrity of its judges."

13. The Commission and Respondent acknowledge the ultimate jurisdiction for the discipline of judges is vested in the North Carolina Supreme Court pursuant to Chapter 7A, Article 30 of the North Carolina General Statutes, which may either accept, reject, or modify any disciplinary recommendation from the Commission.

(Cleaned up.)

C. Recommendation

Based on the foregoing findings of fact and conclusions of law, the Commission, by 6–1 vote of the hearing panel, recommended that the Court censure Respondent.

II. Analysis

The Commission is duly organized under Article IV, Section 17 of the North Carolina Constitution and Chapter 7A, Article 30 of the General Statutes of North Carolina to recommend to this Court the public

discipline of any judge and justice for any reason set forth in N.C.G.S. § 7A-376(b). The Code of Judicial Conduct was established in furtherance of "[a]n independent and honorable judiciary," which is "indispensable to justice in our society." N.C. Code of Jud. Conduct, pmbl. A violation of the Code may be deemed conduct prejudicial to the administration of justice where that violation brings the judicial office into disrepute, constitutes willful misconduct in office, or is grounds for disciplinary proceedings pursuant to Article 30 of Chapter 7A of the General Statutes. *Id.* For such violations, the Commission conducts a hearing, which is "neither a civil nor a criminal action." *In re Nowell*, 293 N.C. 235, 241 (1977).

When reviewing the Commission's recommendations, this Court acts as a court of original jurisdiction rather than as an appellate court. *In re Badgett*, 362 N.C. 202, 207 (2008). "[T]his Court must first determine if the Commission's findings of fact are adequately supported by clear and convincing evidence, and in turn, whether those findings support its conclusions of law." *Id.* This Court has the authority to issue a public reprimand, censure, suspension, or removal of a judge "for willful misconduct in office, willful and persistent failure to perform the judges' duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." *In re Foster*, 385 N.C. 675, 689–90 (2024) (quoting N.C.G.S. § 7A-376(b) (2023)). In considering the appropriate sanction, we look "not so much upon the judge's motives but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers." *In re Edens*, 290 N.C. 299, 306 (1976) (quoting *In re Crutchfield*, 289 N.C. 597, 603 (1975)).

We have defined willful misconduct as "the improper or wrongful use of the power of his office by a judge acting intentionally, or with gross unconcern for his conduct, and generally in bad faith." *In re Nowell*, 293 N.C. at 248. We explained that "[n]ecessarily, the term would encompass conduct involving moral turpitude, dishonesty, or corruption, and also any knowing misuse of the office, whatever the motive . . . these elements are not necessary to a finding of bad faith." *Id.* Additionally, this Court has explained that willful misconduct constitutes more than an error of judgment or an act of negligence. *Id.*; *In re Stuhl*, 292 N.C. 379, 389 (1977). A judge may, through negligence or ignorance not amounting to bad faith, behave in a manner prejudicial to the administration of justice so as to bring the judicial office into disrepute. *In re Nowell*, 292 N.C. at 248–49 (citation omitted). "Likewise, a judge may also commit indiscretions, . . . which nonetheless bring[ ] the judicial office into disrepute." *Id.* at 249.

In *In re Nowell*, we explained, a district court judge fulfills "a most important role in our judicial system" due to his or her handling of more cases than any other judge and wielding great power in the exercise of his or her court's jurisdiction. *Id.* at 251–52. We explained that district court judges exercise power "over the lives and everyday affairs of our citizens," making it imperative they be "dedicated to carrying out their official responsibilities in accordance with the law and established standards of judicial conduct." *Id.* at 252.

While we recognize that district court judges confront more voluminous caseloads than superior court judges, trial court judges as a collective body serve as the face of the judiciary to the public. We have reiterated that "[t]he integrity of [judicial] office requires that its holder project nothing less than the high standards of character and rectitude citizens should expect from their judges." *In re Badgett*, 362 N.C. at 210. The "requirements of the Rule of Law subject the judiciary to intense and ever greater scrutiny by our citizens, the demands of [a judge's] judicial office require[ ] him to comport himself with dignity, reserve, and probity." *Id.* Public confidence in the independence, impartiality and integrity of the judiciary depends on a judge's conduct, especially in the courtroom. *See In re Mack*, 369 N.C. 236, 246–49 (2016) (adopting the Commission's conclusions of law explaining a judge should have considered the propriety of presiding over a personal criminal matter and the conflict of interest and potential for public concern in presiding over a case in which he had financial interest); *In re Martin*, 295 N.C. 291, 306 (1978) ("Public confidence in the courts requires that cases be tried by unprejudiced and unbiased judges."). There can be no room for doubt as to a judge's ability to be impartial and maintain the integrity of the judicial system—a judge's conduct should "objectively and reasonably convey[ ] a clear separation of the judge's private interests from his judicial duties." *In re Mack*, 369 N.C. at 246; *see also In re Cornelius*, 255 N.C. 198, 207 (1993) (concluding superior court judge violated Canon 2A for using his position to assist a county employee in an employment matter based on a personal relationship, which conveyed "the impression that [the employee] had special influence with him").

After reviewing the record and stipulated facts, we conclude the Commission's findings are supported by clear and convincing evidence, and we adopt them as our own. The Commission's conclusions of law are supported by those facts, thus we also adopt the Commission's conclusions of law. By extension, we agree with the Commission's conclusions that respondent's conduct violates Canons 1, 2A, and 5F of the North Carolina Code of Judicial Conduct.

Because respondent has violated Canons 1, 2A, and 5F of the North Carolina Code of Judicial Conduct and N.C.G.S. § 7A-376(b), we must now decide whether to accept the Commission's recommendation of censure. Our guidepost for determining the appropriate sanctions is the impact of the respondent's conduct on public confidence in our judicial system and ensuring the honor and integrity of judges who serve the people of this State. *See In re Crutchfield*, 289 N.C. at 602.

Censure is appropriate where "a judge has willfully engaged in misconduct prejudicial to the administration of justice that brings the judicial office into disrepute." N.C.G.S. § 7A-374.2(1) (2025). In recognizing that respondent in this case was otherwise cooperative and had a positive reputation and professional record, we deem it may be instructive to review in some detail where this Court has decided to censure a judge.

In *In re Belk*, this Court agreed with the Commission's conclusion that a judge's conduct of continuing his membership on a corporate board, after being told that he could not do so, violated Canons 1 and 2A, constituted willful misconduct while in office, and was conduct prejudicial to the administration of justice which brings the judicial office into disrepute. 364 N.C. 114, 124 (2010).

In *In re Badgett*, this Court censured a judge for failure to disclose or recuse from cases due to a business relationship with an attorney appearing before him, and noted three particularly inappropriate actions: (1) his participation in the preparation of a remittal of disqualification, despite provisions of the Code to the contrary; (2) his untruthful statements concerning the state of the Commission's investigation and the opinions purportedly tendered by the Commission; and (3) his use of threats and the power of his office against a district attorney during an exchange in his courtroom. 362 N.C. at 209–10. We noted that the inappropriate use of the judicial office and its powers was particularly concerning. *Id.* at 210.

In *In re Murphy*, this Court censured a judge for failing to take corrective action to prevent an employee's misconduct and sexual harassment within the judge's chambers despite the judge being made aware of the misconduct through his employees and through the Administrative Office of the Courts' Human Resources Department. 376 N.C. 219, 239–40 (2020). Additionally, the judge dismissed or ignored his staff's concerns regarding the severity of the employee's misconduct, engaged in vindictive behaviors, and allowed his personal relationship with the employee to not only influence his judgment but to violate his duties under the Code. *Id.* at 239–41.

In contrast, in *In re Brooks*, we departed from the Commission's recommendation for censure and opted to suspend a judge where he served as executor for the estates of two former clients that were not members of the respondent's family, collected substantial fees or commissions for such service, and failed to properly report that income in violation of Canons 1, 2A, 5D, and 6C. *In re Brooks*, 377 N.C. 146, 147–48 (2021). There, the judge cooperated, admitted error, and showed remorse for conduct that appeared to be a single event as opposed to a pattern of recurring misconduct. *Id.* at 154; *see also In re Bullock*, 324 N.C. 320, 322 (1989) (rejecting recommendation for censure where judge's conduct occurred in an isolated, single event in private).

A common thread amongst the cases in which we have recommended censure is recurring misconduct despite the respondents' awareness or acknowledgment of their alleged violations of the Code. Similarly, respondent in this case knowingly continued to practice law as a sitting judge in violation of the Code and acted outside the scope of the Commission's advisory opinion as to the Complaint Case. Winding down a solo practice is no simple feat, and a practicing solo attorney must ensure that his clients are not left without representation. However, respondent was obviously on notice that if he won his election, he would need to wind down his practice. When respondent took the judicial oath of office on 1 January 2025, respondent still had twelve outstanding cases. Once he learned that he won his judicial election and even after he took his oath, respondent had an obligation to wind down his practice in an orderly and ethical manner. The Commission had given him the necessary time and guidance to allow him to do so in addition to having a former Commission member and once-similarly situated judge reach out to respondent to counsel him on winding down his practice and withdrawing from the Complaint Case. However, as a sitting judge, respondent appeared as attorney of record in his own jurisdiction, and filed numerous summonses, motions to withdraw, and voluntary dismissals in multiple cases. He did so while in active communication with Commission staff in which he was made aware that he was not to practice law, that he was to wind down his practice immediately, and that he was to find replacement counsel for his outstanding cases. Respondent took four months to end all representation.

Nearly every state has adopted some form of Rule 3.10 of the American Bar Association's Model Code of Judicial Conduct, including North Carolina in Canon 5F of the Code, which provides, "A judge shall not practice law." N.C. Code of Jud. Conduct, Canon 5F; *see also* Model Rules of Pro. Conduct r. 3.10 (A.B.A. 2020). The same ABA rule

provides a judge may "act pro se" and may give "legal advice to and draft or review documents for a member of the judge's family" but "without compensation." Model Rules of Pro. Conduct r. 3.10. Further, they are prohibited from representing a family member in any forum. *Id.* Based on that rule and our precedent in judicial standards cases, it can be inferred that the broader reasoning behind the prohibition is to ensure judges avoid even the appearance of impropriety, meaning the use of their position or power in a manner that would make a reasonable person question whether the judge can be impartial. Additionally, judges are to avoid conflicts of interest, and they must not use their position for personal advantages or to advance personal interests. Such conduct would undermine public confidence and have an impact on the integrity of the legal system. Judges, due to their position in the legal profession and in society, are held to a high standard, and this Court is tasked to hold them accountable to that standard.

It is troubling that respondent asked a court employee in his jurisdiction to put forth his deficient motions to withdraw to the Senior Resident Superior Court Judge, which could be interpreted or perceived as a misuse of one's position to pressure court personnel or staff. Furthermore, a sitting judge continuing to appear as an attorney in their own jurisdiction is especially concerning due to the impact the judge's representation could have on the public's confidence in the integrity and impartiality of the judiciary.

However, we do note that respondent was otherwise cooperative with the Commission's investigation, eventually took appropriate remedial measures, and has no prior disciplinary history with the Commission. In other words, respondent was in good professional standing within the legal community and with the State Bar. Weighing respondent's misconduct against his acknowledgement and cooperation, we conclude that the Commission's recommendation of censure is appropriate and supported by the Commission's findings of fact and conclusions of law.

The Supreme Court of North Carolina orders that respondent Sean A. Cole be CENSURED for conduct in violation of Canons 1, 2A, and 5F of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute and willful misconduct in office in violation of N.C.G.S. § 7A-376(b).

Justice BERGER concurring.

I concur with the per curiam opinion approving the Commission's recommendation of censure but write separately to address language in prior opinions which suggests that this Court has independent authority to discipline judges. The Judicial Standards Commission and this Court have specifically defined roles in our system of judicial disciplinary proceedings. In this sphere, both constitute regulatory authority and operate pursuant to express delegations by the General Assembly.

The General Assembly's authority over judicial discipline comes from the people. *See* N.C. Const. art. IV, § 17(2) ("The General Assembly shall prescribe a procedure . . . for the censure and removal of [a judge or justice] for . . . wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute."). Pursuant to this constitutional provision, the General Assembly has specifically delegated to the Judicial Standards Commission the authority to initiate investigations concerning the qualifications or conduct of judicial officers. *See* N.C.G.S. § 7A-377(a) (2025). In general terms, when an investigation reveals misconduct, the Commission issues its recommendation to this Court for disciplinary action. N.C.G.S. § 7A-377(a5) (2025).

In turn, the General Assembly delegated to this Court the authority to review recommendations of discipline from the Judicial Standards Commission. *See* N.C.G.S. § 7A-376(b) (2025). Specifically, "[u]pon recommendation of the Commission, the Supreme Court may issue a public reprimand, censure, suspend, or remove any judge for willful misconduct in office, willful and persistent failure to perform the judge's duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." *Id.* The phrase "upon the recommendation of the Commission" conditions this Court's authority to discipline on the recommendation.

The next section specifically and deliberately limits what can be done with a recommendation of discipline from the Commission: this Court "may approve the recommendation, remand for further proceedings, or reject the recommendation." N.C.G.S. § 7A-377(a5). That's it. Neither statute contemplates that the Court can exercise independent or inherent authority to impose a different form of discipline on its own motion.

But there is considerable tension between these explicit provisions, basic principles of administrative law, and this Court's jurisprudence on judicial discipline. Opinions from this Court have exceeded the authority delegated by the General Assembly and expanded this Court's reach beyond the statutorily prescribed boundaries. In a long line of cases, this Court has stated that "[i]n reviewing recommendations of the Commission, the Court acts as a court of original jurisdiction and exercises independent judgment as to the disciplinary measures imposed on a judge." *In re Foster*, 385 N.C. 675, 690 (2024).

This jurisprudential aggrandizement appears to have begun in *In re Martin*, 295 N.C. 291 (1978). The Court there stated that "[i]t is well established that, in construing either the federal or State Constitution, what is implied is as much a part of the instrument as what is expressly stated." *In re Martin*, 295 N.C. at 299. *But see contra State ex rel. Martin v. Preston*, 325 N.C. 438, 449 (1989) ("[W]here the meaning is clear from the words used, we will not search for a meaning elsewhere."). The atextual interpretive method relied on in *Martin* allowed the Court to read past the plain text of Article IV, Sections 12 and 17 in favor of a theory that judicially assigned original jurisdiction over Judicial Standards Commission matters to this Court. This Court has repeatedly perpetuated the error, citing to precedent declaring that we "may . . . exercise independent judgment as to the appropriate sanction." *In re Foster*, 385 N.C. at 690.

But neither the text of our constitution nor the General Assembly's statutory delegation of authority has vested us with such discretion, and this Court is effectively exercising unbounded authority to discipline judges independent of the recommendations of the Commission. To the extent this Court's precedent and the per curiam opinion today suggest this Court has independent authority to fashion appropriate sanctions beyond that recommended by the Commission, I disagree. The constitutional and statutory provisions are clear: this Court may accept or reject the Commission's recommendation or remand for further proceedings. *See* N.C.G.S. § 7A-377(a5). And even though this Court may have previously operated under a misapprehension of our authority, we should not hesitate to reverse course.

JOSHUA T. LANGLEY
v.
AUTOCRAFT, INC.

JOSHUA T. LANGLEY
v.
KEITH R. CLAPP

No. 304A24

Filed 22 May 2026

1. Contracts—enforceability—employment agreement—ownership interest provision—void for indefiniteness

In an action to enforce an employment agreement provision, under which plaintiff sought to exercise an option to purchase ten percent of the company after five years of employment (with the remaining ninety percent to be owner-financed over a period of years after that), the decision of the North Carolina Business Court granting summary judgment to defendants—based on its determination that the agreement between the parties was illusory—was modified and affirmed. The agreement could not be enforced due to it being void for indefiniteness where the ownership provision was not severable from its sub-division parts and where the agreement lacked material terms regarding the parties' respective rights and obligations, including those necessary for enforcement and, more particularly, a price or formula upon which a price could be calculated.

2. Contracts—enforceability—provision of employment agreement—equitable defenses—quasi-estoppel—mend the hold

In an action to enforce an employment agreement provision, under which plaintiff sought to exercise an option to purchase ten percent of the company after five years of employment (with the remaining ninety percent to be owner-financed over a period of years after that), where the parties' agreement was void for indefiniteness, plaintiff's arguments in the alternative for relief pursuant to equitable principles of quasi-estoppel and mend the hold were unavailing. Since the ownership provision lacked material terms of enforcement, there was no meeting of minds regarding the parties' purported obligations and, thus, the agreement's indefiniteness precluded relief on a quasi-estoppel basis. The doctrine of mend the hold did not apply where defendants' counterclaim—in which they

asserted that plaintiff owed a fiduciary duty to the company—was a separate claim stated in the alternative and did not constitute a new justification for nonperformance that would trigger the doctrine.

Justice EARLS dissenting.

Justice RIGGS joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order and opinion entered on 23 July 2024 by Judge Julianna Theall Earp, Special Superior Court Judge for Complex Business Cases, in Superior Court, Guilford County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(a). Heard in the Supreme Court on 15 April 2025.

Carruthers & Roth, P.A., by Kevin A. Rust, for plaintiff-appellant.

Tuggle Duggins P.A., by Denis E. Jacobson, Richard W. Andrews, Jeffrey S. Southerland, and Daniel D. Stratton, for defendant-appellees.

BARRINGER, Justice.

This Court considers whether the Business Court erred by granting defendants' motion for summary judgment on the basis that consideration for the agreement at issue was illusory. We hold that the provision plaintiff seeks to enforce is void for indefiniteness. Therefore, we modify and affirm the decision of the Business Court.

I. Background

A. Relevant Facts

Defendant Keith R. Clapp (Clapp) is the founder, sole owner, and sole board member of defendant Autocraft, Inc. (Autocraft) (collectively, defendants). Plaintiff Joshua T. Langley (Langley) is a former Autocraft employee who left Autocraft to work for a different company in January 2015. In 2016, Clapp messaged Langley to inform him that if Langley ever wanted to return to Autocraft, he should give Clapp "a holler." Shortly thereafter, Langley contacted Clapp about the possibility of returning to Autocraft, and discussions between the two ensued.

Prior to rejoining Autocraft, Langley prepared a single-page document and presented it to Clapp for signature in the parking lot of a Hooters restaurant. The document provides in full:

Josh Langley's Autocraft Contract

- $125,000/per year Salary starting on hire date
    - o $2403.85/per week
    - o Paycheck every other week (Bi-weekly)
    - o Salary pay/No punch of time clock/ Flexible hours
    - o 40-42 hours/per week max
    - o Leave work by 5:00 PM daily (subject to Josh's decision)
    - o 2% cost of living raise per year giving [sic] on hire date of each year
    - o 5% Christmas bonus at end of each year
- 10% ownership of Autocraft Technologies at 5 year mark from start date
    - o Contingent upon Josh's decision to be 10% owner
    - o Review books and debt at 4 year mark
    - o Owner finance the other 90% over the following 5-10 years
- 3 weeks paid vacation with use of vacation any time of year including winter
- All programming with very little set-up
- Computer Setup
    - o Strong Laptop so I can use at work and home
    - o 24-27 inch dual monitor setup
    - o Logitech performance mx mouse
- MSC to bring in CAPS system to help with keeping tools in stock
    - o I will need MSC login and access to CAPS system to help
- Keep an open understanding about my schooling (College)
- Bobcad schooling in Florida for 3 days (ASAP)

- Mandatory 14-30 day notice upon Josh Langley's leave if necessary
- Josh Langley is guaranteed employment for at least 10 years.

This contract is guaranteed for the next 20 years with Keith Clapp alive or dead and as long as Autocraft Technologies is still a functioning business. All above is guaranteed for the next 20 years with nothing to change except at Josh Langley's discretion from the signed date below.

The signatures of Langley, Clapp, and Clapp's then-wife, all dated 28 December 2016, appear on signature lines at the bottom of the document.[1] The document also includes a signature line for a "Notary Republic [sic]" that was ultimately left blank.

After this document (the Agreement) was signed, Langley resumed working for Autocraft in January 2017 until his termination in August 2022.

Langley seeks to enforce the provision granting him a 10% ownership interest in the company after five years' employment (10% Ownership Provision). It is undisputed that Langley was, in fact, employed by Autocraft for more than five years. Nevertheless, defendants claim Langley is not entitled to an ownership interest because the Agreement is unenforceable.

B. Procedural History

On 19 December 2022, Langley filed an action against Autocraft in Superior Court, Guilford County, asserting breach of contract and seeking a declaratory judgment. During depositions in that action, Clapp claimed that he signed the Agreement in his individual capacity and not on behalf of Autocraft. In response, Langley filed a second action against Clapp individually in Superior Court, Randolph County, on 1 February 2024. Both actions were designated mandatory complex business cases under N.C.G.S. § 7A-45.4(a), and later consolidated by order of the Business Court on 14 March 2024.

On 2 April 2024, defendants filed a motion for summary judgment. After full briefing and a hearing on the motion, the Business Court

1. Clapp's then-wife separately signed the document on 28 December 2016 while at the Autocraft office.

issued an order and opinion (Order) granting defendants' motion. In the Order the Business Court found that the Agreement was illusory. Looking to the final sentence of the Agreement, the Business Court reasoned that "the Agreement confers upon Langley 'an unlimited right to determine the nature or extent of his performance[,]' rendering the consideration provided by Langley illusory." The Business Court addressed no other issues. Langley directly appealed to this Court pursuant to N.C.G.S. § 7A-27(a)(2).

II. Standard of Review

"An appellate court reviews a trial court's decision to grant or deny a motion for summary judgment *de novo*." *SciGrip, Inc. v. Osae*, 373 N.C. 409, 418 (2020) (citation omitted). Under a de novo standard of review, this Court "considers the matter anew and freely substitutes its own judgment" for that of the lower court. *N.C. Farm Bureau Mut. Ins. Co. v. Herring*, 385 N.C. 419, 422 (2023) (quoting *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647 (2003)).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *SciGrip, Inc.*, 373 N.C. at 417–18 (quoting N.C.G.S. § 1A-1, Rule 56(c) (2020)).

III. Analysis

On appeal, Langley argues that the Agreement should be enforced because it is not illusory, both by its plain terms and under this Court's holding in *Canteen v. Charlotte Metro Credit Union*, 386 N.C. 18 (2024). Alternatively, Langley argues that the doctrines of quasi-estoppel and "mend the hold" provide independent bases for enforcing the Agreement.

After careful review, this Court finds that the more appropriate question for resolution of this dispute is whether the Agreement is void for indefiniteness. For the following reasons, we answer that question in the affirmative. Accordingly, we modify and affirm the Business Court's Order.

A. Void for Indefiniteness

[1] In analyzing the enforceability of a contract, we turn to its text. We construe a contract "as a whole," looking to all the text contained therein. *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 7 (2017) (quoting *Ussery v. Branch Banking & Tr.*, 368 N.C. 325, 335 (2015)). This means that "[e]ach clause and word is considered with reference to

each other and is given effect by reasonable construction." *Id.* (quoting *Ussery*, 368 N.C. at 336).

For a contract to be enforceable, "there [must] be 'mutual assent of [the] parties to the terms of the agreement so as to establish a meeting of the minds.' " *Creech v. Melnik*, 347 N.C. 520, 527 (1998) (quoting *Snyder v. Freeman*, 300 N.C. 204, 218 (1980)). When a contract is "so vague and indefinite that it is not possible to collect from it the full intent of the parties," then there was no true meeting of the minds, and the contract "is void." *Holder v. Home Mortg. Co.*, 214 N.C. 128, 133 (1938) (extraneity omitted). This rule is well-founded as, certainly, a court cannot enforce a contract whose meaning it cannot decipher. *See Boyce v. McMahan*, 285 N.C. 730, 734 (1974).

In the instant case, Langley seeks to enforce the 10% Ownership Provision of the Agreement that states "10% ownership of Autocraft Technologies at 5 year mark from start date." Yet immediately indented below this text are three additional sub-provisions, which read:

- Contingent upon Josh's decision to be 10% owner
- Review books and debt at 4 year mark
- Owner finance the other 90% over the following 5-10 years

These three sub-provisions are "common" to and "interdependent" upon the 10% Ownership Provision that Langley seeks to enforce. *Wooten v. Walters*, 110 N.C. 251, 254 (1892). Thus, no single sub-provision is severable from the rest of the 10% Ownership Provision.

Moreover, the other terms of the Agreement confirm as much. Indeed, when we are interpreting contracts, we must "construe them as a whole." *Ussery*, 368 N.C. at 335. Take, for example, the provision regarding computer setup (Computer Setup Provision). Like the 10% Ownership Provision, the Computer Setup Provision is followed by three sub-provisions. Its three sub-provisions state:

- Strong Laptop so I can use at work and home
- 24-27 inch dual monitor setup
- Logitech performance mx mouse

These sub-provisions detail the full extent of the "[c]omputer [s]etup" to which Langley sought to be entitled. Specifically, Langley sought to ensure that his computer would be a "[s]trong" laptop that he could use at work and home along with a dual monitor and a Logitech mouse. In short, the details of the Computer Setup Provision are fully described in

its sub-provisions. It is apparent that Langley would not simply accept any old "[c]omputer [s]etup" under the Agreement. Rather, the computer setup had to meet the requirements outlined in its sub-provisions.

The same is true for the 10% Ownership Provision. Its sub-provisions ensured that Langley would be the one to decide to become a 10% owner, that he would have the opportunity to review the books and debt after 4 years of employment, and that "[o]wner finance" of "the other 90%" would take place over the course of the next 5 to 10 years. Moreover, the consideration for the 10% Ownership Provision and its sub-provisions is the same: Langley's continued employment under the Agreement. Therefore, the 10% Ownership Provision is "not severable" from its sub-provision parts. *Wooten*, 110 N.C. at 254 ("A contract is entire, and not severable, when by its terms, nature and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration, are common each to the other and interdependent.").

As a result, the 10% Ownership Provision is only enforceable if this Court can determine its meaning; however, that we cannot do. In particular, the third sub-provision, which states in full, "[o]wner finance the other 90% over the following 5-10 years[,]" is devoid of terms necessary for enforcement. The sub-provision specifies no price or formula upon which price could be computed. It provides no details for precisely how "the other 90%" would be owner-financed over the following 5 to 10 years. It gives no timeline for which payments would be made. Thus, enforcement of the 10% Ownership Provision would place this Court in an untenable position—compelling the parties to proceed on terms to which they never assented.[2] *See Holder*, 214 N.C. at 133 ("[N]either the court nor the jury can make an agreement for the parties." (extraneity omitted)). We therefore must hold that the indefiniteness of the Agreement is fatal to its enforcement.

B. Equitable Defenses

[2] In the alternative, Langley sought to defend against defendants' summary judgment motion by invoking the doctrines of quasi estoppel and mend the hold. Curiously, the Business Court never addressed these equitable defenses. Yet, because these defenses require no further

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2. When Langley was asked what price he would pay for "the other 90 percent," he admitted that "[p]rice was never brought up." This is a problem. North Carolina courts have repeatedly recognized that price or a means to calculate price is a material term to a contract. *See*, *e.g.*, *Connor v. Harless*, 176 N.C. App. 402, 405 (2006), *disc. rev. denied*, 361 N.C. 219 (2007); *Howell v. C. M. Allen & Co.*, 8 N.C. App. 287, 289 (1970).

factual development and were adequately argued on appeal, we elect to address them here.

"Under a quasi-estoppel theory, a party who accepts a transaction or instrument and then accepts benefits under it may be estopped to take a later position inconsistent with the prior acceptance of that same transaction or instrument." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 18 (2004) (citations omitted). The doctrine is premised on the well-settled principle that "a party will not be allowed to accept benefits which arise from certain terms of a contract and at the same time deny the effect of other terms of the same agreement." *Brooks v. Hackney*, 329 N.C. 166, 173 (1991) (quoting *Cap. Outdoor Advert., Inc. v. Harper*, 7 N.C. App. 501, 505 (1970)).

Langley's quasi-estoppel theory of recovery runs into the same problem as that described above. As a matter of first principles, a party cannot seek to enforce a contract's term—by quasi-estoppel theory or otherwise—that is indefinite. *Cf. Brooks*, 329 N.C. at 168, 173 (enforcing, from an otherwise unenforceable land-sale agreement, a sales provision that specified the total price, interest rate, and periods of payment); *Cap. Outdoor Advert., Inc.*, 7 N.C. App. at 504–05 (enforcing, from an otherwise unenforceable lease agreement, lease provisions that specified the lease period and monthly rental cost). Stated differently, while a provision from an otherwise unenforceable contract may be enforced under quasi-estoppel, such enforcement is not possible if the provision's terms are so indefinite that the court cannot fashion the remedy. *See Elliott v. Duke Univ.*, 66 N.C. App. 590, 595 ("Where one party simply believes that a contract exists, but there is no meeting of the minds, the individual seeking to enforce the obligation upon a contract theory is without a remedy." (citing *Brown v. Williams*, 196 N.C. 247 (1928))), *disc. rev. denied*, 311 N.C. 754 (1984).

Such is the case here. As explained above, the 10% Ownership Provision that Langley seeks to enforce lacks material terms capable of a remedy. The provision is completely devoid of necessary terms for enforcement. Accordingly, a quasi-estoppel theory of recovery is of no avail to Langley. There was no meeting of minds as to the purported obligation.

The doctrine of mend the hold is "an equitable doctrine that precludes the assertion of inconsistent litigation positions, usually concerning the meaning of a contract, within the context of a single lawsuit." *Whitacre*, 358 N.C. at 24. The doctrine "limits a nonperforming party's potential defenses for breaking a contract to those based on the prelitigation explanation for nonperformance that was given to

the other party." Robert H. Sitkoff, Comment, "*Mend the Hold*" *and* Erie: *Why an Obscure Contracts Doctrine Should Control in Federal Diversity Cases*, 65 U. Chi. L. Rev. 1059, 1064 (1998), *cited in Whitacre*, 358 N.C. at 24.

To illustrate its application, the doctrine was first invoked in a case in which a defendant railroad refused to perform on a delivery contract, explaining that it lacked enough cars to make the delivery. *Ry. Co. v. McCarthy*, 96 U.S. 258, 265 (1877). After litigation began, the railroad company then tried to defend its nonperformance, which had occurred on a Sunday, under a West Virginia law forbidding Sunday deliveries. *Id.* at 267. The Supreme Court of the United States explained that "[w]here a party gives a reason for his conduct and decision touching any thing involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold." *Id.* at 267–68.

Langley points to Autocraft's counterclaim as the source of inconsistent litigation positions. That counterclaim alleged that Langley owed a fiduciary duty to Autocraft. Langley's logic is that if Autocraft had previously argued that Langley owed a fiduciary duty, then Autocraft must have implicitly taken the position that the Agreement was enforceable such that Langley possessed an ownership interest.

For starters, this argument asks the Court to infer a position never explicitly taken by defendants. In fact, Autocraft explicitly rejected such a position at the hearing on this counterclaim. There, Autocraft maintained: "[*W*]*e don't think this contract is in any way enforceable*, but the basis for our counterclaim is their allegations, based on this contract, what it means, and what rights and duties it provided to Mr. Langley." (Emphasis added.) Accordingly, it is not clear to this Court that defendants ever took an inconsistent position.

Even still, Langley's argument misapprehends the doctrine of mend the hold. Autocraft's counterclaim is a wholly separate claim stated in the alternative; it is not a new justification for nonperformance under the Agreement. Parties are permitted to argue in the alternative. To be sure, "[t]here is no requirement that all claims be legally consistent." *Concrete Serv. Corp. v. Invs. Grp., Inc.*, 79 N.C. App. 678, 684 (citing N.C. R. Civ. P. 8(e)(2)), *cert. denied*, 317 N.C. 333 (1986). Consequently, a mend the hold theory of recovery fails on the merits as well.

Finally, it is worth acknowledging that the dissent would remand this matter to the Business Court to evaluate an unjust enrichment

claim. However, Langley did not plead unjust enrichment in the complaint; did not raise the claim in the summary judgment briefing; and did not argue the claim in his briefing to this Court. Indeed, in the 1,000 pages of pleadings, motions, and briefing in the trial record, the phrase "unjust enrichment" does not appear even a single time. If we were to take the dissent's approach, we would certainly be charting new territory, as courts are not in the business of making arguments for parties that they did not make themselves. *See In re E.H.*, 388 N.C. 100, 101–02 (2025); *see also State ex rel. Jackson v. E.I. du Pont de Nemours & Co.*, 926 S.E.2d 402, 405 n.1 (N.C. 2026) (Earls, J., dissenting) (criticizing a concurrence for purportedly "making arguments for defendants that they did not make themselves"). For this reason, we disagree that remanding for a claim never raised is appropriate.

IV. Conclusion

A thoughtful review reveals that the more appropriate question for resolution of this dispute is whether the Agreement is void for indefiniteness. We answer that question in the affirmative. The provision that Langley seeks to enforce is not severable from its sub-provisions which detail the full extent of the ownership rights and obligations. In addition, those rights and obligations fail to include material terms that this Court may enforce. As such, the Agreement is void for indefiniteness. We therefore modify and affirm the Business Court's Order.

MODIFIED AND AFFIRMED.

Justice EARLS dissenting.

The Restatement of Restitution and Unjust Enrichment provides that "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other." Restatement (Third) of Restitution and Unjust Enrichment § 1 (A.L.I. 2011). To succeed on an unjust enrichment claim, the plaintiff must show that a benefit was conferred upon the defendant. That benefit cannot have been officious—meaning it must not have arisen from an unjustified intrusion into the other party's affairs—nor can it have been given as a gift. The benefit must also be capable of quantification. *Booe v. Shadrick*, 322 N.C. 567, 570 (1988). Where these elements are satisfied, the defendant is obligated to return the benefit itself, its traceable proceeds, or a monetary equivalent. *See* Restatement (Third) of Restitution § 1.

Mr. Langley and Mr. Clapp entered into an employment agreement under which Mr. Langley would provide services to Autocraft in exchange for, among other things, the opportunity to acquire a 10% ownership interest after five years. That ownership provision was contingent on Mr. Langley's election — following a review of Autocraft's books and debts after four years of service — to exercise his option. The agreement further contemplated that Mr. Clapp would owner-finance the remaining 90% of Autocraft to Mr. Langley over the subsequent five to ten years. Mr. Langley fulfilled his end: he remained employed at Autocraft for more than five years and, during that tenure, served as a critical revenue-generating employee upon whom the company depended. Mr. Clapp, for his part, expressed intent to either convey or facilitate Mr. Langley's purchase of the 10% interest.

On these facts, the unjust enrichment elements are readily apparent. Mr. Langley conferred a measurable benefit on Mr. Clapp through years of valuable service. Mr. Clapp consciously accepted those services. They were rendered neither as a gratuity nor as an unjustified intrusion into Mr. Clapp's affairs, but pursuant to a bargained-for arrangement. And the value of that benefit is capable of quantification — the price of a business interest is precisely the kind of ascertainable figure the Business Court is equipped to assess.

Rightfully, I would remand to the Business Court to evaluate the unjust enrichment claim, consistent with the principle that "[w]here there is no express contract to pay, the law implies a promise to pay fair compensation for services rendered unless rendered as a gratuity or in discharge of some obligation." *See Cline v. Cline*, 258 N.C. 295, 298 (1962). I respectfully dissent.

Justice RIGGS joins in this dissenting opinion.

RELATION INSURANCE, INC. AND RELATION INSURANCE SERVICES OF NORTH CAROLINA, INC.

v.

PILOT RISK MANAGEMENT CONSULTING, LLC, PILOT FINANCIAL BROKERAGE, INC. D/B/A PILOT BENEFITS, KYLE SMYTHE, ROBERT CAPPS, LYNETTE KINNEY, EDWARD MILES GURLEY, SEAN KELLY, TYLER CROOKER, MICHELLE LINTHICUM, LINDA MICHELLE SNEED, TONI KING, AND JOHNATHAN LANCASTER

No. 68A25

Filed 22 May 2026

1. Discovery—misappropriation of trade secrets—spoliation of evidence—widespread deletion of electronic data—scope of adverse inference

In a complex business case in which an insurance agency and its holding company (plaintiffs) sued several former employees (defendants) for multiple claims including misappropriation of trade secrets (specifically, client lists), although the Business Court properly granted plaintiffs' motion for adverse inference—based on evidence that defendants intentionally destroyed or failed to preserve electronic data and materials despite being aware of the litigation and having been sent cease-and-desist letters with a preservation notice—that court failed to identify where and how the inference would be drawn. The Supreme Court remanded the issue of spoliation for the Business Court to fulfill its discretionary function by clarifying with greater precision the application of the inference as to each claim.

2. Trade Secrets—client lists—definition of "trade secret"—six-factor inquiry—summary judgment improper

In a complex business case in which an insurance agency and its holding company (plaintiffs) sued several former employees (defendants) for multiple claims including misappropriation of trade secrets (specifically, client lists) under both federal and state law, the Business Court erred by determining at the summary judgment stage that two client lists (one containing names and addresses of clients serviced by one defendant; the other containing clients and their associated insurance policy renewal dates for various types of policies) did not qualify as protectable trade secrets. With regard to the two compilations, even if certain information about individual clients could be obtained publicly, there was a genuine issue of material fact regarding the lists' public availability, the extent to which other employees and those involved in the business knew

about or could recreate the lists, the extent of measures taken to safeguard the lists' secrecy, the lists' value to plaintiffs, and the time and effort taken to acquire the information contained in each list.

3. Trade Secrets—misappropriation—prima facie case—statutory criteria—absence of consent—remand for adverse inference consideration

In a complex business case in which an insurance agency and its holding company (plaintiffs) sued several former employees (defendants) for multiple claims including misappropriation of trade secrets (specifically, client lists) under both federal and state law, a prima facie case of misappropriation under N.C.G.S. § 66-155(2) requires a claimant to show not only that a specific opportunity to acquire a trade secret existed but also that the opportunity occurred absent consent or authority of the owner. Here, plaintiffs' evidence did not demonstrate that a production analysis document taken by one of the defendants had been obtained or used without defendants' consent or authority. However, where the Business Court had granted plaintiffs' motion for adverse inference due to extensive spoliation of evidence by defendants, the trade secret claim regarding the production analysis document was reversed and remanded for the Business Court to fulfill its discretionary function regarding the application of the adverse inference to this claim.

4. Collateral Estoppel and Res Judicata—enforceability of employment agreement—prior lawsuit—issue not actually litigated—resolved by settlement

In a complex business case in which an insurance agency and its holding company (plaintiffs) sued several former employees (defendants) for multiple claims including breach of contract for allegedly breaching the non-solicitation provisions of an employment agreement, plaintiffs were not collaterally estopped from seeking enforcement of those provisions despite a finding from a trial court in a prior lawsuit (which plaintiffs had brought against one of the defendants) determining that those provisions were unenforceable. The enforceability issue was not actually litigated and necessary to the judgment because the prior lawsuit was resolved by a settlement agreement, and there was no statement indicating the parties' intent to incorporate the unenforceability finding into the settlement agreement.

5. Contracts—employment agreement—non-solicitation provisions—reasonableness—size and scope of company—remand required

In a complex business case in which an insurance agency and its holding company (plaintiffs) sued several former employees (defendants) for multiple claims including breach of contract—alleging that defendants breached the non-solicitation provisions of their employment agreements (barring them from soliciting clients and employees)—although the Business Court had determined that the non-solicitation provisions were unreasonable, the issue was remanded for consideration of the size and scope of the company, since there was a factual dispute as to the meaning and identity of the main company and its affiliated members. On remand, the burden was on plaintiffs to prove the reasonableness of the restrictive provisions.

6. Contracts—employment agreement—non-solicitation provisions—reasonableness—blue pencil doctrine inapplicable

In a complex business case in which an insurance agency and its holding company (plaintiffs) sued several former employees (defendants) for multiple claims including breach of contract—alleging that defendants breached the non-solicitation provisions of their employment agreements (barring them from soliciting clients and employees)—although plaintiffs argued in the alternative for the application of the blue pencil doctrine to save any unenforceable provisions, the equitable doctrine could only be applied to an unreasonable provision that was separable from the rest of the agreement. Here, the doctrine did not apply because plaintiffs' suggestion on appeal that a particular term be blue-pencilled out of the agreement would require striking the term from at least forty-six separate clauses and not merely removing a separable, divisible provision from an otherwise enforceable contract.

7. Contracts—business dispute—breach of settlement agreement—non-solicitation provision—application of adverse inference

In a complex business case in which an insurance agency and its holding company (plaintiffs) sued several former employees (defendants) for multiple claims including breach of a settlement agreement from a prior lawsuit—which included a non-solicitation-of-employees provision—where the Business Court had properly granted plaintiffs' motion for adverse inference due to defendants' extensive spoliation of evidence, plaintiffs' claim for breach of settlement agreement was remanded for the Business Court to fulfill its discretionary function regarding the application of the adverse inference to this claim.

8. Unjust Enrichment—business dispute—solicitation of employees and clients by former employees—lack of conferring of a benefit

In a complex business case in which an insurance agency and its holding company (plaintiffs) sued several former employees (defendants) for multiple claims, the decision of the Business Court to grant summary judgment in favor of defendants on plaintiffs' claim for unjust enrichment was affirmed, although on alternative grounds. Where the basis of plaintiffs' claim was that defendants wrongfully retained plaintiffs' confidential information, clients, and employees, there was no evidence that plaintiffs conferred a benefit on defendants, a necessary element of an unjust enrichment claim, since defendants acted without plaintiffs' permission.

9. Fraud—Computer Fraud and Abuse Act—"exceeds authorized access"—post-employment computer access—remand for adverse inference consideration

In a complex business case in which an insurance agency and its holding company (plaintiffs) sued several former employees (defendants) for multiple claims involving the alleged misappropriation of client lists, the Business Court erred by granting summary judgment in favor of defendants on three of plaintiffs' computer trespass claims made pursuant to the federal Computer Fraud and Abuse Act. With regard to one defendant, there was sufficient evidence that she "exceed[ed] authorized access" by accessing a vendor portal post-employment and after plaintiffs sent her a cease-and-desist letter. For another defendant, there was a genuine issue of material fact regarding whether, when he took client expiration lists prior to resigning from employment with plaintiffs, he knowingly violated an established company rule. For a third claim, although plaintiffs failed to sufficiently support their allegation that all defendants emailed confidential documents to their personal email accounts and took screenshots of confidential information from their work computers prior to resigning, the matter was remanded for the Business Court to fulfill its discretionary function regarding the application of a previously-granted adverse inference (based on defendants' extensive spoliation of evidence) to this claim.

10. Judges—Business Court—issuance of clarifying order—summary dismissal of claims—lack of written basis

In a complex business case in which an insurance agency and its holding company (plaintiffs) sued several former employees (defendants) for multiple claims including misappropriation of

trade secrets, after both parties filed cross-motions for summary judgment and the Business Court entered an initial summary judgment order, the presiding Business Court Judge erred by issuing a "Clarifying Order" a few weeks later—which modified the first order by granting defendants' summary judgment motion pursuant to Civil Procedure Rule 56—without legal analysis or legal basis as required by N.C.G.S. § 7A-45.3. The court's order summarily granting summary judgment was reversed and the matter was remanded for entry of a written, reasoned opinion as to defendants' motion.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order and opinion entered on 25 July 2024 and an order clarifying that order and opinion entered on 1 August 2024 by Judge Mark A. Davis, Special Superior Court Judge for Complex Business Cases, in Superior Court, Guilford County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(a). Heard in the Supreme Court on 18 September 2025.

Fox Rothschild LLP, by Kip D. Nelson and Ashley B. Chandler, for plaintiff-appellants.

Gavin J. Reardon and Amiel J. Rossabi for defendant-appellees.

BARRINGER, Justice.

For the reasons stated herein, we affirm in part, reverse in part, and remand the Business Court's orders for further proceedings not inconsistent with this opinion.

I. Background

Relation Insurance, Inc. is a holding company for Relation Insurance Services of North Carolina, Inc. (collectively, plaintiffs or Relation). Relation Insurance, Inc. has multiple subsidiaries located in other states. Relation Insurance Services of North Carolina, Inc. operates out of an office in Greensboro, North Carolina.

According to its own contracts, Relation is an "independent insurance agency and broker engaged in the business of the sale, marketing and provision of various insurance products and services to individuals and institutional, governmental and business clients[.]" As Relation's president put it, Relation "serves as an intermediary between insureds and insurance carriers." As an intermediary, Relation negotiates, places,

and services the insurance coverage best suited to meet the specific needs of each policyholder.

According to affidavits filed, salespersons at Relation are known as "producers," who "are individuals licensed to sell, service, and negotiate insurance products and services, including insurance policies." Meanwhile, "account managers" at Relation are employees who "work alongside producers to manage client relationships and service accounts in more of a customer service role." Account managers are salaried employees who do not rely on commission. The same is not true of producers. The salary of producers is tied to commission—especially those experienced producers who have built sizeable books of business. Historically, Relation's compensation models increased alongside the size of a producer's book of business.

However, by 2019, Relation shifted its commission rate model for producers. Rather than varying the rate based upon the size of the producer's book of business, Relation implemented "a standard 25/40% split." Yet, in implementing its new commission model, Relation failed to inform all the producers of the change. Relation's failure to inform gave rise to discontent among its employees. At the Greensboro office, Relation employees lodged complaints about the company's lack of transparency and overburdensome workload.

In early 2020, defendant Kyle Smythe, who at the time was employed as a Relation producer, left Relation. Smythe formed a new insurance agency, defendant Pilot Risk Management Consulting, LLC (Pilot Risk). Smythe, defendant Robert A. Capps III, and defendant Lynette Kinney are members of Pilot Risk. In addition, Capps and Kinney are "part-owners" of defendant Pilot Financial Brokerage, Inc. d/b/a Pilot Benefits (Pilot Benefits).[1] By March 2020, Pilot began operations as "a direct competitor of Relation" in the insurance agency business.

Soon after Pilot opened its doors, Relation filed a prior lawsuit in Superior Court, Guilford County (the Smythe Lawsuit). Relation brought claims against Smythe for breach of his employment agreement, tortious interference, and unfair and deceptive trade practices. On 4 September 2020, the trial court entered an interlocutory order dismissing all of Relation's claims in the Smythe Lawsuit, except for the breach of employment agreement claim (the Smythe Order). On 11 March 2021, the Smythe Lawsuit was settled through a settlement

1. For purposes of this opinion, Pilot Risk and Pilot Benefits are collectively designated as "Pilot."

agreement (the Settlement Agreement). The Settlement Agreement was entered into with Relation by Smythe, Capps, Kinney, and Pilot. Smythe, Capps, Kinney, and Pilot are named defendants in this case.

Not long after Smythe left Relation, matters worsened for Relation's disgruntled employees. On 1 April 2020, Relation conducted a conference call for all of its employees. On the call, Relation informed its employees that the company would be instituting a freeze on all pay raises in response to the COVID-19 pandemic. This new pay freeze ultimately triggered an exodus of Relation employees beginning in the fall of 2021.

During this period, seven employees left Relation's Greensboro office for Pilot. These seven employees are the remaining defendants in this case: Edward Miles Gurley, Sean Kelly, Tyler Crooker, Johnathan Lancaster, Michelle Linthicum, Linda Michelle Sneed, and Toni King (collectively, the Former Employees). Gurley, Kelly, Crooker, and Lancaster were employed as producers at Relation. Linthicum, Sneed, and King were employed as account managers.

The Former Employees' tenures with Relation differed, with some having spent four years at the company and others as many as ten. Prior to beginning their employment with Relation, each of the Former Employees signed an employment agreement (the Employment Agreements).[2] The Employment Agreements contained non-solicitation provisions, which prohibited the solicitation of Relation's clients or employees upon an employee's departure from Relation.

The Former Employees transitioned from Relation to Pilot during approximately a three-month period, which began in late 2021 and finished in early 2022. The first of the Former Employees to leave was Crooker, who resigned on 30 November 2021 and began working for Pilot on 3 December 2021. Sneed quickly followed, resigning from Relation on 1 December 2021 and beginning at Pilot on 6 December 2021. King accepted a position with Pilot on 17 February 2022, even though she did not resign from Relation until eight days later. Both Kelly and Gurley accepted positions at Pilot on 18 February 2022 and resigned from Relation that same day. Also on 18 February 2022, Linthicum resigned from Relation. Pilot hired Linthicum three days

2. At the time that each Former Employee signed his or her employment agreement, Relation Insurance, Inc. was known as "Ascension Insurance, Inc." As such, the Employment Agreements use "Ascension Insurance, Inc." rather than the present-day name of "Relation Insurance, Inc."

later. On 25 February 2022, Relation terminated Lancaster. Pilot assigned Lancaster a Pilot email address that same day.

During this three-month period of departures, the Former Employees sent numerous messages to each other, as well as to their old Relation clients. In addition, each Former Employee forwarded various documents from their Relation email account to their personal email accounts, which Relation contends violated the Employment Agreements and amounted to misappropriation of trade secrets in some instances.

On 11 April 2022, plaintiffs filed their complaint, initiating the current action in Superior Court, Guilford County, after which the case was designated a mandatory complex business case. On 5 July 2022, defendants filed various counterclaims against plaintiffs. After the close of discovery, the parties filed cross-motions for partial summary judgment on 28 July 2023. Plaintiffs also filed a motion for adverse inference on 31 August 2023.

On 12 July 2024, the Business Court filed its Order and Opinion on Defendants' Motion for Partial Summary Judgment, Plaintiff's Motion for Partial Summary Judgment, and Plaintiffs' Motion for Adverse Inference at Summary Judgment and Trial Based on Spoliation of Evidence (the Summary Judgment Order) granting in part and denying in part the cross-motions for partial summary judgment. S*ee Rel. Ins., Inc. v. Pilot Risk Mgmt. Consulting, LLC*, No. 22 CVS 4285, 2024 WL 3549145 (N.C. Super. Ct. July 12, 2024). In the Summary Judgment Order, the Business Court additionally granted plaintiffs' motion for adverse inference. *Id.* at *15. Approximately two weeks later, on 1 August 2024, the Business Court filed an Order Clarifying 12 July 2024 Order and Opinion (Clarifying Order) dismissing several of plaintiffs' other claims. Plaintiffs now appeal both orders.

As an initial matter, the orders did not dispose of all claims and defenses. As such, plaintiffs appeal interlocutory orders. *Veazey v. City of Durham*, 231 N.C. 357, 362 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.").

"The general rule is that 'there is no right of immediate appeal from interlocutory orders and judgments.' " *Land v. Whitley*, 388 N.C. 296, 298 (2025) (quoting *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725 (1990)). However, there are exceptions to the general rule. *See* N.C.G.S. §§ 1-277, 7A-27(a)(3), (b)(3) (2025); N.C.G.S. § 1A-1, Rule 54(b) (2025); *see also Land*, 388 N.C. at 298 (recognizing the same).

The interlocutory orders, here, are appealable to this Court pursuant to N.C.G.S. §§ 1-277(a) and 7A-27(a)(3), because the orders dismissed some of plaintiffs' claims against certain defendants in full. The claims that remain will require a jury to resolve issues of fact that will later implicate claims against those defendants the court dismissed. This could lead to inconsistent verdicts. As such, the orders affect a substantial right. *See Hamby v. Profile Prods., LLC*, 361 N.C. 630, 634 (2007) ("This Court has recognized that a substantial right is affected if the trial court's order granting summary judgment to some, but not all, defendants create the possibility of separate trials involving the same issues which could lead to inconsistent verdicts.").

Given the interlocutory nature of plaintiffs' appeal, our review is limited to only those claims dismissed by the summary judgment orders and the motion for adverse inference.

II. Standard of Review

"The evidence proffered at summary judgment must be taken in the light most favorable to the nonmovant." *Hinman v. Cornett*, 386 N.C. 62, 65 (2024). "The moving party has the burden of establishing the absence of any triable issue . . . by proving that an essential element of the opposing party's claim is nonexistent or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim." *Zimmerman v. Hogg & Allen, Pro. Ass'n*, 286 N.C. 24, 29 (1974).

"If the moving party meets this burden, the party who opposes the motion for summary judgment must either assume the burden of showing that a genuine issue of material fact for trial does exist or provide an excuse for not so doing." *Id.* "If a genuine issue of material fact does exist, the motion for summary judgment must be denied[.]" *Id.*; *see also* N.C.G.S. § 1A-1, Rule 56(c) (2025). A trial court's summary judgment ruling receives de novo review. *Hinman*, 386 N.C. at 65.

III. Analysis

A. Motion for Adverse Inference

[1] Shortly after the Former Employees left Relation for Pilot, Relation sent cease-and-desist letters to each defendant. The letters included a preservation notice, advising each individual defendant "to preserve any and all information relevant to the facts surrounding the topics in this letter." Plaintiffs then filed their complaint in this action. Two days later, plaintiffs filed a motion for preliminary injunction. In that motion,

plaintiffs requested that the Business Court order defendants to preserve all data and materials stored on defendants' various electronic devices.

The same day that the motion for preliminary injunction was filed, Linthicum reset her cell phone. Throughout the following week, Smythe, Lancaster, Capps, King, and Sneed also reset their cell phones. Two weeks after that, Gurley "wiped" his personal computer. Then after that, Lancaster switched out the SIM card in his cell phone. Kinney subsequently reset her phone.

At a discovery dispute conference, the Business Court informed the parties that a forensic analysist in the field of information technology would be permitted to conduct digital imaging of defendants' electronic devices beginning on 25 October 2022. The prospect of digital imaging sparked more deletions by defendants. Gurley reset his phone the same day as the conference. The next day, Smythe and Crooker deleted cell phone data files from their laptop computers. Sneed reset her laptop computer. Kelly reset his cell phone. Linthicum installed a new SIM card on her phone. And files were deleted from Gurley's laptop on two separate occasions.

In response to the deletions, plaintiffs filed their motion for adverse inference with the Business Court. The Business Court granted plaintiffs' motion, finding that plaintiffs had "met their burden of establishing that the [i]ndividual [d]efendants intentionally destroyed or failed to preserve potentially relevant evidence despite being aware of either actual litigation or the possibility of future litigation." *Rel. Ins.*, *Inc.*, 2024 WL 3549145, at *15. We do not disturb the Business Court's grant of plaintiffs' motion for adverse inference. However, we do take issue with its application to the Summary Judgment Order and Clarifying Order before us.

Under the spoliation of evidence rule, an adverse inference may be drawn against a party who destroys relevant evidence. This Court has articulated the rule as follows: "where a party fails to introduce in evidence documents that are relevant to the matter in question and within his control, . . . there is a presumption or at least an inference that the evidence withheld, if forthcoming, would injure his case." *Yarborough v. Hughes*, 139 N.C. 199, 208–09 (1905). "The rule is founded on a sort of presumption that there is something in the evidence withheld which makes against the party not producing it." *Id.* at 209 (extraneities omitted). Application of the rule provides "a significant fact for the consideration of the jury," *id.* at 210, and "is classed among the

strongest circumstantial proofs" against the party that withholds evidence in its possession, *id.* (citing *Black v. Wright*, 31 N.C. (9 Ired.) 447, 451–52 (1849)).

"The [adverse] inference is not mandatory, but lies within the province of the trier of fact." *Sunset Beach Dev., LLC v. AMEC, Inc.*, 196 N.C. App. 202, 220 (2009). Where the trial court finds that such an inference is appropriate, it is within that court's "broad discretion" to shape the contours of the inference's application by jury instruction. *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995); N.C.G.S. § 1A-1, Rule 51 (2025). Herein lies the difficulty for this Court sitting in review.

The spoliation of evidence in this case is remarkable. As the forensic analysist opined, "in his 35+ years of experience, he has never seen such extensive and coordinated deletions of evidence across so many electronic devices as he discovered in his forensic examination in this matter. The deletions have destroyed what the full picture of data would have been in this case." (Extraneities omitted.) Indeed, the Business Court found as a fact that "there are multiple instances in the record of [d]efendants deleting materials from their devices or completely 'wiping' their devices[,]" with the subject matter of at least some of the deleted material "directly address[ing] issues raised in this case." *Rel. Ins., Inc.*, 2024 WL 3549145, at *14.

The extensive spoliation of evidence renders meaningful review of many factual questions in this case exceedingly difficult. After granting plaintiffs' motion for adverse inference, the Business Court failed to identify with specificity where and how the inference should be drawn, leaving its scope unclear. As such, we remand the issue of spoliation for the Business Court to clarify, with greater precision, its application of the inference as to each claim. On remand, the Business Court should provide the parties to this case with its adverse inference instruction and specifically detail in its orders where the inference applies. With the Business Court's discretionary function more fully exercised, the parties (and *if necessary*, a court sitting in review) will be better equipped to understand its application.

Mindful of the adverse inference issue, we now address the legal questions properly presented on appeal.

B. Misappropriation of Trade Secrets

Plaintiffs brought misappropriation of trade secrets claims under both the federal Defend Trade Secrets Act (DTSA), 18 U.S.C.

§§ 1832–1839, and the North Carolina Trade Secrets Protection Act (NCTSPA), N.C.G.S. §§ 66-152 to 66-157 (collectively, the Acts). To bring a claim under the Acts, a claimant must sufficiently demonstrate that the information constitutes a "trade secret" and that the trade secret was subject to "misappropriation."

1. Definition of "Trade Secret"

[2] The DTSA defines a "trade secret" as follows:

> all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if—
>
> (A) the owner thereof has taken reasonable measures to keep such information secret; and
>
> (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

18 U.S.C. § 1839(3).[3]

The NCTSPA defines a "trade secret" as follows:

> business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
>
> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent

3. Moreover, the DTSA carves out information obtained by "reverse engineering, independent derivation, or any other lawful means of acquisition" from its trade secret definition. 18 U.S.C. § 1839(6)(B). This carve-out mirrors the NCTSPA definition.

> development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.C.G.S. § 66-152(3) (2025). In determining whether information constitutes a trade secret, North Carolina and federal courts consider six factors:

> (1) The extent to which the information is known outside the business; (2) the extent to which it is known to employees and others involved in the business; (3) the extent of measures taken to guard secrecy of the information; (4) the value of information to the business and its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could properly be acquired or duplicated by others.

Wells Fargo Ins. Servs. USA, Inc. v. Link, 372 N.C. 260, 278 (2019) (extraneities omitted); *see also TSG Finishing, LLC v. Bollinger*, 238 N.C. App. 586, 591–92 (2014); *Sterling Title Co. v. Martin*, 266 N.C. App. 593, 601 (2019); *Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc.*, 160 N.C. App. 520, 525 (2003); *Combs & Assocs., Inc. v. Kennedy*, 147 N.C. App. 362, 369–70 (2001); *State ex rel. Utils. Comm'n v. MCI Telecomms. Corp.*, 132 N.C. App. 625, 634 (1999); *Wilmington Star-News, Inc. v. New Hanover Reg'l Med. Ctr.*, 125 N.C. App. 174, 180–81 (1997); *Allstate Ins. Co. v. Fougere*, 79 F.4th 172, 188 (1st Cir. 2023).

These factors derive from the First Restatement of Torts. *See* Restatement (First) of Torts, § 757 (A.L.I. 1939). Rather than operating as a six-part test, the factors serve as an instructive guide for ascertaining whether a trade secret exists. *See SCR-Tech LLC v. Evonik Energy Servs. LLC*, No. 08 CVS 16632, 2011 WL 3209080, at *10 (N.C. Super. Ct. July 22, 2011); *see also IVS Hydro, Inc. v. Robinson*, 93 F. App'x 521, 527 (4th Cir. 2004) (unpublished); *Learning Curve Toys, Inc. v. PlayWood Toys Inc.*, 342 F.3d 714, 722 (7th Cir. 2003); *In re Bass*, 113 S.W.3d 735, 740 (Tex. 2003); *Minuteman, Inc. v. Alexander*, 434 N.W.2d 773, 777 (Wis. 1989); *Basic Am., Inc. v. Shatila*, 992 P.2d 175, 184 (Idaho 1999).

The Business Court below noted that the parties had not identified "any differences in the analysis to be applied to a claim under the DTSA as compared to one under the NCTSPA." Thus, the Business Court

determined it proper to address plaintiffs' DTSA and NCTSPA claims "in tandem." *Rel. Ins., Inc.*, 2024 WL 3549145, at *16. We agree with this approach and do the same. Indeed, "trade secret law varies little from state to state and is generally governed by widely recognized authorities such as the Restatement of Unfair Competition and the Uniform Trade Secrets Act." *TianRui Grp. Co. v. Int'l Trade Comm'n*, 661 F.3d 1322, 1327–28 (Fed. Cir. 2011).

As a preliminary matter, to even claim information is a trade secret, a plaintiff must first "identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur." *Krawiec v. Manly*, 370 N.C. 602, 609–10 (2018) (quoting *Washburn v. Yadkin Valley Bank & Tr. Co.*, 190 N.C. App. 315, 326 (2008)). Once identified, courts will then determine whether the requirements for a trade secret, as defined by statute, have been met. *Id.* at 610.

Below, plaintiffs identified several documents with sufficient particularity to bring their trade secrets claims. However, the Business Court found that three documents did not qualify as protectable trade secrets under the Acts. Plaintiffs appeal two of those documents: Gurley's Customer List and the Client Renewal List. Both documents are Excel spreadsheets containing various information about plaintiffs' clients. In other words, each constitutes a client list.

So long as the information meets each of the Acts' statutory requirements, client lists can qualify as a trade secret. *Id.* at 610; *James B. Oswald Co. v. Neate*, 98 F.4th 666, 676 (6th Cir. 2024). A client list, however, will not qualify as a trade secret where the record indicates that the list could have been compiled "through public listings such as trade show and seminar attendance lists." *Krawiec*, 370 N.C. at 610 (quoting *Combs & Assocs.*, 147 N.C. App. at 370). Similarly, a client list will also not qualify as a trade secret where there is no evidence "that the company took any special precautions to ensure the confidentiality of its customer information and any information used to contact the clients would have been easily accessible . . . through a local telephone book." *Id.* at 610–11 (extraneities omitted) (quoting *NovaCare Orthotics & Prosthetics E., Inc. v. Speelman*, 137 N.C. App. 471, 478 (2000)).

That said, "the inclusion of some information in compilations which could have been obtained from public sources does not mean the compilations [are] not trade secrets . . . when it would have been immensely difficult to collect and compile it in the form in which it appear[s] in the compilation." *Allstate Ins. Co.*, 79 F.4th at 189.

Whether certain information qualifies as a trade secret has repeatedly been characterized as a case-specific, factual determination. *See, e.g.*, *Syntel Sterling Best Shores Mauritius Ltd. v. The TriZetto Grp., Inc.*, 68 F.4th 792, 801 (2d Cir. 2023) ("The existence of a trade secret . . . is 'a fact-specific question to be decided on a case-by-case basis.' " (quoting *Oakwood Lab'ys LLC v. Thanoo*, 999 F.3d 892, 906 (3d Cir. 2021))); *Bimbo Bakeries USA, Inc. v. Sycamore*, 39 F.4th 1250, 1261 (10th Cir. 2022) ("Whether a compilation constitutes a trade secret is a fact-intensive inquiry."); *Decision Insights, Inc. v. Sentia Grp., Inc.*, 311 F. App'x 586, 592 (4th Cir. 2009) (unpublished) ("Whether or not a trade secret exists is a 'fact-intensive question to be resolved at trial.' " (quoting *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 419 (4th Cir. 1999))); *AvidAir Helicopter Supply, Inc. v. Rolls-Royce Corp.*, 663 F.3d 966, 971 (8th Cir. 2011) ("[T]he existence of a trade secret is a fact-intensive inquiry."); *Learning Curve Toys, Inc.*, 342 F.3d at 723 ("[T]he existence of a trade secret is not obvious; it requires an ad hoc evaluation of all the surrounding circumstances.").

From this then it follows that plaintiffs' trade secrets claims will fail at summary judgment if there is no evidence from which a reasonable juror could have found that the overall weight of the relevant six factors favors plaintiffs. With these legal principles in mind, we evaluate the two client lists, which the Business Court found did not qualify as protectable trade secrets.

a. Gurley's Customer List

Gurley's Customer List is an Excel spreadsheet containing the names and addresses of ninety-eight Relation clients serviced by Gurley. The Business Court summarily concluded that Gurley's Customer List was not a trade secret. It reasoned, "[t]he [c]ourt is unpersuaded that Gurley's Customer List should be characterized as a trade secret . . . [because] the basic compilation of client information found in Gurley's Customer List is not the type of compilation that is deserving of trade secret protection." *Rel. Ins., Inc.*, 2024 WL 3549145, at *20. We disagree.

Regarding the first factor, defendants testified that no online source provided those outside the business with a compilation of the clients serviced by plaintiffs. Defendants attempt to rebut this testimony by focusing on the fact that the names and addresses of the *individual* clients can be obtained online. However, this misconstrues the identified trade secret. Gurley's Customer List is a compilation of ninety-eight Relation clients. There is no evidence that such a compilation is publicly available or could have been compiled from public listings. As such, when

construing the evidence in the light most favorable to the non-moving party, plaintiffs have created a genuine issue of material fact as to the public availability of Gurley's Customer List. *See Penalty Kick Mgmt. Ltd. v. Coca Cola Co.*, 318 F.3d 1284, 1291 (11th Cir. 2003) ("The fact that some or all of the components of the trade secret are well-known does not preclude protection for a secret combination, compilation, or integration of the individual elements." (extraneities omitted)).

Regarding the second and sixth factors, plaintiffs presented evidence that Gurley could only recall three of his clients from memory. Defendants offered no evidence that other employees would have known Gurley's clients or had access to the list. Accordingly, there is a genuine issue of material fact regarding the extent to which the ninety-eight clients compiled on Gurley's Customer List were known to employees and others involved in the business and the ease or difficulty with which the information could properly be acquired or duplicated.

Regarding the third factor, plaintiffs presented evidence that their company computer systems were password protected. Defendants do not dispute this fact but rather argue that "the lack of more significant measures is a factor that militates against finding a trade secret." Defendants' argument ignores the summary judgment standard. Plaintiffs' evidence of password protection created a genuine issue of material fact as to the extent of measures taken to guard the secrecy of its client list.

Regarding the fourth factor, plaintiffs have shown that most of Gurley's new clients at Pilot can be identified on Gurley's Customer List. This clearly evinces a value of the list to the business and its competitors. As such, plaintiffs have created a genuine issue of material fact as to the value of Gurley's Customer List.

Regarding the fifth factor, plaintiffs presented an affidavit of an insurance brokerage industry expert, explaining that "[b]rokerages spend significant amounts of time and money to develop [their client lists]." Moreover, "[b]rokerages spend significant time, expense, and resources compiling information, even while some individual pieces of information may be found online or through other generally available resources." This evidence, combined with the fact that Gurley dedicated nearly a decade to acquiring and developing relationships with his clients at Relation, creates a genuine issue of material fact regarding the amount of effort or money expended in developing the list.

In sum, when construing the evidence in the light most favorable to the non-moving party, as we must do, there are genuine issues of

material fact as to whether Gurley's Customer List constitutes a trade secret under the Acts. We reverse the Business Court's conclusion that Gurley's Customer List cannot properly be characterized as a trade secret at the summary judgment stage.

b. Client Renewal List

The Client Renewal List is an Excel spreadsheet containing thirty-seven clients along with their associated insurance policy renewal dates for types of insurance policies, including "Medical," "Dental," and "Ancillary." The spreadsheet was emailed by King from her Relation account to her personal Gmail account on 18 February 2022—merely one day before she accepted her new position at Pilot. The Business Court concluded that the Client Renewal List did not qualify as a protectable trade secret, because "Relation has failed to demonstrate—based on the case law discussed above—that the information contained in the Client Renewal List is sufficient to warrant trade secret protection." *Rel. Ins., Inc.*, 2024 WL 3549145, at *21. For reasons similar to those stated above, we disagree.

Regarding the first factor, plaintiffs presented affidavits stating that a compiled list of Relation clients with their corresponding policy renewal dates cannot be found online. Defendants again respond by arguing that the names and specific policy renewal dates of *individual* clients can be obtained online. However, as made clear above, "the inclusion of some information in compilations which could have been obtained from public sources does not mean the compilations were not trade secrets." *See Allstate Ins. Co.*, 79 F.4th at 189. Defendants have not adequately shown that the Client Renewal List could easily be collected and compiled in the form in which it appears. Accordingly, there is a genuine issue of material fact as to the extent to which the information compiled in the Client Renewal List is known outside the business.

Regarding the second and sixth factors, plaintiffs have introduced evidence tending to demonstrate that King emailed the Client Renewal List to her personal email one day after she accepted her new role at Pilot. This conduct, at the very least, creates a reasonable inference that information contained in the Client Renewal List is not well known to those involved in the industry and that information cannot be properly acquired or duplicated by others with ease. As such, there is a genuine issue of material fact as to the second and sixth factors.

Regarding the third factor, our analysis from Gurley's Customer List controls. To reiterate, defendants do not dispute that plaintiffs' company computer systems were password protected but rather argue that "the

lack of more significant measures is a factor that militates against finding a trade secret." However, this argument ignores the summary judgment standard. For that reason, there is a genuine issue of material fact as to the extent of measures taken to guard the secrecy of its client lists.

Regarding the fourth factor, defendants maintain that the Client Renewal List was created for mere individual convenience, not to be of value to Relation after an employee's departure. However, plaintiffs have presented evidence of the Client Renewal List's value. For instance, plaintiffs have shown that a substantial portion of Lancaster's new Pilot clients are listed on the Client Renewal List taken from Relation. In addition, plaintiffs offered testimony illustrating the importance of knowing each client's renewal date, due to the industry being "very time-sensitive." As such, a genuine issue of material fact exists regarding the value of the Client Renewal List.

Regarding the fifth factor, our analysis largely tracks that for Gurley's Customer List. Plaintiffs produced an affidavit of an insurance brokerage industry expert, explaining that "[b]rokerages spend significant amounts of time and money to develop [their client renewal histories]" and "[c]lient renewal lists give brokerages the ability to calendar and prioritize their employees' activities, their interactions with their clients, and their interactions with insurance companies." The record reflects that King worked approximately a decade for plaintiffs, presumably developing her client relationships and maintaining those clients' renewal histories. Consequently, there is a genuine issue of material fact as to the amount of effort or money expended in developing the information contained on the Client Renewal List.

In sum, when construing the evidence in the light most favorable to the non-moving party, there are genuine issues of material fact as to whether the Client Renewal List constitutes a trade secret under the Acts. We reverse the Business Court's summary judgment conclusion that the Client Renewal List is not a protectable trade secret.

2. Definition of "Misappropriation"

[3] Once properly classified as a trade secret under the Acts, it must then be adequately shown that the trade secret was misappropriated. The misappropriation definition under the DTSA differs slightly from that articulated under the NCTSPA.

Under the DTSA, "misappropriation" is defined as follows:

> (A) acquisition of a trade secret of another by a person who knows or has reason to know that

the trade secret was acquired by improper means; or

(B) disclosure or use of a trade secret of another without express or implied consent by a person who—

(i) used improper means to acquire knowledge of the trade secret;

(ii) at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was—

(I) derived from or through a person who had used improper means to acquire the trade secret;

(II) acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the use of the trade secret; or

(III) derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret or limit the use of the trade secret; or

(iii) before a material change of the position of the person, knew or had reason to know that—

(I) the trade secret was a trade secret; and

(II) knowledge of the trade secret had been acquired by accident or mistake.

18 U.S.C. § 1839(5).

The NCTSPA, for its part, defines "misappropriation" as "acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret." N.C.G.S. § 66-152(1) (2025). The NCTSPA then sets forth criteria to establish a prima facie case of misappropriation. *See* N.C.G.S. § 66-155 (2025). Specifically, § 66-155 of the NCTSPA states:

> Misappropriation of a trade secret is prima facie established by the introduction of substantial evidence that the person against whom relief is sought both:
>
> (1) Knows or should have known of the trade secret; and
>
> (2) Has had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner.

N.C.G.S. § 66-155.

In construing § 66-155(2), the Business Court explained:

> Evidence that a former employee had access to, and therefore an "opportunity to acquire," an employer's trade secrets, without more, is not sufficient to establish a prima facie case of misappropriation. Rather the employer must establish either that the former employee accessed its trade secrets without authorization or provide other sufficient evidence of misappropriation to raise an inference of actual acquisition or use of its trade secrets.

Rel. Ins., Inc., 2024 WL 3549145, at *29 (quoting *Am. Air. Filter Co. v. Price*, No. 16 CVS 13610, 2017 WL 485517, at *8 (N.C. Super. Ct. Feb. 3, 2017)).

Plaintiffs dispute the Business Court's reading of § 66-155. In their view, "a prima facie case is established when an employee worked with and had access to a trade secret during his employment." Stated differently, in the employment context, plaintiffs contend that all a claimant must show is that the employee had a specific opportunity to acquire the trade secret and nothing more. We agree that the NCTSPA encompasses a "specific opportunity to acquire," but we disagree that the inquiry ends there.

By its plain terms, the NCTSPA encompasses both a specific opportunity to acquire a trade secret and actual acquisition of a trade secret. That said, a specific opportunity to acquire alone is not enough. To establish a prima facie case, the specific opportunity to acquire must also be "without the express or implied consent or authority of the owner." N.C.G.S. § 66-155(2).

Upon initial observation, when reading § 66-155(2) it is not plainly obvious whether the condition of "without the express or implied consent or authority of the owner" attaches to the phrase "[h]as had a specific opportunity to acquire [the trade secret] for disclosure or use[.]" However, this uncertainty is clarified upon consulting the definition of misappropriation.

Misappropriation is defined as the "acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent[.]" N.C.G.S. § 66-152(1). Thus, the condition "without express or implied authority or consent" clearly attaches to the phrase "acquisition, disclosure or use."

When construing statutes, we are instructed that "[s]tatutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each." *Bd. of Adjustment of Swansboro v. Town of Swansboro*, 334 N.C. 421, 427 (1993). Accordingly, to harmonize the two provisions and give effect to the definition set forth in § 66-152(1), we must read § 66-155(2) as requiring both (i) a specific opportunity to acquire *and* (ii) an absence of express or implied consent or authority to disclose or use the trade secret. Moreover, a common sense reading of the statute likewise supports such an interpretation.

This, in turn, means that an employer cannot state a prima facie case against its employee merely by showing that it gave the employee access to its trade secrets at some point. Rather, an employer must show that the employee had the specific opportunity to acquire the trade secret after the employer's express or implied consent or authority ceased to exist.

The Business Court's construction of § 66-155(2) traces back to a Fourth Circuit panel that was tasked with predicting how this Court would read our State's misappropriation statute. *See RLM Commc'ns, Inc. v. Tuschen*, 831 F.3d 190, 200 (4th Cir. 2016) (analyzing § 66-155(2) after observing, "the Supreme Court of North Carolina . . . has not had occasion to consider the meaning of the statute"). The Fourth Circuit concluded that § 66-155(2) requires "evidence that the defendant actually acquired or used trade secrets." *Id.* This conclusion, however, reads the phrase "[h]as had the specific opportunity to acquire" out of the statute, in contravention with our rules of statutory construction. *See N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201 (2009) ("[W]e give every word of the statute effect, presuming that the legislature carefully chose each word used.").

The Fourth Circuit's reading was shaped principally by its fear of an undesirable outcome, rather than by the text itself. *RLM Commc'ns, Inc.*, 831 F.3d at 200. In its view, if evidence of an opportunity to acquire were permissible, "[e]very employee in North Carolina who had access to her employer's trade secrets but did not acquire them would have to go to trial to fend off the employer's claim of misappropriation." *Id.*

We take a different view. As explained above, mere access to a trade secret alone is insufficient. There must also be an absence of express or implied consent or authority at the time that the employee had a specific opportunity to acquire the trade secret.

While our construction of § 66-155(2) differs slightly from that articulated by the Fourth Circuit and the Business Court below, it functions in much the same way. To illustrate, § 66-155(2) explicitly states that the opportunity to acquire the trade secret must be a "*specific* opportunity." N.C.G.S. § 66-155(2) (emphasis added). Around the time that § 66-155 was enacted, The American Heritage Dictionary defined "specific" to mean "[e]xplicitly set forth; particular; definite." *Specific*, The American Heritage Dictionary (New College ed. 1980). "Specific" is a limiting term. As such, we are to give a narrow construction of what might be considered a specific opportunity. *See N.C. Dep't of Corr.*, 363 N.C. at 201 ("[W]e give every word of the statute effect . . . .").

Our narrow construction of what qualifies as a "specific opportunity to acquire" effectively mirrors the Business Court's understanding of § 66-155(2). For example, a "specific opportunity to acquire" "without express or implied consent or authority" might include an identifiable instance of a defendant downloading or accessing a trade secret beyond the scope of that defendant's tasks and duties or without express consent.

This sort of evidence aligns with what courts have found sufficient to establish a prima facie case of misappropriation. *Contrast, e.g., Amerigas Propane, L.P. v. Coffey*, No. 14 CVS 376, 2015 WL 6093207, at *13 (N.C. Super. Ct. Oct. 15, 2015) (holding that a prima facie case of misappropriation was not established where the claimant "ha[d] not offered evidence that [the defendant-employee] accessed or downloaded customer information from [the plaintiff's] computer database in connection with his departure from the company"), *with, e.g., Med. Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 659 (2009) (holding that a prima facie case of misappropriation was established where a defendant, just prior to joining a business competitor, "accessed [the plaintiff's] 'game plan' and other confidential documents from [the plaintiff's] network with unusual frequency").

In short, the plain language of § 66-155(2) permits a claimant to establish a prima facie case of misappropriation with substantial evidence of a specific opportunity to acquire the trade secret—so long as that specific opportunity occurred absent consent or authority of the owner. A specific opportunity must be a discrete, identifiable instance of means to access the trade secret. Therefore, while our construction of § 66-155(2) differs from that stated by the Business Court, it functions much the same.

Once a plaintiff establishes a prima facie claim, a defendant may rebut that claim by introducing "substantial evidence" that the defendant "acquired the information comprising the trade secret by independent development, reverse engineering, or it was obtained from another person with a right to disclose the trade secret." N.C.G.S. § 66-155; *see also* 18 U.S.C. § 1839(6)(B).

a. Crooker's Production Analysis

The Business Court dismissed plaintiffs' NCTSPA and DTSA claims against Crooker for retaining a paper copy of a document called "Crooker's Production Analysis." The court reasoned that plaintiffs had not established a prima facie case of misappropriation, because "there is no evidence that [Crooker] ever forwarded, printed or accessed the document following his termination." *Rel. Ins., Inc.*, 2024 WL 3549145, at *30.

On appeal, plaintiffs cite evidence suggesting that Crooker "took [Crooker's Production Analysis] from Relation and had it during litigation to provide to his attorney." Thus, plaintiffs appear to argue that possession alone is sufficient to establish a prima facie claim of misappropriation. Not so. By their plain terms, the NCTSPA and DTSA require that the conduct be made without "consent or authority of the [trade secret's] owner," N.C.G.S. § 66-155(2), or "by improper means," 18 U.S.C. § 1839(5). Plaintiffs do not provide any evidence to suggest that Crooker acquired, had a specific opportunity to acquire, or used the document *without consent or authority*. As such, the allegations and cited evidence on appeal would fall short of establishing misappropriation.

Even still, the shortcomings related to Crooker's Production Analysis stem from a lack of evidence. As recognized above, the Business Court granted plaintiffs' motion for adverse inference. The adverse inference specifically relates to factual defects in plaintiffs' claims. Therefore, to safeguard the Business Court's full exercise of its discretionary function, we reverse and remand the trade secrets claims related to Crooker's Production Analysis.

C. Breach of Non-Solicitation Clauses of Employment Agreements

In their complaint, plaintiffs asserted breach of contract claims against the Former Employees for allegedly breaching the Non-Solicitation-of-Employees and Non-Solicitation-of-Clients Provisions (collectively, Non-Solicitation Provisions or Provisions) contained in the Employment Agreements.

On 13 April 2022, plaintiffs filed an emergency motion for preliminary injunction (PI Motion) with the Business Court. In their PI Motion, plaintiffs requested that the Business Court prohibit and restrain defendants from committing any acts in violation of the Non-Solicitation Provisions.

The Business Court denied plaintiffs' PI Motion, finding that the Non-Solicitation Provisions were likely unenforceable as a matter of law. Then, in its subsequent Summary Judgment Order, the Business Court explained "that the analysis contained in its [order on plaintiffs' PI Motion] remains legally correct." *Rel. Ins.*, *Inc.*, 2024 WL 3549145, at *31. The Business Court later concluded, at the summary judgment stage, that the Non-Solicitation Provisions in the Employment Agreements are "unenforceable as a matter of law." *Id.* at *32.

Plaintiffs appeal the Business Court's conclusion that the Provisions are unreasonably broad and therefore unenforceable. In plaintiffs' view, the Non-Solicitation Provisions are sufficiently narrow to only protect Relation's legitimate business interests.

The Non-Solicitation Provisions contained in each Former Employee's Employment Agreement are substantively identical. The only term that varies among the Employment Agreements is the duration for which the restrictions apply: for producers, the Non-Solicitation Provisions last two years; meanwhile, for account managers, the Non-Solicitation Provisions last just one year. To illustrate the Provisions' material terms, we restate the relevant language from Linthicum's Employment Agreement.

The Non-Solicitation-of-Clients Provision provides, in pertinent part, that the "Employee will not, either directly or indirectly:"

> (i)(A) solicit, or attempt to solicit[,] the insurance or employee benefit plan business of any Client . . . ,
>
> (B) solicit, or attempt to solicit[,] the insurance or employee benefit plan business of any Prospective Client . . . ,

(C) induce Clients to terminate, cancel, not renew or not place business with the Company or any other member of the Ascension Group,

(D) induce Prospective Clients to terminate, cancel, not renew or not place business with the Company or any other member of the Ascension Group,

(E) perform insurance or benefits services of the type sold or provided by the Company or other member of the Ascension Group during the last twelve months of Employee's employment with the Company on behalf of any Clients,

(F) perform insurance or benefits services of the type sold or provided by the Company or other member of the Ascension Group during the last twelve months of Employee's employment with the Company on behalf of any Prospective Clients,

(G) supervise the performance of insurance or benefits services of the type sold or provided by the Company or other member of the Ascension Group during the last twelve months of Employee's employment with the Company on behalf of any Clients, or

(H) supervise the performance of insurance or benefits services of the type sold or provided by the Company or other member of the Ascension Group during the last twelve months of Employee's employment with the Company on behalf of any Prospective Clients.[4]

The restrictions contained in the Non-Solicitation-of-Clients Provision are then limited by the following terms: "The foregoing restrictions . . . shall apply only to those Clients or Prospective Clients with whom

4. As previously discussed, for present-day purposes, "Ascension Group" is now known as "Relation Insurance, Inc." The entity of Ascension Group never changed, just its name. As such, "Ascension Group" contained in the Employment Agreements is understood to as mean referring to Relation.

Employee had material contact or about whom Employee obtained Confidential Information during the last twelve (12) months of Employee's employment with the Company."

The Employment Agreement defines "material conduct" as "interaction between Employee and a Client or Prospective Client that was intended to further the business relationship of the Company, or of any other member of the Ascension Group."

The Employment Agreement defines "Confidential Information" as "all information of a confidential or proprietary nature . . . in any form or medium, that relates to or results from the business . . . of the Company or of any other member of the Ascension Group." This definition explicitly extends to, "without limitation": (i) "Client and Prospective Client lists," which include "identifying information"; (ii) "information about and personnel files of employees of the Company or any other member of the Ascension Group, former employees of the Company or any other member of the Ascension Group"; and (iii) "any other information developed or used by the Company or the Ascension Group that is not known generally to the public and that gives the Company or any member of the Ascension Group an advantage in the marketplace."

The Non-Solicitation-of-Employees Provision provides, in pertinent part, that "Employee will not, either on Employee's own account or on behalf of any person . . . or entity, recruit or solicit for employment, [or] attempt to recruit or solicit for employment[,] . . . any employee of the Company or of any other member of the Ascension Group."

The restrictions contained in the Non-Solicitation-of-Employees Provision are then limited to those employees

> (A) with whom Employee came into contact during Employee's last twelve (12) months of employment with the Company or other member of the Ascension Group, or about whom Employee obtained Confidential Information during Employee's last twelve (12) months of employment with the Company or other member of the Ascension Group, and (B) who is known by Employee at the time of such recruitment . . . to then be employed by the Company or any other member of the Ascension Group.

"Confidential Information" retains the same definition as that stated above.

1. Collateral Estoppel

[4] Before turning to the merits of plaintiffs' claims, defendants seek to invoke the doctrine of collateral estoppel to estop plaintiffs from enforcing the Non-Solicitation Provisions of the Employment Agreements. As their basis for invoking the doctrine, defendants point to the Smythe Order—the interlocutory order in the Smythe Lawsuit. The Smythe Order found that the restrictive covenants contained in Smythe's employment agreement "are too broadly written and are unenforceable . . . as a matter of law." The restrictive covenants contained in Smythe's employment agreement were substantially similar to those contained in the Former Employees' Employment Agreements. The Smythe Order nevertheless denied Smythe's motion to dismiss the breach of contract claim on the grounds that another provision contained in the employment agreement was enforceable. The Smythe Lawsuit was subsequently settled by the Settlement Agreement.

To assert defensive-use collateral estoppel, the following elements must be established:

> (1) a valid final judgment on the merits in a previous suit; (2) the later suit involves identical issues; (3) the issue was actually litigated in the prior suit and necessary to the judgment; (4) the issue was actually determined; and (5) the party to be collaterally estopped was a party or in privity with a party to the prior suit, who had a full and fair opportunity to litigate the issue in the earlier action.

In re A.D.H., 388 N.C. 578, 586 (2025).

Importantly, where a claim ends by settlement agreement, it cannot be said that the relevant issues were actually litigated or necessary to the judgment. *See Arizona v. California*, 530 U.S. 392, 414 (2000) ("In the case of a judgment entered by confession, consent, or default, none of the issues [are] actually litigated." (quoting Restatement (Second) of Judgments § 27 (A.L.I. 1982))). Thus, "settlements ordinarily occasion no *issue preclusion* (sometimes called collateral estoppel), unless it is clear . . . that the parties intend their agreement to have such an effect." *Id.*

The issues related to the Non-Solicitation Provisions contained in the Smythe Order were ultimately resolved by the Settlement Agreement. The Settlement Agreement contains no provisions expressing the parties' intent to incorporate the Smythe Order's finding that his employment agreement's non-solicitation provisions were unenforceable. As

such, defendants cannot establish that the unenforceability of the Non-Solicitation Provisions was actually litigated and necessary to the judgment. Plaintiffs are not collaterally estopped from seeking enforcement of the Provisions now.

2. Enforceability of Clauses

[5] The enforceability of a contract's covenants turns on five elements. The covenant must be: "(1) in writing; (2) reasonable as to terms, time, and territory; (3) made a part of the employment contract; (4) based on valuable consideration; and (5) not against public policy." *Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 228 (1990).

The Business Court found that the Employment Agreements' restrictive covenants were unreasonable as to the terms, time, and territory as well as against public policy. "The reasonableness of a [restrictive] covenant is a matter of law for the court to decide." *Wells Fargo Ins. Servs.*, 372 N.C. at 267. The burden is on the party seeking enforcement of a restrictive covenant to prove its reasonableness. *Id.*

On appeal, defendants maintain that the Non-Solicitation Provisions are unenforceable for the same reasons articulated in *Wells Fargo*. Specifically, defendants argue that two terms contained in the Non-Solicitation Provisions stretch the restrictions too broadly—"Ascension Group" and "Confidential Information."

In *Wells Fargo*, it was emphasized that the sheer scope of the company and its affiliates rendered the non-solicitation provisions unreasonable. *Id.* at 268–69. The opinion remarked that, according to publicly available data, "Wells Fargo employed over 269,000 full-time employees" and its subsidiaries included companies engaged in business distinct from the business in which the defendant had been employed. *Id.* at 269. In other words, in evaluating the enforceability of such provisions, great weight is afforded to size and scope of the company and its affiliates where a non-solicitation provision is tied to such entities. *See also Med. Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 657 (2009) (concluding the restrictive covenants were unenforceable where the provisions "foreclose[d] the solicitation of clients and employees of . . . an unrestricted and undefined set of [the plaintiff's] affiliated companies that engage[d] in business distinct from the . . . business in which [the defendant] had been employed").[5]

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5. This approach mirrors the one taken in the non-compete restrictive covenant context too. There our courts evaluate the reasonableness of a covenant based upon

The scope of each Former Employee's Non-Solicitation Provision is directly tied to "the Company or any other member of the Ascension Group." To illustrate, the Non-Solicitation-of-Employees Provisions provide that all Former Employees must "not . . . recruit or solicit for employment" or "attempt to recruit or solicit for employment . . . any employee of the Company or of any other member of the Ascension Group." The same is true for the Non-Solicitation-of-Clients Provisions. The scope of each of these provisions expressly stretches across "the Company [and] any other member of the Ascension Group" through the definition of "material contact" and "Confidential Information." Accordingly, it is critical for this Court to possess facts regarding the size and scope of Relation and its affiliated members for our legal analysis.

In its Summary Judgment Order, the Business Court believed that plaintiffs had failed to identify the members of Relation Insurance. This consequently left the Business Court with no information to understand the breadth of the Provisions. The Business Court explained that the Non-Solicitation-of-Employees Provisions, as written, "would foreclose the solicitation of an employee of any of [p]laintiffs' unnamed affiliate companies, potentially precluding solicitation of employees who are engaged in business activities wholly distinct from those as to which the Former Employees had been engaged." *Rel. Ins., Inc.*, 2024 WL 3549145, at *32.

On appeal, plaintiffs cite to an "Organizational Chart" seemingly outlining all of Relation Insurance Holdings, LLC's subsidiaries to illustrate the size and scope of the term "the Company or any other member of [Relation]." Based on this chart alone, plaintiffs claim that "the identity of the employer entity and its operating subsidiaries encompassed by the Former Employees' [E]mployment [A]greements is not in dispute."

However, at oral arguments, plaintiffs reversed course, telling this Court that there *is* a factual dispute as to the meaning and identity of Relation and its affiliated members. Oral Argument at 57:20–57:40, *Rel. Ins., Inc. v. Pilot Risk Mgmt. Consulting LLC* (No. 68A25) (N.C. May 22, 2026), https://www.youtube.com/watch?v=mb2vkq3YnMk (hereinafter Oral Argument). Plaintiffs insisted that such a factual dispute "needs to be decided by a jury." Oral Argument at 57:30–57:40. Defendants, for their part, explained at oral arguments that plaintiffs created and

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the geographic territory the restriction spans. *Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC*, 368 N.C. 693, 698 (2016).

produced the Organizational Chart in discovery, thus constituting inadmissible hearsay. Oral Argument at 34:47–35:20.

Based upon the record before us, we cannot determine whether the Organizational Chart was ever properly presented to the Business Court. We also cannot determine whether the Organizational Chart constitutes inadmissible hearsay. As such, we remand this evidentiary dispute to the Business Court to resolve. In doing so, we emphasize that the burden is on plaintiffs to prove the reasonableness of their Non-Solicitation Provisions. *Wells Fargo Ins. Servs.*, 372 N.C. at 267. Further, Rule 56(e) requires affidavits supporting or opposing a motion for summary judgment to "be made on personal knowledge, [and to] set forth such facts as would be admissible in evidence, and . . . show affirmatively that the affiant is competent to testify to the matters stated therein." N.C.G.S. § 1A-1, Rule 56(e).

In sum, the breadth of each non-solicitation provision is linked to the size and scope of Relation and its affiliated members. *Wells Fargo* underscores the importance of a company's size and scope to the legal enforceability of restrictive covenants where those covenants explicitly tether their restrictions to the company. 372 N.C. at 268–69. We remand plaintiffs' breach of contract claim (which seeks to enforce the Non-Solicitation Provisions) to the Business Court, because there are evidentiary disputes regarding the size and scope of Relation and its affiliated members. In doing so, we emphasize that plaintiffs bear the burden of proving the reasonableness of their Non-Solicitation Provisions, and plaintiffs cannot oppose a summary judgment motion based upon incompetent evidence, such as hearsay.

3. Blue-Pencil Doctrine

[6] Finally, plaintiffs asked the Business Court, in the alternative, to apply the "blue-pencil" doctrine to save their Non-Solicitation Provisions if the court were to find those provisions to be unenforceable.

The blue-pencil doctrine is a doctrine in equity, designed to save a contract where particular restrictions are deemed unreasonable and unenforceable. *Welcome Wagon Int'l, Inc. v. Pender*, 255 N.C. 244, 248 (1961). It is a "kind of selective enforcement" of various covenants contained in a single contract. 6 Richard A. Lord, *Williston on Contracts* § 13:31 (4th ed. 2025). Generally, under the blue-pencil doctrine, courts "will sever unreasonable, divisible portions and then enforce the reasonable parts that remain, usually without rewriting the covenant by adding, changing, or rearranging terms." *Id.*

"North Carolina has adopted the 'strict blue[-]pencil doctrine' under which a court cannot rewrite a faulty [restrictive covenant] but [instead] may enforce divisible and reasonable portions of the covenant . . . ." *Beverage Sys. of the Carolinas, LLC*, 368 N.C. at 696; *see also Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 528 (1989) ("If the contract is separable, however, and one part is reasonable, the courts will enforce the reasonable provision.").

North Carolina's strict application of the doctrine stems from our traditional contract law rule that "[t]he courts will not rewrite a contract if it is too broad but will simply not enforce it." *Whittaker Gen. Med. Corp.*, 324 N.C. at 528. In the employment context, especially, this strict application makes practical sense as well.

As other courts have observed, "[f]or every agreement that makes its way to court, many more do not." *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1286 (Ariz. 1999). Overly broad restrictions can have an *in terrorem* effect on departing employees. *Id.*; *Hassler v. Circle C. Res.*, 505 P.3d 169, 177 (Wyo. 2022). Under a liberal blue-pencil standard, employers are encouraged to create ominous covenants, knowing that if the provisions are contested, courts will modify the agreement to make it enforceable—all the while maintaining the added benefit that departing employees may adhere to the onerous covenant without challenge.

To avoid this injustice, North Carolina courts will only blue-pencil an unreasonable covenant that is "separable" or "divisible" from the reasonable, enforceable covenant. *Whittaker Gen. Med. Corp.*, 324 N.C. at 528; *Beverage Sys. of the Carolinas*, 368 N.C. at 696. Only those separable or divisible covenants may be fairly stricken out. This is rooted in the notion that a natural reading of such a contract would indicate that the parties separately intended to agree to each separable covenant. In other words, the agreement to one covenant is not influenced by the agreement to another. Therefore, maintaining the enforceability of a separate, reasonable covenant preserves the parties' contractual intent to the greatest extent practicable while not altering the bargained-for exchange.

Below, the Business Court "decline[d] to consider application of the 'blue[-]pencil' doctrine because Relation (as the party seeking application of the doctrine) ha[d] not met its burden of demonstrating precisely how it c[ould], or should, be applied on these facts." *Rel. Ins., Inc.*, 2024 WL 3549145, at *32. Plaintiffs, in their reply brief to this Court, narrow their request for blue-penciling. Specifically, plaintiffs ask that the "Ascension Group" term be rewritten as:

> the Company ~~or with any other member of the Ascension Group~~.

Further, plaintiffs request that the term "Confidential Information" be rewritten as:

> During the Restriction Period, the foregoing restrictions . . . shall apply only to those Clients with whom Employee had Material Contact ~~or about whom Employee obtained Confidential Information within twelve (12) months prior to the Termination Date~~.

On appeal, issues related to blue-penciling are reviewed de novo. *See generally Welcome Wagon Int'l*, 255 N.C. at 248.

By our own count, plaintiffs' request to blue-pencil only the "Ascension Group" term results in striking at least forty-six separate clauses contained within various provisions of just one of the seven total Employment Agreements. Simply stated, plaintiffs are seeking to invoke the blue-pencil doctrine for interlineation deletions in over forty different places throughout a single contract. As detailed above, North Carolina's strict application of the blue-pencil doctrine does not allow courts to surgically excise language. The provision sought to be removed must be separable or divisible from the provision sought to be enforced. Since plaintiffs do not request blue-penciling of a separable, divisible provision from an otherwise enforceable provision, blue-penciling cannot apply. We remand the Non-Solicitation Provisions as they are written.

D. Breach of the Settlement Agreement

[7] At the Business Court, plaintiffs brought claims for breach of the Settlement Agreement against Smythe, Capps, Kinney, and Pilot. The Settlement Agreement, in relevant part, prohibited Pilot from soliciting any employee of Relation "through and including" 31 March 2021. The Business Court found that its "review of the record fails to reveal any evidence of solicitations of Relation employees by [Pilot] during the period from 11 March 2021 and 31 March 2021." *Rel. Ins., Inc.*, 2024 WL 3549145, at *38. Instead, the Business Court observed that "Relation has merely shown that Crooker [and Pilot] were clients of the same attorney at the same time" and that there were "several chance encounters between a Relation employee and one of the Managing Members of [Pilot] in a public place." *Id.* at *38–39.

Before this Court, plaintiffs argue that the Business Court improperly drew factual inferences in favor of the moving party, *defendants*,

rather than plaintiffs. Moreover, plaintiffs explain that "the one reason there was not *more* evidence was because of [d]efendants' spoliation."

Plaintiffs' arguments on appeal directly invoke the adverse inference issue that the Business Court failed to identify with specificity. For the reasons articulated above, we reverse and remand plaintiffs' claim for breach of the non-solicitation-of employees-clause of the Settlement Agreement for the Business Court to exercise its discretionary function.

E. Unjust Enrichment

[8] Below, plaintiffs brought an unjust enrichment claim against all defendants, alleging defendants received plaintiffs' confidential information, clients, and employees and then intentionally leveraged that information for Pilot's benefit. The Business Court granted defendants' motion for summary judgment as to the claim on the grounds that plaintiffs' claim for breach of the confidentiality provisions of the Employment Agreements "encompasses the same subject matter as the unjust enrichment claim." *Rel. Ins., Inc.*, 2024 WL 3549145, at *42. We affirm the Business Court's grant of summary judgment, but on alternative grounds.

A claim for unjust enrichment is "a claim in quasi contract or a contract implied in law." *Booe v. Shadrick*, 322 N.C. 567, 570 (1988). "The claim is not based on a promise but is imposed by law to prevent an unjust enrichment." *Id.* As such, "[i]f there is a contract between the parties[,] the contract governs the claim and the law will not imply a contract." *Id.* To establish a claim for unjust enrichment, a plaintiff must prove that: (1) the plaintiff conferred a benefit on another party; (2) the other party consciously accepted the benefit; and (3) the benefit was not conferred gratuitously or by an interference in the affairs of the other party. *Se. Shelter Corp. v. BTU, Inc.*, 154 N.C. App. 321, 330 (2002) (citing *Booe*, 322 N.C. at 570).

Plaintiffs, on appeal, dispute which provision of the Employment Agreements encompasses their unjust enrichment claim. Plaintiffs suggest that it is the Non-Solicitation Provisions that pertain to their unjust enrichment claim, not the confidentiality provisions of the Employment Agreements. On this basis, plaintiffs' unjust enrichment claim may serve as an "alternative claim" if the Non-Solicitation Provisions are deemed unenforceable. *See Bandy v. Gibson*, No. 16 CVS 456, 2017 WL 3207068, at *4 (N.C. Super. Ct. July 26, 2017) (recognizing that a claimant may plead an express contract and a claim for unjust enrichment in the alternative). Meanwhile, defendants argue that unjust enrichment "only applies where the 'contract as a whole,' rather than any 'particular

clause,' is invalid." In our view, however, plaintiffs' unjust enrichment claim fails for a more straightforward reason.

The underlying basis for plaintiffs' unjust enrichment claim is that the Former Employees took or wrongfully retained Relation's clients, employees, and confidential information and gave them to Pilot. However, a taking and transferring of another's property without permission is not a willing transfer. Accordingly, plaintiffs have not shown that they "*conferred*" the benefits on defendants. *See*, *e.g.*, *KNC Techs., LLC v. Tutton*, No. 19 CVS 793, 2019 WL 6219035, at *14 (N.C. Super. Ct. Oct. 9, 2019) ("Alleging merely that the [d]efendants have taken for themselves some benefit to which [the] [p]laintiff believes it is rightfully entitled does not state a claim for unjust enrichment."); *Chisum v. Campagna*, No. 16 CVS 2419, 2017 WL 5161978, at *11 (N.C. Super. Ct. Nov. 7, 2017) (explaining that there is no unjust enrichment claim where a plaintiff "does not allege that he conferred any benefit on [the defendants], but rather only that the [defendants] 'received' or 'wrongfully retained' benefits from their alleged misconduct").

Plaintiffs have not established a claim for unjust enrichment. Accordingly, we affirm summary judgment as to this claim.

F. Computer Fraud and Abuse Act

[9] Plaintiffs brought claims for computer trespass under both federal and state law against the Former Employees. The Business Court granted the Former Employees' motion for summary judgment only as to plaintiffs' federal law claim brought under the Computer Fraud and Abuse Act of 1986 (CFAA). 18 U.S.C. § 1030.

The CFAA subjects to liability anyone who "intentionally accesses a computer *without authorization or exceeds authorized access*" and thereby obtains computer information. *Id.* § 1030(a)(2) (emphasis added).[6] Based on its understanding of the statutory language "exceeds authorized access," the Business Court found that "there is no evidence of any unauthorized access by the Former Employees." *Rel. Ins., Inc.*, 2024 WL 3549145, at *44. Plaintiffs appealed.

On appeal, plaintiffs argue that their claim is "based on evidence that the Former Employees exceeded the scope of the access they were provided, including after their employment at Relation." In plaintiffs' view, evidence of access *after* employment and continued use of confidential

6. In addition, civil actions under the CFAA are limited to actions where a party has suffered a loss of at least $5,000 during a one-year period. 18 U.S.C. § 1030(c)(4)(A)(i)(I).

documents *after* employment falls within the CFAA's "exceeds authorized access" prohibition. We agree in part.

The Business Court relied upon *Van Buren v. United States*, 141 S. Ct. 1648 (2021), to discern the meaning of the phrase "exceeds authorized access." In *Van Buren*, a police sergeant in Georgia used his patrol-car computer to access the state law enforcement computer database with his valid credentials. *Id.* at 1653. However, the search he conducted was entirely unrelated to his police sergeant duties. *Id.* Instead, the sergeant conducted his search to retrieve information about a particular license plate number in exchange for money. *Id.*

The Supreme Court of the United States held that the improper search fell outside the scope of the CFAA's "exceeds authorized access" prohibition. *Id.* at 1662. In construing the phrase "exceeds authorized access," the Court adopted a "gates-up-or-down inquiry." *Id.* at 1658–59. Under this inquiry, courts need not determine whether a defendant obtained information for an "improper purpose," but instead must analyze whether a defendant obtained the information on a computer system or within an area of the computer system that is "off limits to him." *Id.* at 1662.

While *Van Buren*'s "gates-up-or-down" test is instructive, the case does not confront the distinct issue of post-employment access. However, the federal courts of appeals have had such occasions to confront the issue. Their cases are particularly helpful to the arguments presented here.

United States v. Eddings, 161 F.4th 199 (3d Cir. 2025), a Third Circuit case, directly addresses post-employment computer access under the CFAA. At the outset, *Eddings* observed that the governing framework for post-employment conduct typically turns on the CFAA's "without authorization" prohibition rather than its "exceeds authorized access" limitation. *Id.* at 201. *Eddings* then formulated a simple standard for identifying "without authorization." The *Eddings* standard provides that, absent an applicable contract or policy, the employer must take some "affirmative act" to rescind permission to access the employer's computer. *Id.* at 206. In essence, employee resignation alone is "not enough." *Id.* at 205.

What, precisely, constitutes an "affirmative act" to rescind permission is not conclusively defined. Indeed, "[s]o long as there is evidence the employer took some step to rescind the employee's permission, it is up to the jury to decide whether, as a matter of fact, that action

sufficed." *Id.* at 209. Even so, certain acts have been recognized as sufficient for revoking access, including the issuance of a cease-and-desist letter, *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1067 (9th Cir. 2016); the revocation of login credentials, *United States v. Nosal*, 844 F.3d 1024, 1036 (9th Cir. 2016), *overruled in part on other grounds by Lagos v. United States*, 584 U.S. 577 (2018); and the firing of a former employee, *United States v. Shahulhameed*, 629 F. App'x 685, 688 (6th Cir. 2015) (unpublished), *cited with approval in Abu v. Dickson*, 107 F.4th 508, 516 (6th Cir. 2024).

On appeal, plaintiffs point to three instances of Former Employees exceeding authorized access to establish their CFAA claim. We address each in turn.

1. King's Access of "Carrier Portals"

First, plaintiffs contend that King accessed Relation's "carrier portals" and "gave everyone at Pilot access to Relation's account on a carrier's website" after leaving Relation. To substantiate this first allegation, plaintiffs cite to several documents in the record clearly indicating that, on 26 April 2022, King logged into her old Relation account to access a vendor portal, causing a series of security alerts to Relation staff. The security alerts indicated that several other Pilot employees, including Kinney, accessed the same Relation vendor portal. And significantly, King's access of the portal occurred nearly two months after Relation issued its cease-and-desist letter to King and two weeks after plaintiffs filed their PI Motion in this matter.

Based on federal circuit precedent, the 1 March 2022 cease-and-desist letter to King revoked her authorization to access old Relation accounts. *Facebook*, 844 F.3d at 1067 (holding that "[a plaintiff] expressly rescinded . . . permission when [the plaintiff] issued its written cease and desist letter to [the defendant]"). In fact, the cease-and-desist letter explicitly directed King to "NOT . . . use . . . [or] transfer . . . any Company property or confidential information you have stored on any mobile device, computer, . . . or any other cloud-based storage program . . . including but not limited to any emails, production reports, customer lists, policy and contract renewal and expiration dates and data."

This instruction was sufficient to inform King that her access to Relation property, including online accounts, had been revoked. As such, plaintiffs have presented sufficient evidence that King's access of and distribution of access to the "carrier portals" was "without authorization" under the CFAA.

The Business Court erred in awarding defendant King summary judgment as to plaintiffs' CFAA claim against King on the basis that she had not accessed information "without authorization."

2. Crooker's Access of "Expiration Lists"

Second, plaintiffs allege that Crooker took expiration lists by "impermissibly accessing Relation's computers." To support this allegation, plaintiffs cite to deposition testimony of Jill Zewalk, Relation's Chief Operating Officer. Zewalk's testimony explained that Crooker "had taken some expiration lists" from Relation "[b]efore he resigned from Relation." She further testified that producers at Relation, like Crooker, "didn't have access to" the Relation database that held the expiration lists. When asked why producers did not have access to the database, Zewalk replied, "That's just a Relation rule. Always has been."

Based on Zewalk's deposition testimony, it appears there is a genuine issue of material fact as to existence of the "Relation rule" that supposedly barred producers, like Crooker, from accessing the database containing the expiration lists. *See Lowe v. Bradford*, 305 N.C. 366, 370 (1982) ("The opposing party need not convince the court that he would prevail on a triable issue of material fact but only that the issue exists."). If the existence of this Relation rule is proven, then Crooker's access of the expiration lists would constitute "exceeding authorized access," as that particular area of Relation's computer system was seemingly off limits to him. *See Van Buren*, 593 U.S. at 396 ("[A]n individual 'exceeds authorized access' when he accesses a computer with authorization but then obtains information located in particular areas of the computer . . . that are off limits to him.").

The Business Court erred in awarding defendant Crooker summary judgment as to plaintiffs' CFAA claim against Crooker on the basis that he had not accessed information in a manner that "exceed[ed] authorized access." (Alteration in original.)

3. Former Employees' Emails and Screenshots

Finally, plaintiffs assert that all "Former Employees emailed confidential documents to their personal email accounts and took screenshots of information from Relation's computers to use at Pilot." Plaintiffs do not cite any record evidence to support this assertion. Ordinarily, lack of record evidence would entitle the moving party to summary judgment. *See Lowe*, 305 N.C. at 369 ("A party moving for summary judgment may prevail if it meets the burden . . . of showing through discovery that

the opposing party cannot produce evidence to support an essential element of his or her claim.").[7]

Nevertheless, the core infirmity in this CFAA allegation is an absence of evidence. Once again, we encounter the Business Court's spoliation of evidence finding and this Court's inability to determine where and how the adverse inference might apply to the factual defects in this claim. Therefore, we conclude that the best course of action here is to reverse and remand the issue. In our view, remand will afford the Business Court the broadest latitude to exercise its discretionary function.

* * *

For these reasons, we reverse and remand the Business Court's grant of summary judgment as to plaintiffs' CFAA claim against all Former Employees. In addition, we recognize that civil liability under the CFAA is strictly limited to those claims resulting in loss "aggregating at least $5,000 in value" during any "1-year period." 18 U.S.C. § 1030(c)(4)(A)(i)(I). As such, the Business Court must undertake an additional inquiry as to the extent of loss resulting from the civil claims.

G. Clarifying Order

[10] On 1 August 2024, the Business Court issued its Clarifying Order. The Clarifying Order modified the previously entered Summary Judgment Order by granting defendants summary judgment as to plaintiffs' claims for tortious interference with business and contractual relations, tortious interference with prospective economic advantage, and unfair and deceptive trade practices against Kinney and Capps. The Clarifying Order further modified the previously entered Summary Judgment Order by granting defendants summary judgment as to plaintiffs' same claims (with the exclusion of their unfair and deceptive trade practices claim) against Pilot.

Despite its name, there is nothing "clarifying" about the order. The Clarifying Order provides no legal analysis or legal basis for its grant of summary judgment as to these claims.

In 2014, the North Carolina General Assembly enacted the Business Court Modernization Act. An Act to Modernize the Business Court by Making Technical, Clarifying, and Administrative Changes to the

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7. In addition, it bears noting that plaintiffs' assertion suggests access for an "improper purpose" which falls squarely outside the CFAA as a matter of law. *See Van Buren*, 593 U.S. at 396.

Procedures for Complex Business Cases, to Streamline the Process of Corporate Reorganization Utilizing Holding Companies, and to Establish a Business Court Modernization Subcommittee of the Joint Legislative Economic Development and Global Engagement Oversight Committee, S.L. 2014-102, § 2, 2014 N.C. Sess. Laws 621. The Act specifically modified N.C.G.S. § 7A-45.3 to provide that "[t]he presiding Business Court Judge *shall* issue a written opinion in connection with any order granting or denying a motion under [N.C.]G.S. 1A-1, Rule . . . 56." *Id.* at § 2, 2014 N.C. Sess. Laws at 622 (emphasis added); *see* N.C.G.S. § 7A-45.3 (2025).

The Clarifying Order granted defendants' summary judgment motion pursuant to Rule 56 without written opinion in direct contravention of § 7A-45.3's plain text. Accordingly, we reverse and remand those claims for which the Business Court summarily granted summary judgment. The presiding Business Court Judge shall issue a written, reasoned opinion in connection with defendants' summary judgment motion.

IV. Conclusion

Based on the foregoing, we affirm the Business Court's grant of summary judgment as to plaintiffs' unjust enrichment claim but reverse the Business Court's grant of summary judgment as to all other claims plaintiffs raised on appeal and remand for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SHIVELY v. ACI LEARNING HOLDINGS, LLC

[389 N.C. 454 (2026)]

BRETT SHIVELY
v.
ACI LEARNING HOLDINGS, LLC; MIS TRAINING INSTITUTE HOLDINGS, INC.; BOATHOUSE CAPITAL CONTINUATION FUND, LP; BOATHOUSE CAPITAL LP; AND BOATHOUSE CAPITAL III LP

No. 10A26

Filed 22 May 2026

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) from an interlocutory order and opinion affecting a substantial right entered on 27 August 2025 by Chief Business Court Judge Michael L. Robinson in Superior Court, Union County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(a). Heard in the Supreme Court on 15 April 2026.

Parker Poe Adams & Bernstein LLP, by Nicholas H. Lee; and Vedder Price P.C., by Chad A. Schiefelbein, pro hac vice, and Jason B. Sobelman, pro hac vice, for plaintiff-appellee.

Gordon Rees Scully Mansukhani, LLP, by Robert W.F. Beckmann and Benjamin L. Williams, for defendant-appellants ACI Learning Holdings, LLC and MIS Training Institute Holdings, Inc.

Rayburn Cooper & Durham, P.A., by Lauren J. Schantz and Ross R. Fulton; and Ice Miller LLP, by Aaron A. Nichols, pro hac vice, for defendant-appellants Boathouse Capital Continuation Fund, LP, Boathouse Capital LP, and Boathouse Capital III LP.

PER CURIAM.

AFFIRMED.[1]

1. The order and opinion of the North Carolina Business Court, 2025 NCBC 51, is available at https://www.nccourts.gov/assets/documents/opinions/2025%20NCBC%2051.pdf?VersionId=QM_RLuoGqR7kE4yLDuvBQYj.FCpL3oy0.

STATE OF NORTH CAROLINA EX REL. NORTH CAROLINA UTILITIES COMMISSION, AND DUKE ENERGY PROGRESS, LLC, APPLICANT
v.
CAROLINA INDUSTRIAL GROUP FOR FAIR UTILITY RATES II AND HAYWOOD ELECTRIC MEMBERSHIP CORPORATION, INTERVENORS, AND ATTORNEY GENERAL JOSHUA H. STEIN, INTERVENOR

STATE OF NORTH CAROLINA EX REL. NORTH CAROLINA UTILITIES COMMISSION, AND DUKE ENERGY CAROLINA, LLC, APPLICANT
v.
CAROLINA INDUSTRIAL GROUP FOR FAIR UTILITY RATES III, BLUE RIDGE ELECTRIC MEMBERSHIP CORPORATION, HAYWOOD ELECTRIC MEMBERSHIP CORPORATION, PIEDMONT ELECTRIC MEMBERSHIP CORPORATION, RUTHERFORD ELECTRIC MEMBERSHIP CORPORATION, AND ATTORNEY GENERAL JOSHUA H. STEIN, INTERVENORS

Nos. 75A24 and 139A24-1

Filed 22 May 2026

1. Utilities—general rate case—performance-based regulation—interclass subsidization

In a pair of general rate cases where the Utilities Commission approved rate increases for Duke Energy Progress, LLC (DEP) and Duke Energy Carolinas, LLC (DEC) under the performance-based regulation set forth in N.C.G.S. § 62-133.16 (the PBR statute)—enacted to provide an alternative to traditional ratemaking with the aim of reducing the carbon emissions of electric public utilities—the Commission's approval of a 10% reduction in the utilities' interclass subsidies was upheld. The PBR statute required adherence "to the greatest extent practicable" with: (1) the cost causation principle (establishing a causal link between a customer class, its use of the electric system, and the costs incurred by the public utility) and (2) the minimization of interclass subsidies (where a customer class pays more than its share of the utility's cost to produce power for all customers); the 10% reduction in interclass subsidies was an appropriate balance of those directives with gradualism—adjusting rates incrementally to avoid "rate shock" to customers, a mandatory consideration under the PBR statute—and was supported by competent, material, and substantial evidence in the entire record.

2. Utilities—general rate case—performance-based regulation—electric vehicle charging

In a pair of general rate cases where the Utilities Commission approved rate increases for Duke Energy Progress, LLC (DEP) and

Duke Energy Carolinas, LLC (DEC) under the performance-based regulation set forth in N.C.G.S. § 62-133.16 (the PBR statute)—enacted to provide an alternative to traditional ratemaking with the aim of reducing the carbon emissions of electric public utilities—the Commission's approval of the exclusion of revenue generated by residential electric vehicle (EV) charging from DEP's and DEC's decoupling mechanisms, which attempt to eliminate the incentive of electric public utilities to encourage greater energy consumption in order to increase revenue and are required in PBR applications, was upheld. The PBR statute allows such exclusions, and the Commission's approval of the estimation of revenue attributable to EV charging under existing residential schedules, rather than requiring DEC and DEP to develop rate schedules or riders specifically for EV charging, was permitted by the statute's plain language. Further, findings regarding the reasonableness of the costs was supported by competent, material, and substantial evidence.

3. Utilities—general rate case—performance-based regulation—future capital projects—hazardous tree removal

In a general rate case where the Utilities Commission approved rate increases for Duke Energy Carolinas, LLC (DEC) under the performance-based regulation set forth in N.C.G.S. § 62-133.16 (the PBR statute)—enacted to provide an alternative to traditional ratemaking with the aim of reducing the carbon emissions of electric public utilities, including by allowing a multiyear rate plan (MYRP) to be approved with second- and third-year rate increases based upon certain cost projections—where DEC identified capital spending projects for hazardous tree removal in its application but later reduced its cost estimates, the revised cost estimates were "known and measurable" as required by the PBR statute where that phrase was understood to apply to projected (future) capital investments. Moreover, there was no legal error in the Commission's assumption that hazardous tree removal could qualify as a capital spending project for MYRP purposes even though some project costs might be classified as maintenance expenses under accounting rules promulgated by the Federal Energy Regulatory Commission, which were mandatory for DEC to employ. Further, record evidence established that the Commission's decision rested on competent, material, and substantial evidence.

4. Utilities—general rate case—performance-based regulation—fuel cost allocation

In a pair of general rate cases where the Utilities Commission approved rate increases for Duke Energy Progress, LLC (DEP) and

Duke Energy Carolinas, LLC (DEC) under the performance-based regulation set forth in N.C.G.S. § 62-133.16—enacted to provide an alternative to traditional ratemaking with the aim of reducing the carbon emissions of electric public utilities—the Commission's prohibition on the utilities' continued use of the equal percentage fuel cost allocation method in fuel rider proceedings governed by N.C.G.S. § 62-133.2 was upheld. While section 62-133.2 includes a detailed definition of "cost of fuel and fuel-related costs," the statute leaves to the Commission's discretion how to allocate the cost adjustment among a utility's customer classes, and nothing in the record evidence indicated that the Commission acted (1) under a misapprehension of law regarding the applicability of the cost causation principle to fuel rider proceedings or (2) in an arbitrary and capricious manner. Instead, the Commission's findings of fact were supported by competent, material, and substantial evidence.

5. Appeal and Error—preservation of issues—general rate case—transmission cost allocation stipulation—no opposition or objection raised

In a pair of general rate cases where the Utilities Commission approved rate increases for Duke Energy Progress, LLC (DEP) and Duke Energy Carolinas, LLC (DEC), intervenor-appellant Carolina Industrial Group for Fair Utility Rates (CIGFUR) failed to preserve for review its challenge to the Commission's approval of a transmission cost allocation (TCA) stipulation approved by DEP, DEC, and the Public Staff. No party opposed the TCA stipulation during the DEP or DEC evidentiary hearings or raised any objection to it in post-hearing briefing and, additionally, CIGFUR only challenged the TCA stipulation in its appeal in the DEC rate case, yet asked that the stipulation be vacated in both the DEP and DEC matters.

6. Utilities—general rate case—different returns on equity authorized based on similar evidence—not arbitrary and capricious

In a pair of general rate cases where the Utilities Commission approved rate increases for Duke Energy Progress, LLC (DEP) and Duke Energy Carolinas, LLC (DEC) under the performance-based regulation set forth in N.C.G.S. § 62-133.16—enacted to provide an alternative to traditional ratemaking with the aim of reducing the carbon emissions of electric public utilities—the Commission's authorization of a return on equity (ROE) (the return earned on a utility's capital investment by charging rates to customers) of 9.8% for DEP and 10.1% for DEC was upheld. Although DEP and DEC presented substantially similar evidence, it was not arbitrary and

capricious for the Commission to approve a higher ROE for DEC than it did for DEP. The Commission's ROE decisions involved the exercise of discretion and the application of subjective judgment to voluminous, complex, and sometimes contradictory evidence. Additionally, the customer interest portion of the DEC order demonstrated that the Commission duly considered that issue before approving DEC's ROE. The Commission followed the law and based its decision on competent, material, and substantial evidence.

Justice EARLS concurring in part and dissenting in part.

Justice RIGGS joins in this concurring in part and dissenting in part opinion.

Consolidated appeals as of right pursuant to N.C.G.S. §§ 62-90, 7A-29(b) from final orders of the North Carolina Utilities Commission entered on 18 August 2023 in Docket No. E-2, Sub 1300 and on 15 December 2023 in Docket Nos. E-7, Sub 1134 and 1276. Heard in the Supreme Court on 13 February 2025.

Troutman Pepper Hamilton Sanders LLP, by Kiran H. Mehta, Jack E. Jirak, Christopher G. Browning, Jr., and Molly McIntosh Jagannathan for Duke Energy Carolinas, LLC and Duke Energy Progress, LLC, applicant-appellees.

Public Staff—NCUC, by Lucy E. Edmondson, Chief Counsel, and Jennifer T. Harrod, Nadia J. Luhr, William S.F. Freeman, William E.H. Creech, Thomas J. Felling, and Anne M. Keyworth, intervenor-appellee.

Ward and Smith, P.A., by Christopher S. Edwards, Alex C. Dale, and Alexandra E. Ferri, and Bailey & Dixon, LLP, by Christina D. Cress, for Carolina Industrial Group for Fair Utility Rates II, Carolina Industrial Group for Fair Utility Rates III, Blue Ridge Electric Membership Corp., Piedmont Electric Membership Corp., Rutherford Electric Membership Corp., and Haywood Electric Membership Corp., intervenor-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Marcus W. Trathen, Matthew B. Tynan, Amanda S. Hawkins, and Christopher B. Dodd, for Carolina Utility Customers Association, Inc., cross-intervenor-appellant.

Jeff Jackson, *Attorney General*, *by Derrick C. Mertz and Tirrill Moore*, *Special Deputy Attorneys General.*

ALLEN, Justice.

In this appeal we consider the lawfulness of final orders issued by the North Carolina Utilities Commission granting rate increases for Duke Energy Progress, LLC (DEP) and Duke Energy Carolinas, LLC (DEC), both of which are wholly owned subsidiaries of Duke Energy Corporation.[1] The orders approve performance-based regulation (PBR) pursuant to N.C.G.S. § 62-133.16, a statute enacted by the General Assembly in 2021 that provides electric public utilities in North Carolina with an alternative to traditional ratemaking.

The Attorney General and other intervenors appealed the Commission's final orders to this Court. The intervenors point to several alleged errors by the Commission, many of which concern its interpretations of provisions in N.C.G.S. § 62-133.16. Because the Commission construed the law correctly and made sufficient findings of fact supported by competent, material, and substantial evidence in view of the entire record, we affirm.

I. Background

The Public Utilities Act—Chapter 62 of the General Statutes—authorizes and requires the Commission to regulate investor-owned companies that sell electricity or other designated utility services to the public. *See* N.C.G.S. § 62-3(23) (2025) (defining "public utility" for purposes of Chapter 62 of the General Statutes); N.C.G.S. § 62-31 (2025) ("The Commission shall have and exercise full power and authority to

1. Duke Energy Corporation announced in August 2025 that it would seek approval from regulators to merge DEP and DEC to "streamlin[e] operations and significantly reduc[e] costs for customers." *Combining Duke Energy Carolinas and Duke Energy Progress projected to save customers over $1B in future costs*, Duke Energy News Ctr. (Aug. 14, 2025), https://news.duke-energy.com/releases/combining-duke-energy-carolinas-and-duke-energy-progress-projected-to-save-customers-over-1b-in-future-costs. The Federal Energy Regulatory Commission approved the merger on 30 January 2026. *Duke Energy reaches agreement with South Carolina customer groups and others on proposed combination of Duke Energy Carolinas*, *Duke Energy Progress*, Duke Energy News Ctr. (Mar. 10, 2026), https://news.duke-energy.com/releases/duke-energy-reaches-agreement-with-south-carolina-customer-groups-and-others-on-proposed-combination-of-duke-energy-carolinas-duke-energy-progress. The Commission as well as South Carolina's utility regulator, the Public Service Commission of South Carolina, must still approve the merger before it may go into effect next year. *Id.*

administer and enforce the provisions of [the Act], and to make and enforce reasonable and necessary rules and regulations to that end."). In particular, the Act directs the Commission to "make, fix, establish or allow just and reasonable rates for all public utilities subject to its jurisdiction." N.C.G.S. § 62-130(a) (2025); *see also* N.C.G.S. § 62-32(a) (2025) (granting the Commission "general supervision over the rates charged and service rendered by all public utilities in this State").

Section 62-133 of the General Statutes spells out the procedures that have traditionally governed the fixing of utility rates in general rate cases. N.C.G.S. § 62-133 (2025). The General Assembly enacted N.C.G.S. § 62-133 to achieve the "twin goals" of "assuring sufficient shareholder investment in utilities while simultaneously maintaining the lowest possible cost to the using public for quality service." *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, Inc.*, 348 N.C. 452, 458 (1998). These twin goals must be understood in the context of the Act's "primary purpose," which "is to assure the public of adequate service at a reasonable charge," not "guarantee to the stockholders of a public utility constant growth in the value of and in the dividend yield from their investment." *State ex rel. Utils. Comm'n v. Gen. Tel. Co. of the Se.*, 285 N.C. 671, 680 (1974).

In October 2021, the General Assembly enacted N.C.G.S. § 62-133.16 (the PBR Statute) as one of a package of measures aimed at reducing the carbon emissions of electric public utilities.[2] The PBR Statute provides

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2. An Act to Authorize the Utilities Commission to (I) Take All Reasonable Steps to Achieve a Seventy Percent Reduction in Emissions of Carbon Dioxide from Electric Public Utilities from 2005 Levels by the Year 2030 and Carbon Neutrality by the Year 2050, (II) Authorize Performance-Based Regulation of Electric Public Utilities, (III) Proceed with Rulemaking on Securitization of Certain Costs and Other Matters, and (IV) Allow Potential Modification of Certain Existing Power Purchase Agreements with Eligible Small Power Producers, S.L. 2021-165, § 4(a)–(c), 2021 N.C. Sess. Laws 738, 741–46.

In broad terms, the legislation instructed the Commission to "take all reasonable steps to achieve a seventy percent (70%) reduction in emissions of carbon dioxide (CO_2) emitted in the State from electric generating facilities owned or operated by electric public utilities from 2005 levels by the year 2030 and carbon neutrality by the year 2050." *Id.* § 1, 2021 N.C. Sess. Laws at 739. In 2025, the General Assembly amended the legislation, striking the requirement to achieve a 70% reduction in CO_2 emissions by 2030. An Act to Eliminate the Interim Date for Carbon Reduction by Certain Electric Public Utilities, to Allow an Alternative Cost Recovery Mechanism for the Financing Costs of Construction Work in Progress for Baseload Electric Generating Facilities, to Modify the Statutes Governing Cost Recovery for Fuel-Related Charges and Performance-Based Ratemaking, and to Codify a Provision Authorizing Securitization of Costs for Retirement of Coal-Fired Generating Units, S.L. 2025-78, § 1, https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2025-2026/SL2025-78.pdf.

an alternative to traditional ratemaking that differs from it in significant respects. In traditional ratemaking, for example, a public utility may not impose a general rate increase without filing a new general rate application with the Commission. The PBR Statute allows the Commission to approve a "multiyear rate plan" (MYRP) that remains in effect for up to three years and includes preapproved rate increases for years two and three. N.C.G.S. § 62-133.16(c)(1)(a), (f) (2025). The public electric utility's base rates for the first year of the MYRP are fixed in accordance with N.C.G.S. § 62-133, whereas the rate increases for the MYRP's second and third years are based on certain cost projections, such as "projected incremental Commission-authorized capital investments that will be used and useful during the rate year." N.C.G.S. § 62-133.16(c)(1)(a). Thus, an approved MYRP enables an electric public utility to fund Commission-authorized investments "without the need . . . to file a subsequent general rate application pursuant to [N.C.G.S. §] 62-133." *Id.* § 62-133.16(a)(5), (c) (2025).

On 6 October 2022, DEP filed a general rate case application with the Commission that included a request for PBR regulation. DEC did the same on 19 January 2023. The Commission responded by initiating a general ratemaking case for each application. From March to May 2023, the Commission held an evidentiary hearing in the DEP case. In June 2023, following the conclusion of the DEP hearing, the Commission began its evidentiary hearing in the DEC case.

The Attorney General and the Public Staff[3] intervened by right in both ratemaking cases. *See* N.C.G.S. § 62-15(d)(3) (2025); N.C.G.S. § 62-20 (2023) (repealed 2024). The Commission permitted other groups to intervene, including the Carolina Industrial Group for Fair Utility Rates (CIGFUR), the Carolina Utility Customers Association (CUCA), and multiple electric membership corporations (EMCs).[4] The intervenors actively participated in the evidentiary hearings, offering expert testimony and making recommendations to the Commission.

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3. The Public Staff is a statutorily created consumer advocate that represents the public in the Commission's rate cases. *See* N.C.G.S. § 62-15(b) (2025).

4. CIGFUR and CUCA are associations comprising business or industrial customers of DEP or DEC. "CIGFUR" refers to more than one entity. The members of CIGFUR II are customers of DEP, whereas those of CIGFUR III are customers of DEC. CIGFUR II appealed the Commission's final order in the DEP case; CIGFUR III appealed the final order in the DEC case. In the interest of readability, and because they filed a joint brief, we will simply use the term "CIGFUR" when we mean either CIGFUR II or III.

On 18 August 2023, the Commission issued its final order in the DEP case (the DEP Order). In the DEP Order, the Commission approved DEP's proposed MYRP, albeit with modifications. Ten days later, on 28 August 2023, the Commission concluded DEC's evidentiary hearing. On 15 December 2023, the Commission issued its final order in the DEC case (the DEC Order), wherein it approved a modified version of DEC's proposed MYRP.

Pursuant to N.C.G.S. §§ 7A-29(b) and 62-90(d) (2025), a party may appeal the Commission's final order in a general rate case directly to this Court. The Attorney General, CIGFUR, and Haywood EMC appealed the DEP Order. They also appealed the DEC Order, as did CUCA, Blue Ridge EMC, Piedmont EMC, and Rutherford EMC. In their appeals, the intervenors assert that the Commission made numerous errors, some of which involve alleged misinterpretations of the PBR Statute.[5] We address each alleged error in turn.

II. Standard of Review

"Subsection 62-79(a) of the North Carolina General Statutes sets forth the standard for Commission orders against which they will be analyzed on appeal." *State ex rel. Utils. Comm'n v. Cooper*, 367 N.C. 644, 647 (2014) (cleaned up). It 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 or 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) (2025).

In an appeal from a final order of the Commission, subsection 62-94(b) authorizes this Court to

> affirm or reverse the decision of the Commission, declare the decision null and void, or remand the

5. CIGFUR and the EMCs filed a consolidated brief and reply brief with this Court. For clarity's sake, we refer to those documents as CIGFUR's briefs in this opinion.

> case for further proceedings; or [we] 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 any of the following:
>
> (1) In violation of constitutional provisions.
>
> (2) In excess of statutory authority or jurisdiction of the Commission.
>
> (3) Made upon unlawful proceedings.
>
> (4) Affected by other errors of law.
>
> (5) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted.
>
> (6) Arbitrary or capricious.

N.C.G.S. § 62-94(b) (2025).

In reviewing a decision by the Commission, this Court must "review the whole record or the portions of it that are cited by any party" and take "due account . . . of the rule of prejudicial error." *Id.* § 62-94(b). If the Commission correctly followed the law in setting rates, and competent, material, and substantial evidence supports its decision, this Court will not reverse that decision "merely because we would have reached a different conclusion upon the evidence." *State ex rel. Utils. Comm'n v. Morgan*, 277 N.C. 255, 267 (1970). "The Commission's conclusions of law are, however, subject to de novo review for legal error on appeal." *State ex rel. Utils. Comm'n v. Va. Elec. & Power Co.* (*VEPCO*), 381 N.C. 499, 515 (2022).

On appeal "the rates fixed or any rule, finding, determination, or order made by the Commission under . . . Chapter [62] is prima facie just and reasonable." N.C.G.S. § 62-94(b). Consequently, "[t]he burden is on the appellant to demonstrate an error of law in the proceedings." *State ex rel. Utils. Comm'n v. Piedmont Nat. Gas Co.*, 346 N.C. 558, 573 (1977).

III. Analysis

A. Interclass Subsidization

[1] The Commission approved a 10% reduction in interclass subsidies for DEP and DEC (the Utilities). CIGFUR appeals the Commission's decision in both cases, while CUCA appeals the Commission's decision in the DEC case only.

Although the PBR Statute authorizes the Commission to implement PBR ratemaking, it circumscribes that authority in important ways. Specifically, subsection (b) of the PBR Statute requires the Commission to (1) adhere to the cost causation principle and (2) minimize interclass subsidies. N.C.G.S. § 62-133.16(b) (2025). The cost causation principle "means establishment of a causal link between a specific customer class, how that class uses the electric system, and costs incurred by the electric public utility for the provision of electric service." *Id.* § 62-133.16(a)(1) (2025). Interclass subsidization occurs when one category of an electric public utility's customers pays more than its share of the utility's cost to produce power for all customers.

The Utilities sort their customers into classes based on which rate schedules the customers use. For instance, those customers purchasing power on one of the "residential" schedules fall into the "residential customer class." Commercial and industrial customers typically fall under one of the "general service" schedules. The Utilities subdivide their general service customers into classes based on how much power the customers demand: small general service, medium general service, and large general service. The Utilities also categorize customers based on the type of energy they use. For example, customers operating large outdoor light fixtures take service under one of the "lighting" schedules.

The Utilities' residential customers have long benefited from significant interclass subsidies largely paid by commercial and industrial customers. To combat interclass subsidization, each of the Utilities utilizes a "cost of service study" (COSS) to align costs with its customer classes. The COSS results provide only a starting point, and the Utilities consider other factors before finalizing their rate requests, such as the need to prevent the "rate shock" that a sharp increase in electricity bills could cause some customers.

Here, the Utilities ultimately proposed a 10% reduction in interclass subsidies, which was less than the COSS recommendations. Citing the "concept of gradualism," the Commission approved a 10% reduction in both cases. Gradualism recognizes that, when customers have set expectations in light of an interclass subsidy, eliminating the subsidy entirely in a single rate case could harm those customers whose rates increase drastically. The better approach, according to gradualism, is to eliminate the subsidy in stages by adjusting rates incrementally over several ratemaking cases.

At the hearings in both cases, expert witnesses for CIGFUR recommended that the Commission approve a subsidy reduction of at least 25%. According to these witnesses, the Utilities' large commercial and

industrial customers were paying subsidies in the tens of millions of dollars. While acknowledging CIGFUR's "legitimate concern" about the ongoing interclass subsidy, the Commission concluded that other factors weighed against CIGFUR's recommendation. On appeal CIGFUR and CUCA argue that the Commission erred in making this determination.

Section (b) of the PBR Statute reads:

> In addition to the method for fixing base rates established under [N.C.G.S. §] 62-133, the Commission is authorized to approve performance-based regulation upon application of an electric public utility pursuant to the process and requirements of this section, *so long as the Commission allocates the electric public utility's total revenue requirement among customer classes based upon the cost causation principle*, including the use of minimum system methodology by an electric public utility for the purpose of allocating distribution costs between customer classes, *and interclass subsidization of ratepayers is minimized to the greatest extent practicable by the conclusion of the MYRP period.*

N.C.G.S. § 62-133.16(b) (emphases added).

Additionally, subsection (d) of the PBR Statute prohibits the Commission from approving a PBR application unless it finds that the utility's proposal "would result in just and reasonable rates, is in the public interest, and is consistent with the criteria established in this section and rules adopted thereunder." N.C.G.S. § 62-133.16(d)(1) (2025). In assessing whether the proposal meets this standard, the Commission "shall consider" whether the PBR application:

> a. Assures that no customer or class of customers is unreasonably harmed and that the rates are fair both to the electric public utility and to the customer.
>
> b. Reasonably assures the continuation of safe and reliable electric service.
>
> c. *Will not unreasonably prejudice any class of electric customers and result in sudden substantial rate increases or "rate shock" to customers.*

Id. (emphasis added).

According to CIGFUR, subsection (b) of the PBR Statute outlines a two-step process for the Commission's approval of a PBR application. The Commission may approve a PBR application only "so long as" it complies with cost causation and reduces subsidies to the greatest extent practicable. Thus, under CIGFUR's interpretation of subsection (b), the Commission's first step is to determine whether the plan satisfies these dual requirements. If it does, the Commission proceeds to step two, where it approves the application "pursuant to the process and requirements of [N.C.G.S. § 62-133.16]." It is not until step two, CIGFUR argues, that the Commission must consider the factors listed in subsection (d), such as the risk of rate shock to customers.

"When construing a statute, a court's principal goal is to accomplish the legislative intent. The court must begin with an examination of the relevant statutory language." *N.C. Dep't of Revenue v. Philip Morris USA*, Inc., 388 N.C. 181, 187 (2025). "If the statute's plain language is clear and unambiguous," the court "applies the statute as written and does not engage in further statutory construction." *N.C. Farm Bureau Mut. Ins. Co. v. Hebert*, 385 N.C. 705, 711 (2024).

We agree with CIGFUR that the words "so long as" in subsection (b) of the PBR Statute introduce two conditions that must be satisfied before the Commission may approve a PBR application, namely, allocation of the utility's revenue requirement based on the cost causation principle and minimization of interclass subsidies "to the greatest extent practicable." We disagree, though, with CIGFUR's contention that the text of the PBR Statute supports its two-step approach.

CIGFUR would have a stronger argument if the General Assembly had used the word "possible" instead of "practicable" in subsection (b). It may well have been "possible" for the Commission to have eliminated interclass subsidization entirely among the Utilities' customers by authorizing a subsidy reduction of 100%.

But "possible" and "practicable" are not exactly synonymous. "Practicable" is a narrower term. It refers to a subset of "possible" outcomes. Specifically, it refers to those possible outcomes that are "*reasonably* capable of being accomplished" or "*feasible* in a particular situation." *Practicable*, Black's Law Dictionary (12th ed. 2024) (emphases added). As we recently explained when interpreting the legislature's use of the term "practicable" in the judicial dissolution statute for limited liability companies, N.C.G.S. § 57D-6-02(2)(i), " 'practicable' is synonymous with 'feasible[,]' . . . [and] [s]omething may be possible but *not feasible* without extra time or resources in a certain circumstance. By

that same logic, 'not practicable' is synonymous with 'unfeasible' and does not mean 'impossible.' " *James H.Q. Davis Tr. v. JHD Props., LLC*, 387 N.C. 19, 26 (2025).

By using the term "practicable" in subsection (b), the General Assembly required the Commission to make judgments about the appropriateness of proposed interclass subsidy reductions. Read carefully, other language in subsection (b) also indicates that the legislature expected such reductions to occur incrementally. Subsection (b) requires interclass subsidization to be "*minimized* to the greatest extent practicable *by the conclusion of the MYRP period*." N.C.G.S. § 62-133.16(b) (2025) (emphases added). In using the term "minimized" rather than "eliminated," the legislature left the door open for some level of continued interclass subsidization after the MYRP period ends.

Yet subsection (b) does not identify the factors that should—or must—inform the Commission's practicability analysis. Subsection (d) fills this obvious gap, at least partially. Certainly, if a proposed interclass subsidy reduction would "unreasonably prejudice any class of electric customers and result in sudden substantial rate increases or 'rate shock' to customers," N.C.G.S. § 62-133.16(d)(1)(c), the Commission might justifiably regard the reduction as neither "*reasonably* capable of being accomplished" nor "*feasible*," *Practicable*, Black's Law Dictionary (12th ed. 2024) (emphases added). Similarly, the Commission might rationally deem a proposed reduction impracticable if it would "unreasonably harm[ ]" a utility's "customer or class of customers." N.C.G.S. § 62-133.16(d)(1)(a). In short, the PBR Statute makes reasonableness and fairness the touchstones of the Commission's "practicable" analysis under subsection (b).

Subsection (b) requires the Commission to determine at what point further increases in the subsidy reduction would present an unreasonable risk of rate shock. That is what the Commission did in the DEP and DEC Orders. Hence, it is CIGFUR—not the Commission—that has misconstrued subsection (b).

CIGFUR further argues that the Commission failed to adhere to the cost causation principle. Based on its understanding of that principle, CIGFUR maintains that large general service customers should experience a rate decrease over the course of the MYRP. Because that will not happen, CIGFUR reasons that the Commission's order must violate the cost causation principle.

This argument is a non sequitur. The Utilities filed their PBR applications seeking to increase the rates paid by their customers. Application

of the cost causation principle might mean that large general service customers will bear a smaller portion of the rate increase than they otherwise would, but it by no means guarantees that their rates will go down.

CIGFUR and CUCA also maintain that the evidence before the Commission was insufficient to show that no subsidy reduction greater than 10% was "practicable." CIGFUR notes that expert witnesses for DEP and DEC testified that the 10% reduction "help[s] reduce interclass subsidies to better align each rate class to the average rate of return" while at the same time "balanc[ing] the rate increases . . . so that no rate class receives a disproportionate increase." Neither witness testified that 10% was the highest "practicable" subsidy reduction, so CIGFUR contends that it was error for the Commission to conclude as much based on the limited testimony.

CUCA observes that DEC proposed subsidy reductions of 25% in previous ratemaking cases but that in the present DEC case the Utility's expert witness testified that 25% was too high because it would trigger a 10% rate increase for DEC's lighting customers. CUCA argues that, even if the witness's testimony supports the Commission's decision not to impose a uniform 25% subsidy reduction, the Commission failed to analyze whether a uniform reduction between 10% and 25% was practicable. Moreover, according to CUCA, the Commission failed to evaluate whether a nonuniform reduction might protect DEC's lighting customers. CUCA believes that the Commission should have made such inquiries before deciding that a 10% subsidy reduction would satisfy subsection (b) of the PBR Statute.

As discussed above, the Commission's task under subsection (b) is to balance increased subsidy reductions against other important factors. Performing this task requires the Commission to apply its technical knowledge and expertise in utility ratemaking. For this reason, a reviewing court will not disturb the Commission's finding that a particular subsidy reduction is the highest practicable based on the factors set out in the PBR Statute if the finding rests upon "competent, material and substantial evidence." *VEPCO*, 381 N.C. at 515 (quoting *State ex rel. Utils. Comm'n v. Cooper*, 367 N.C. 444, 448 (2014)).

In the DEP Order, the Commission ultimately concluded that a 10% uniform subsidy reduction was acceptable under subsection (b) because it "move[d] towards eventual rate parity/minimization of interclass subsidization while, at the same time, balancing the other requirements of the PBR Statute including that no class of customer is unreasonably

harmed or faces a sudden and substantial increase in rates resulting in rate shock." In reaching its conclusion, the Commission placed "significant weight" on the testimony of DEP's expert witness who proposed the 10% reduction. According to the Commission, the witness "appropriately considered [ ]competing priorities[ ] such as cost causation, rate shock, and gradualism." In her testimony, the expert acknowledged that DEP had proposed and received subsidy reductions of 25% in some earlier rate cases. She explained, though, that a 25% reduction in the present case would have produced unreasonable rate increases for the residential and lighting customer classes. She also noted that DEP and DEC were using a different COSS methodology than the one they had employed in previous ratemaking cases.

On much the same grounds, the Commission concluded in the DEC Order that a 10% uniform subsidy reduction was "consistent with the PBR Statute" because it "help[ed] move toward eventual rate parity and minimize interclass subsidization . . . while considering and incorporating other important factors," including the risk of "disproportionate [rate] increases" and rate shock. The Commission further determined that "it [was] reasonable and equitable to apply the same basic rate design and revenue requirement allocation approach in [DEC's] case as was approved and implemented" in DEP's case. The Commission placed "significant weight" on the testimony of DEC's expert witness and that of the Public Staff's expert witness, both of whom recommended a 10% reduction.[6] Like DEP's expert witness, DEC's expert conceded that residential customers benefitted from interclass subsidies and that the Commission had approved 25% subsidy reductions in other cases. Echoing DEP's expert witness, however, DEC's expert argued against a 25% reduction, citing DEC's adoption of a new COSS methodology and the unreasonable cost increases for DEC's lighting customers that would result from a uniform 25% subsidy reduction.

In both final orders, the Commission expressly rejected CIGFUR's proposed 25% subsidy reduction. The Commission acknowledged CIGFUR's concerns regarding the persistence of interclass subsidies that burden general service customers but noted that reducing interclass subsidies is "not the only issue that a utility must consider when

6. The Public Staff's expert recommended a uniform 10% reduction in his initial testimony but later filed supplemental testimony advocating for a different approach. CIGFUR unconvincingly argues it was prejudiced by this. In fact, the Commission gave "little to no weight" to the supplemental testimony. Accordingly, CIGFUR cannot show prejudice. *See* N.C.G.S. § 62-94(c) (providing that in appeals from the Commission's decisions "due account shall be taken of the rule of prejudicial error").

designing rates." In the end, the Commission concluded that "other important factors," such as the need to protect against unreasonable rate increases, supported a lower subsidy reduction.

We hold that in each case the Commission's approval of a 10% subsidy reduction was supported by "competent, material and substantial evidence in view of the entire record as submitted." N.C.G.S. § 62-94(b)(5). *See generally State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 348 N.C. 452, 460 (1998) ("Substantial 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." (cleaned up)). During her cross-examination, DEP's expert witness explained that, given the need to avoid unreasonable rate increases, 10% was the greatest subsidy reduction practicable. Similarly, DEC's expert witness explained that, even before the passage of the PBR Statute, DEC had consistently sought to "reduce interclass cross subsidization as quickly as [it] c[ould] within each case" and that DEC had done the same in the present case. These expert opinions explained why a 25% reduction was unwarranted and provided a legally sufficient basis for the Commission's decision to approve a reduction rate of 10% in each case.

CIGFUR also insists that, for the Commission to approve the 10% reduction, it needed evidence establishing that uniform reductions higher than 10% but lower than 25% were not practicable. CUCA similarly argues that the Commission should have considered in the DEC case whether any nonuniform subsidy reductions that applied a lower reduction rate to DEC's lighting customers than to other customer classes were practicable. According to appellants, the Commission's failure to consider any alternative subsidy reductions other than CIGFUR's proposed 25% uniform rate means that the Commission's decisions were not supported by competent, material, and substantial evidence.

We disagree. The Commission made its decision in each case after hearing expert testimony that a 10% uniform reduction would reduce interclass subsidies to the greatest extent practicable. The Commission was entitled to rely on this evidence if it deemed it credible. *See State ex rel. Utils. Comm'n v. Gen. Tel. Co. of the Se.*, 281 N.C. 318, 360–61 (1972) ("It is . . . the prerogative of the [Utilities] Commission to determine the credibility of evidence . . . ."). Having determined that the experts' testimony was credible and entitled to "significant weight," the Commission was not obligated to second-guess the testimony and cast about for other evidence on the off chance that it might support a subsidy reduction that no party had requested.

Finally, CIGFUR argues that the Commission erred in failing to explain adequately why it approved a 25% subsidy reduction rate in prior ratemaking cases filed by DEP and DEC but not in the present cases. CIGFUR claims that it argued to the Commission in both of the present cases that subsection (b) of the PBR Statute required the Utilities to continue seeking a subsidy reduction rate of at least 25%. According to CIGFUR, the Commission acted arbitrarily and capriciously by not adequately summarizing CIGFUR's argument in the DEP and DEC Orders.

The Public Utilities Act requires the Commission's final orders to be "sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings." N.C.G.S. § 62-79(a). The orders must include "[f]indings and conclusions and the reasons or bases therefor upon all the material issues of fact, law, or discretion presented in the record." *Id.* § 62-79(a)(1). In *State ex rel. Utilities Commission v. Conservation Council of North Carolina*, 312 N.C. 59 (1984), we analyzed whether the Commission's findings were adequate under N.C.G.S. § 62-79(a)(1) to support its decision to include roughly $145 million in an electric utility's rate base for construction work then in progress. *Conservation Council*, 312 N.C. at 61. We held that, although the Commission's "scant findings and conclusions barely pass[ed] muster[,] . . . [t]he Commission's summary of the appellant's argument and its rejection of the same [were] sufficient to enable the reviewing court to ascertain the controverted questions presented in the proceeding." *Id.* at 62. In our view, "[t]hat [was] all that [N.C.]G.S. § 62-79(a) require[d]." *Id.*

CIGFUR cites *Conservation Council* for the proposition that N.C.G.S. § 62-79(a)(1) required the Commission to summarize CIGFUR's argument that historic practice called for a subsidy reduction rate of at least 25% in the present cases. But CIGFUR did not squarely present that argument in the evidence that it calls to our attention. Merely pointing out—as CIGFUR's expert witnesses undoubtedly did—that the Utilities had requested 25% subsidy reductions in prior cases is not the same thing as asserting that the Commission would violate subsection (b) of the PBR Statute if it approved lower reductions in the DEP or DEC proceeding. We do not read *Conservation Council* to demand responses to implied arguments.

The Commission correctly evaluated whether the Utilities' PBR applications minimized interclass subsidization "to the greatest extent practicable by the conclusion of the MYRP period." N.C.G.S. § 62-133.16(b). Moreover, competent, material, and substantial evidence supported the Commission's approval of a 10% uniform subsidy reduction in the DEP

and DEC Orders. We therefore reject the challenges to the Commission's decisions regarding interclass subsidization.

B. Electric Vehicle Charging

[2] The Commission approved excluding revenue generated by residential electric vehicle (EV) charging from the Utilities' decoupling mechanisms. The Attorney General appeals this decision in both cases.[7]

PBR applications must include a "decoupling rate-making mechanism." *Id.* § 62-133.16(c) (2025). In the absence of such a mechanism, electric public utilities might be inclined to encourage greater energy consumption with a view towards increasing their revenue. A decoupling mechanism attempts to eliminate this incentive by "break[ing] the link between an electric public utility's revenue and the level of consumption of electricity on a per customer basis by its residential customers."[8] *Id.* § 62-133.16(a)(2) (2025).

As part of PBR ratemaking, the utility estimates how much power its residential customers will consume and calculates a per-customer revenue target consistent with the utility's overall revenue requirement. If residential customers purchase more power than anticipated, the utility may be overfunded. If they purchase less power than expected, the utility risks being underfunded.

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7. Unlike the Attorney General, the Public Staff apparently saw no basis for appealing the Commission's EV exclusion decision or any other final decision made by the Commission in the DEP and DEC Orders. On the contrary, the Public Staff filed a brief with this Court defending those orders against some of the challenges mounted by CIGFUR. It seems odd to have the Attorney General on one side attacking the validity of the orders and the Public Staff on the other side arguing in favor of their legality, especially since Chapter 62 designates the Public Staff as the consuming public's representative in Commission proceedings. *See* N.C.G.S. § 62-15(d)(3) (directing the Public Staff to "[i]ntervene on behalf of the using and consuming public, in all Commission proceedings affecting the rates or service of any public utility").

In deciding to defend the DEP and DEC Orders, the Public Staff may have been influenced by its success in persuading the Utilities to accept several pro-consumer modifications to their applications. For instance, the Utilities agreed to exclude from their revenue requirements, among other things, "incentive pay related to earnings per share and total shareholder return for the top levels of Company leadership," "50% of the benefits associated with the five Duke Energy executives with the highest amounts of compensation," and "the credit card payment fees for nonresidential customers." DEC further agreed to "reduce [its] projected MYRP capital by $351 million on a system basis." We do not know to what extent the Public Staff's pro-consumer agreements with the Utilities would survive if the Attorney General were to prevail on appeal.

8. The decoupling mechanism in the PBR Statute applies to residential customers only. N.C.G.S. § 62-133.16(c)(2).

The decoupling mechanism employs an annual rider to neutralize the impact that fluctuating residential power purchases might otherwise have on a utility's revenue. *Id.* § 62-133.16(c)(1)(b). The rider can be used to return excess revenue to customers if the utility exceeded its per-customer revenue target or to collect additional funds from customers if the utility fell short of that target. *See id.* § 62-133.16(c)(1)(c)(3) (directing the Commission to establish a proceeding "[w]ithin 60 days of the conclusion of each rate year" to "[e]valuate the decoupling rate-making mechanism, and refund or collect, as applicable, a corresponding amount from residential customers through the rider established by the Commission").

By eliminating the financial incentive that utilities would otherwise have to encourage their customers to consume more electricity, the decoupling mechanism advances the General Assembly's goal of reducing energy consumption. It is subject to an exception for EV charging, however.

> The electric public utility may exclude rate schedules or riders for electric vehicle charging, including EV charging during off-peak periods on time-of-use rates, from the decoupling mechanism to preserve the electric public utility's incentive to encourage electric vehicle adoption.

N.C.G.S. § 62-133.16(c)(2).

In other words, the legislature wants electric public utilities to promote the use of EVs, so the PBR Statute allows them to exclude revenue that falls within the EV exclusion from the decoupling mechanism. Consequently, the decoupling mechanism does not require a utility to refund revenue covered by the EV exclusion, even if the utility exceeded its per-customer revenue target.

The Utilities proposed to exclude from their respective decoupling mechanisms revenue gained from incremental residential EV charging.[9] Yet rather than develop rate schedules or riders specifically for EV charging, the Utilities proposed to estimate their revenue attributable to EV charging under existing residential schedules.

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9. Because it applied to incremental EV revenues, the Utilities' EV exclusion encompassed only those EVs purchased by residential customers after the decoupling mechanism took effect. It did not encompass EVs registered to residential customers before the decoupling mechanism's implementation.

In both cases, the Attorney General opposed the proposed EV exclusion, arguing that it was not in the public interest and that the Utilities' formula for estimating EV sales was unacceptably imprecise. The Commission nonetheless approved an EV exclusion for each Utility.

In his briefing to this Court, the Attorney General contends that the Commission exceeded its authority under the PBR Statute by permitting the Utilities to exclude estimated EV revenues from the decoupling mechanism. According to the Attorney General, the "plain language" of the PBR Statute restricts the EV exclusion's applicability to rate schedules or riders adopted for EV charging. Based on his reading of the PBR Statute's EV exclusion, the Attorney General insists that the Commission should not have allowed the Utilities to exclude EV charging revenue because "DEP and DEC do not have any rate schedules, rates, riders, or rider programs for, or specific to, EV charging."

The Attorney General misreads the PBR Statute. As quoted above, the PBR Statute's EV exclusion permits an electric public utility to exclude from the decoupling mechanism "rate schedules or riders for [EV] charging, *including EV charging during off-peak periods on time-of-use rates*." *Id.* (emphasis added).

On its face, this provision does not condition the exclusion of incremental EV charging revenues on a utility's adoption of new rate schedules or riders particular to EVs. If anything, the "plain language" of the provision cuts the other way. As the Utilities point out in their joint brief to this Court, the PBR Statute "expressly references" time-of-use (TOU) rates "as one of the possible types of rate schedules for EV charging," even though "[r]esidential TOU rates are not solely dedicated to EV charging." We agree with the Utilities that, "[b]y explicitly including TOU rates, the General Assembly made clear that it is not necessary that rate schedules and riders must be exclusively for EVs."[10]

Additionally, the Attorney General attacks as unreasonable the Utilities' formula for calculating the EV exclusion. Consistent with a stipulation reached by the Utilities, CIGFUR, and the Public Staff, this formula comprised three major steps. First, using data from the North Carolina Department of Motor Vehicles (DMV), each Utility would

10. Since we hold that the plain language of the PBR Statute's EV exclusion defeats the Attorney General's argument, we need not go further. It is worth noting, though, that the Attorney General's cramped reading of the statutory language seems inconsistent with the General Assembly's goal of incentivizing electric public utilities "to encourage electric vehicle adoption." N.C.G.S. § 62-133.16(c)(2).

determine the number of incremental residential EVs in its service territory.[11] Second, each Utility would multiply that number by the estimated monthly per-customer kilowatt hours attributable to EV charging.[12] (The Utilities agreed to replace estimated per-customer EV usage with actual EV usage data in subsequent decoupling proceedings.) Third, each Utility would arrive at its total EV charging revenue by applying the appropriate rate to the number of kilowatt hours yielded by step two.

The Attorney General takes issue with all three steps of the EV exclusion formula. To begin with, he describes the DMV data relied on by the Utilities as "speculative and imprecise." Although the data indicated the number of EVs registered in each North Carolina county, the Utilities had no way of knowing how many of those EVs were residential, as opposed to commercial or industrial. Nor did the data reveal which, if any, of the EVs were owned by individuals residing in parts of the county served by electric membership cooperatives or other electric utilities.

The Attorney General also criticizes the Utilities' estimate of monthly per-EV charging consumption as "speculative and imprecise." He notes that the Utilities based their estimate on the results of DEP's Make-Ready Credit Program, a relatively new pilot program involving roughly 1.3% of all EVs then registered in North Carolina. According to the Attorney General, no evidence in the record provides grounds for believing that the customers in the pilot program were representative of EV owners statewide.

Furthermore, the Attorney General denies the existence of any evidence in the record "supporting which non-EV-specific rate schedule constituted the most accurate substitute for [the Utilities'] failure to offer a residential EV charging-specific rate schedule." He asserts that the Utilities' initial proposal "averaged certain off-peak rate schedule rates, which did not measure only for EV charging." On the other hand, "[t]he Public Staff advocated using the general residential flat service rate." The Attorney General maintains that "neither proposed rate

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11. Originally, the Utilities proposed using data from the Electric Power Research Institute (EPRI) to determine the total number of EVs in each service territory. When the Attorney General objected to the EPRI data, the Utilities agreed to rely on DMV data instead.

12. That estimate was 180 kilowatt hours in the first year of the MYRP. This number was calculated using data from DEP's and DEC's Make-Ready Credit Program. Through this program, DEP and DEC will defray part of the cost of installing the infrastructure necessary to charge EVs. The initial status report of the Make-Ready Credit Program indicated that an average monthly EV consumption is 180 kilowatt hours.

schedule was a demonstrably accurate substitute for the creation of a rate schedule (or metering) specifically for EV charging."

The Attorney General emphasizes that the Utilities bear the burden of establishing the reasonableness of requested rate increases. Given his critique of their EV exclusion formula, the Attorney General insists that "the reasonableness of [the Utilities'] estimated costs was sufficiently challenged but the Commission did not meet its obligation to test the same." The Attorney General cites *State ex rel. Utilities Commission v. Stein*, 375 N.C. 870 (2020), as authority for the Commission's duty to test the formula's reasonableness.

While recognizing that "North Carolina utilities have the burden of proving that the costs upon which their rates are based are reasonable and prudent," this Court explained in *Stein* that "the reasonableness and prudence of those costs is presumed unless the Commission or an intervenor adduces sufficient evidence to cast doubt upon their reasonableness or prudence, at which point the burden to make an affirmative showing of the reasonableness of the costs in question shifts to the utility." *Id.* at 908 (cleaned up). To meet this evidentiary threshold,

> an intervenor must offer affirmative evidence tending to show that the expenses that the utility seeks to recover are exorbitant, unnecessary, wasteful, extravagant, or incurred in abuse of discretion or in bad faith or that such expenses exceed either the cost of the same or similar goods or services on the open market or the cost similar utilities pay to their affiliated utilities for the same or similar goods or services.

Id. (cleaned up). Once an intervenor satisfies this evidentiary standard, "the Commission has the obligation to test the reasonableness of such expenses."[13] *Id.* (cleaned up).

Even if we assume that these principles from *Stein* govern the Attorney General's challenge to the Utilities' EV exclusion formula, the Attorney General has clearly failed to adduce evidence sufficient

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13. "In addition, '[i]f there is an absence of data and information from which either the propriety of incurring the expense or the reasonableness of the cost can readily be determined, the Commission may require the utility to prove their propriety and reasonableness by affirmative evidence.' " *Stein*, 375 N.C. at 908 (quoting *State ex rel. Utils. Comm'n v. Intervenor Residents of Bent Creek/Mt. Carmel Subdivisions*, 305 N.C. 62, 75 (1982)).

to satisfy the evidentiary standard articulated in *Stein*. True, the EV exclusion formula produced an estimate and not an exact accounting of EV charging purchases, but this fact alone does not render the formula "exorbitant, unnecessary, wasteful, extravagant," an "abuse of discretion," or an act of "bad faith." *Id.* Likewise, the Attorney General has not shown that EV charging calculations under the formula "exceed[ed] either the cost of [EV charging] on the open market or the cost similar utilities pa[id] to their affiliated utilities for the same." *Id.* (cleaned up).

In any event, the Commission had ample evidence before it of the EV formula's reasonableness. As remarked above, the formula incorporated the terms of a stipulation agreed to by the Utilities, CIGFUR, and the Public Staff. Although the Attorney General was not a party thereto,

> 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. The 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.

State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 348 N.C. 452, 466 (1998) (cleaned up).

The DEP and DEC Orders demonstrate convincingly that the Commission did not simply take the EV stipulation at face value. It also weighed extensive witness testimony regarding the mechanics and soundness of the EV exclusion. In its order approving DEC's PBR application, for example, the Commission noted the following:

> DEC witnesses [Laura] Bateman[, Vice President of Carolinas Rates and Regulatory Strategy,] and [Phillip] Stillman[, Managing Director of Load Forecasting and Corporate Strategic Regulatory Initiatives,] explained the agreement to exclude all

> residential EV sales from the decoupling mechanism resolves contested issues between the parties and provides a process for DEC to work with the Public Staff to develop tariffs and programs to estimate and update revenue associated with EV sales. Witnesses Bateman and Stillman explained that the tracking metric to report beneficial electrification from incremental load of EVs from estimated incremental load from EVs is consistent with N.C.G.S. § 62-133.16(c)(2)'s provision to encourage EVs by excluding EV charging from the decoupling mechanism. . . . They assert that the residential EV tracking metric will provide important data about an area with material policy interest. . . . Witnesses Bateman and Stillman concluded that the conditions associated with tracking and estimating DEC's proposal to exclude incremental residential EV sales from the decoupling mechanism "are reasonable and will result in a transparent process for updating EV revenue estimates before the Commission."
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> In [the] supplemental direct testimony [of Melissa B. Abernathy, Director of Rates and Regulatory Planning for DEC], she further explained that the [EV exclusion] Stipulation (also approved in the [DEP Order]) agreed and clarified that DEC and DEP will obtain data that will help them to better estimate revenue associated with incremental residential EVs. Witness Abernathy explained that the agreed upon method entails using data from the Department of Transportation to derive the number of residential EVs in DEC's service territory and then applying the flat residential tariff rate to the average monthly EV usage amount to derive the amount of residential EV sales to exclude from the decoupling mechanism. Finally, witness Abernathy stated that pursuant to the [EV exclusion] Stipulation, within 90 days of a Commission order in this proceeding, DEC will file tariffs or programs, and further using the data from those tariffs and programs, will refine the analytics to update the number of EVs and the usage assigned to each vehicle.

(Cleaned up.)

After considering the available evidence, the Commission concluded that "DEC's proposal to exclude EV sales from the decoupling mechanism . . . , as modified by the [EV exclusion] Stipulation, is reasonable and should be approved." In reaching this conclusion, the Commission gave

> substantial weight to the testimony of the DEC witnesses who explained that [the] residential EV sales section of the [EV exclusion] Stipulation is consistent with the spirit and intent of N.C.G.S. § 62-133.16(c)(2) to encourage EV sales and who explained the process that will be utilized to arrive at an estimate of EV sales that addresses the objections of the Public Staff to DEC's initial proposal.

"The Commission is responsible for determining the weight and credibility to be afforded to the testimony of any witness, including any expert opinion testimony." *Stein*, 375 N.C. at 900. Such determinations are "entitled to great deference" because the Commission's members "possess an expertise in utility ratemaking that makes them uniquely qualified to decide the issues that are presented for their consideration." *Id.* Here, the Commission acted well within its discretion in deciding what weight to assign to the testimony of various witnesses in the DEP and DEC cases.

The Commission correctly interpreted the PBR Statute's exclusion for EV charging, and competent, material, and substantial evidence supported its approval of the Utilities' EV exclusion formula. It therefore did not err in approving the exclusion of EV charging revenues from the Utilities' decoupling mechanisms.

C. Future Capital Projects

[3] In its PBR application, DEC identified certain capital spending projects that it planned to implement during the MYRP period.[14] DEC later reduced its cost estimates for those projects in response to concerns raised by the Public Staff. The Commission eventually approved the inclusion of those revised cost estimates in the MYRP. The Commission's decision prompted both the Attorney General and CUCA to appeal.

The Commission fixes the rates charged by an electric public utility at levels that will enable the utility to meet its revenue requirement. An electric public utility's revenue requirement is that amount of money it

14. DEP did the same, but no one appealed the portion of the Commission's order approving DEP's capital spending projects.

is allowed to recoup to (1) cover the costs it incurs in providing power to its customers and (2) provide the utility with a reasonable profit. N.C.G.S. § 62-133(b); *see also State ex rel. Utils. Comm'n v. Thornburg*, 325 N.C. 463, 467 n.2 (1989) (explaining the ratemaking formula in N.C.G.S. § 62-133).

This Court has previously described the steps used to calculate a utility's revenue requirement:

> The clear wording of N.C.G.S. § 62-133(b) requires the Commission to determine the utility's rate base (RB) (the reasonable cost of its property used and useful in service to the public, *less* accumulated depreciation plus reasonable cost of construction work in progress), its reasonable operating expenses (OE), and a fair rate of return on the company's capital investment (RR). These three components are then combined in a formula expressed as follows: (RB X RR) + OE = Revenue Requirements. Operating expenses generally include costs for fuel, wages and salaries, and maintenance, as well as annual depreciation charges and taxes. The rate of return is a percentage multiplier applied to the rate base to produce the amount of money the Commission concludes should be earned by the utility, over and above its reasonable operating expenses.

State ex rel. Utils. Comm'n v. Pub. Staff N.C. Utils. Comm'n, 333 N.C. 195, 201 (1993) (cleaned up).

In a traditional general rate case under N.C.G.S. § 62-133, the Commission in determining a utility's rate base must "[a]scertain the reasonable original cost . . . of the public utility's property used and useful . . . in providing the service rendered to the public within the State." N.C.G.S. § 62-133(b)(1). The Commission calculates the original cost of the utility's property based on a historical "test period," which "consist[s] of 12 months' historical operating experience prior to the date the [new] rates are proposed to become effective."[15] N.C.G.S. § 62-133(c); *see generally State ex rel. Utils. Comm'n v. Carolina Util.*

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15. The inputs to the utility's revenue requirement may be modified in light of "actual changes in costs, revenues or the cost of the . . . utility's property . . . based upon circumstances and events occurring [after the test period ends and] up to the time the [rate-making] hearing is closed." N.C.G.S. § 62-133(c).

Customers Ass'n, Inc., 314 N.C. 171, 185 (1985) (explaining that under N.C.G.S. § 62-133 "the utility's rates are based upon a historic twelve[-] month test period").

The PBR Statute mandates the use of data from the twelve-month test period in PBR ratemaking. N.C.G.S. § 62-133.16(c)(1)(a). Unlike N.C.G.S. § 62-133, the PBR Statute also allows an electric public utility to recover through its base rates the "costs associated with a known and measurable set of capital investments . . . associated with a set of discrete and identifiable capital spending projects to be placed in service during the first rate year" of the MYRP. *Id.* Additionally, "changes in base rates in the second and third rate years of the MYRP" are permissible "based on projected incremental Commission-authorized capital investments that will be used and useful during the rate year." *Id.*

In its appeal to this Court, CUCA objects to the Commission's approval of six capital spending projects in DEC's MYRP:

(1) the Hardening & Resilience: Public Interference Program for (a) identifying parts of DEC's distribution infrastructure vulnerable to outages from vehicles striking utility poles and (b) implementing custom solutions to decrease outage risk;

(2) the Infrastructure Integrity Program for identifying and replacing damaged, outdated, or obsolete equipment in DEC's distribution infrastructure (such as capacitors, regulators, and reclosers) that could cause outages;

(3) the Transmission Cathodic Protection Program for identifying and remedying corrosion on DEC's transmission towers;

(4) the Targeted Wood Pole Upgrade Program for identifying wood transmission poles nearing the end of their lifespans and replacing them with steel poles;

(5) the Distribution Hazard Tree Removal Program for identifying and cutting down dying or structurally unsound trees growing outside DEC's rights of way that threaten DEC's distribution lines; and

(6) the Transmission Hazard Tree Removal Program for identifying and cutting down dying or structurally unsound trees growing outside DEC's rights of way that threaten DEC's transmission lines.

CUCA argues that the Commission should not have approved these six programs because they do not qualify as a "known and measurable

set of capital investments . . . associated with a set of discrete and identifiable capital spending projects to be placed in service during the first rate year."[16] *Id.* According to CUCA, "[i]f there were a theme among these proposed programs, it would be that they are categories of spending that DEC's witnesses expected [DEC] might incur although DEC does not know how, when, or where." CUCA asserts that the programs are "exactly the opposite of 'known and measurable' and 'discrete and identifiable' capital spending projects" since each of them "involved continuous proposed spending on as-yet-undetermined activities in as-yet-undetermined locations."

To illustrate its point, CUCA focuses on what it perceives as a fatal shortcoming in the Distribution Hazard Tree Removal Program. According to CUCA, "[t]here were no particular trees expected to be removed nor any particular locations identified where tree removal was expected to be needed." CUCA directs our attention to the testimony of a DEC witness, who admitted that he could not "point to any specific or identifiable trees that [DEC] is going to be removing as part of the [MYRP]."

The Commission construes the phrase "known and measurable" differently, and not just in the context of electric public utilities. The phrase also appears in N.C.G.S. § 62-133.1B. That statute establishes multiyear ratemaking for water and sewer utilities and allows the Commission to "authorize[ ] annual rate changes for a three-year period based on reasonably known and measurable capital investments." N.C.G.S. § 62-133.1B(a) (2025). In its order adopting Commission Rule R1-17A, which implements N.C.G.S. § 62-133.1B, the Commission "acknowledge[d] that at the time the [MYRP] is proposed by the utility in its general rate case application there will not be actual cost data available pertaining to the 'reasonably known and measurable capital investments' for the Public Staff to review and analyze." *Order Adopting Commission Rule R1-17A*, Docket No. W-100, Sub 63, at 11 (Jan. 7, 2022). The Commission reasoned that a utility could still satisfy the "known and measurable" standard by "provid[ing] to the Public Staff

16. CUCA also states that the challenged programs failed the standard for inclusion in DEC's second-year and third-year rate bases—that they be "projected incremental . . . capital investments that will be used and useful during the rate year." N.C.G.S. § 62-133.16(c)(1)(a). Yet CUCA does not explain why the programs fall short of this standard. CUCA has therefore abandoned the argument under Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, which provides that "[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."

and the Commission, among other things, 'a detailed description, including the reason for and scope of each proposed capital investment project.' " *Id.* (quoting 4 N.C. Admin. Code 11.R1-17A (2024)).

The Commission's rule on PBR applications reflects this same interpretation of "known and measurable."[17] Under Commission Rule R1-17B(d), an electric public utility's PBR application must contain

> [p]rojected costs, including [allowance for funds used during construction], if applicable, and related workpapers associated with the discrete and identifiable capital spending projects to be placed into service for each Rate Year of the MYRP, including:
>
> i. The reason for each capital spending project;
>
> ii. The scope of each capital spending project;
>
> iii. The timing of each capital spending project, including projected in-service month and year for each capital spending project;
>
> iv. The depreciation life of each capital spending project by year;
>
> v. Changes expected in the depreciable life of each capital spending project for two years after the conclusion of the MYRP; and
>
> vi. The impacts on (a) operating expenses (including operations and maintenance, depreciation, and taxes other than income expenses), and (b) the itemized rate base, related to the construction, and placement into service, of the capital spending projects for each Rate Year of the MYRP.

4 N.C. Admin. Code 11.R1-17B(d)(2)(j) (2024) (amended 2025).

This Court does not defer to an administrative agency's statutory interpretations, but we "will consider and respect [the agency's] reasoning." *Savage v. N.C. Dep't of Transp.*, 388 N.C. 196, 202 (2025). Like the Commission, we do not interpret the phrase "known and measurable" in N.C.G.S. § 62-133.16(c)(1)(a) to mandate the extreme specificity demanded by CUCA. CUCA's overly strict approach would require

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17. The PBR Statute directs the Commission to adopt rules that include, among other things, "[t]he specific procedures and requirements that an electric public utility shall meet when requesting approval of a PBR application." N.C.G.S. § 62-133.16(j)(1) (2025).

utilities to provide an unreasonable—if not impossible—level of detail for *projected* capital investments. In contrast, the Commission's interpretation of "known and measurable" recognizes that the phrase concerns future projects. Viewed in this light, the information requirements of Rule R1-17B(d) seem reasonably designed to furnish the Commission with the information it needs to analyze whether the cost estimates for a proposed MYRP are "associated with a known and measurable set of capital investments . . . associated with a set of discrete and identifiable capital spending projects." N.C.G.S. § 62-133.16(c)(1)(a).

A closer look at the testimony regarding the Distribution Hazard Tree Removal Program shows both the reasonableness of the Commission's approach and the unreasonableness of CUCA's. While admitting that DEC had not designated the particular trees that would be removed as part of the program, the same witness quoted by CUCA explained that the program, just like "[e]very kind of project in MYRP," was "a forward-looking project based on estimates and estimated scopes." He further observed:

> The only thing different in the MYRP and the projects we've submitted is the forward-looking ratemaking mechanism that's associated with those. We have significant experience doing this exact type of work with estimating what it takes to do the work, what the scopes will be that we will find, what it takes to engineer it, what it takes to execute it and the cost associated. And the only thing that's different about hazard tree here or any other project that's listed here is that we submit it as part of a forward-looking ratemaking plan. The work is no different than what we've been doing for years.

This testimony aligns with DEC's explanation to this Court of how it arrived at the cost estimates for its proposed MYRP projects: "The cost estimates were informed by substantial experience and historical data from completing substantially similar projects in the past. Such past experience provides further confidence in the cost and schedule estimates provided, further confirming the known and measurable nature of these MYRP [p]rojects."

Simply put, DEC estimated the cost of its Distribution Hazard Tree Removal Program based on what its experience and data indicated that it would have to spend on removing hazardous trees during the MYRP period. Though unavoidably imperfect, this approach also strikes us as

rational under the circumstances. On the other hand, it does not seem rational to demand—as CUCA apparently would—that DEC identify in advance every tree that it expects to cut down over the course of the MYRP.

CUCA offers another objection to DEC's proposed Distribution Hazard Tree Removal Program and Transmission Hazard Tree Removal Program. It argues that these two programs do not qualify as MYRP capital projects because "[t]hey are not 'capital investments' or 'capital spending' programs and do not result in any capital being 'placed in service.' " CUCA points out that DEC must follow accounting rules promulgated by the Federal Energy Regulatory Commission (FERC). As construed by CUCA, those rules "require accounting for tree trimming in connection with transmission and distribution lines as [a] *maintenance* expense—not capital—unless the tree trimming is associated with initial construction." CUCA notes that "FERC's Division of Audits, Office of Enforcement, has explicitly rejected the suggestion that hazard tree removal for trees outside of utility rights-of-way . . . should be capitalized." Thus, "[t]he Commission's decision to allow DEC to include hazard tree removal in the [MYRP]—and thereby to capitalize and earn a return on this recurring expense—is legally erroneous[ ] . . . and . . . should be reversed."

The Attorney General likewise challenges the Commission's decision to allow the inclusion of DEC's hazardous tree removal programs in the MYRP. In his brief to this Court, the Attorney General highlights the requirement in subsection 62-133.16(c)(1)(a) that projected capital investments involve property that "will be used and useful during the rate year." N.C.G.S. § 62-133.16(c)(1)(a). He asserts that "[t]here was no evidence offered that would allow the Commission to conclude that . . . expenses [for the hazardous tree removal programs] were for property used and useful." According to the Attorney General, a utility's facilities and equipment are "used and useful" if they have been "completed, placed into service during the time for which recovery is sought, and [are] currently used to provide electric service to customers." The hazardous tree removal programs were mere "[m]aintenance work" that did not "increase [DEC's] existing property's value or substantially prolong its useful life." Hence, they may not be classified as capital spending projects under N.C.G.S. § 62-133.16(c)(1)(a).[18]

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18. The Attorney General further claims that the Commission arbitrarily and capriciously deviated from its past practice by approving the inclusion of the hazardous tree removal programs among the capital projects in DEC's MYRP. He notes that the Commission

We disagree with the Attorney General and CUCA. "The burden of showing the impropriety of rates established by the Commission lies with the party alleging such error. The rate order of the Commission will be affirmed if upon consideration of the whole record we find that the Commission's decision is not affected by error of law and the facts found by the Commission are supported by competent, material and substantial evidence . . . ." *State ex rel. Utils. Comm'n v. Duke Power Co.*, 305 N.C. 1, 10 (1982) (cleaned up).

We do not discern legal error in the Commission's assumption that an electric public utility's spending on hazardous tree removal may qualify as a capital spending project for MYRP purposes. It seems obvious that, if properly planned and executed, a program to remove—not merely prune—dying or structurally unsound trees that threaten power lines can substantially prolong the life of those lines. By cutting down such trees, a utility can permanently eliminate serious risks to its ability to provide its customers with uninterrupted service. Here, DEC's hazardous tree removal programs would protect power lines that currently carry electricity to DEC's customers; those lines thus constitute property "used and useful" even under the Attorney General's definition of the term.

CUCA's invocation of FERC's accounting rules also falls flat. In deciding whether to approve a capital spending project in a utility's MYRP, the Commission must be guided by the text of the PBR Statute, which makes no reference to FERC. It may well be that some project costs that must be classified as maintenance expenses under FERC's accounting rules nonetheless qualify as "capital investments . . . associated with a set of discrete and identifiable capital spending projects to be placed in service during the first rate year" of an MYRP. N.C.G.S. § 62-133.16(c)(1)(a).

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categorized the costs of DEC's hazardous tree removal as operating expenses in two recent rate cases.

The Attorney General cannot show that the Commission acted arbitrarily and capriciously because—as explained in this section of our opinion—the Commission had sound reasons for treating the programs as capital spending projects and competent, material, and substantial evidence supported its decision. *See generally State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 420 (1980) ("Agency decisions have been found arbitrary and capricious . . . when . . . they fail to indicate any course of reasoning and the exercise of judgment . . . ." (cleaned up)), *overruled on other grounds*, *In re Redmond*, 369 N.C. 490 (2017). Moreover, DEC denies that the Commission has a uniform practice of classifying the costs of hazardous tree removal programs as operating expenses. It points to evidence in the record indicating that DEC has been capitalizing hazardous tree removal costs for at least a decade.

Lastly, the record evidence establishes that the Commission rested its decision to approve DEC's hazardous tree removal programs on competent, material, and substantial evidence. DEC witness Nicholas G. Speros, Director of Accounting for Duke Energy Business Services, LLC, testified that hazardous tree removal is a "narrow category of vegetation management that is capitalized" because it provides a long-term benefit to customers and is not annually recurring. He explained that, "[w]hen a danger tree is removed, a sustained, long term reliability enhancement is provided for that line[:] the benefit of that tree no longer being able to result in an outage is experienced for years to come."

Similarly, Public Staff witness Tommy Williamson, an engineer with the Public Staff's Energy Division, furnished extensive information about how DEC identifies hazardous trees and about the scope of its hazardous tree removal programs. For instance, Mr. Williamson testified that, "[d]uring the 2014 through 2022 timeframe, [DEC] removed approximately 301,978 hazard trees that were a threat to its distribution system, for an average of 33,353 trees per year." The combined testimony of Mr. Speros and Mr. Williamson provides more than a scintilla of competent and material evidence supporting the Commission's findings.

The Commission did not err in approving the capital spending projects challenged by CUCA and the Attorney General. We thus affirm the Commission's order to the extent that it allowed DEC to include those projects in its MYRP.

D. Fuel Cost Allocation

[4] The DEP Order prohibits DEP from continuing to use the equal percentage fuel cost allocation method in fuel rider proceedings governed by N.C.G.S. § 62-133.2. The DEC Order imposes the same restriction on DEC. CIGFUR appeals both decisions.

The Commission sets the base fuel rates for an electric public utility in a general rate case. Thereafter, the utility is entitled

> to charge an increment or decrement as a rider to its rates for changes in the cost of fuel and fuel-related costs used in providing its North Carolina customers with electricity from the cost of fuel and fuel-related costs established in the . . . utility's previous general rate case on the basis of cost per kilowatt hour.

N.C.G.S. § 62-133.2(a) (2025).

Section 62-133.2 defines "cost of fuel and fuel-related costs" to include discrete types of credits and debits, such as "[t]he cost of fuel

burned," "[t]he cost of [chemicals] consumed in reducing or treating emissions," energy sales by the utility to other companies, and certain costs associated with energy purchases from other companies. *Id.* § 62-133.2(a1)(1), (3)–(4) (2025). For an expense to be recoverable through the fuel rider, it must fit within the statutory definition. *See id.* § 62-133.2(d) (2025).

Before authorizing a fuel rider, the Commission conducts a hearing at which it receives evidence from the utility, the Public Staff, intervenors, and the public. N.C.G.S. § 62-133.2(d). Subsection 62-133.2(c) lists information that the utility must submit to the Commission for purposes of the hearing. *Id.* § 62-133.2(c) (2025). In making its decision on the fuel rider, the Commission must consider that information along with "all other competent evidence that may assist the Commission in reaching its decision." *Id.* § 62-133.2(d). The Commission then selects an adjustment rate based on "the experienced over-recovery or under-recovery of reasonable costs of fuel and fuel-related costs" that the utility "prudently incurred." *Id.* ("The Commission shall allow only that portion, if any, of a requested cost of fuel and fuel-related costs adjustment that is based on adjusted and reasonable cost of fuel and fuel-related costs prudently incurred under efficient management and economic operations."). The utility bears the burden of proving that the cost of fuel and fuel-related costs incurred were reasonable and prudent. *Id.*

Although it describes how the Commission should go about determining the cost adjustment for a fuel rider, section 62-133.2 does not directly address how the Commission should allocate the cost adjustment among the utility's customer classes. Thus, it is left to the Commission to approve a cost allocation methodology.

Subsection (f) of N.C.G.S. § 62-133.2 does specify that nothing in the statute "relieve[s] the Commission from its duty to consider the reasonableness of the cost of fuel and fuel-related costs in a general rate case and to set rates reflecting reasonable cost of fuel and fuel-related costs pursuant to [N.C.G.S. §] 62-133." *Id.* § 62-133.2(f) (2025). Relying on this provision, the Commission has made it a practice in general rate cases to adopt the fuel cost allocation methodology that will apply in a utility's subsequent fuel rider proceedings. *See* 4 N.C. Admin. Code 11.R8-55(d)(1) (2024) ("Cost of fuel and fuel-related costs [in a fuel rider proceeding] will be preliminarily established utilizing the methods and procedures approved in the utility's last general rate case . . . .").

Starting in 2008, the Commission began utilizing the "equal percentage methodology" to allocate DEP's annual fuel-cost adjustments, and

in 2012 the Commission began using this same methodology for DEC's fuel riders.[19] The equal percentage methodology adjusts each customer class's share of the total fuel and fuel-related costs by the same percentage. Using data from the test period, the utility determines what percentage of its total revenue comes from a customer class, calculates the identical percentage of its increase in fuel costs, and then assigns that portion to the customer class. For example, if the utility needs an additional $300 million to cover fuel costs for the previous year and the utility's residential customers contributed 40% of the utility's actual revenue for that year, the utility will recover $120 million—or 40% of $300 million—of the fuel costs from its residential customers through the fuel rider.

In these cases, DEP and DEC proposed to continue using the equal percentage methodology in their fuel cost allocations. The Public Staff opposed this, arguing that the equal percentage methodology causes rate "distortion" that unfairly benefits large industrial customers. Due to factors other than the cost of fuel, industrial customers pay lower average rates per kilowatt hour than customers in other classes. Thus, the percentage of the Utilities' total revenue contributed by industrial customers is lower than the percentage of the Utilities' fuel costs attributable to those same customers. As a result, when fuel prices increase, other customer classes shoulder a disproportionate share of the costs.

Given this misalignment between consumption and cost allocation, the Public Staff asked the Commission to eliminate the equal percentage methodology from the Utilities' rate schemes. Public Staff witness Jay Lucas, Manager of the Electric Section, Operations and Planning in the Energy Division of the Public Staff, acknowledged that the Public Staff had supported the adoption of equal percentage methodology by DEP and

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19. Until 2008, subsection 62-133.2(a) required the fuel rider's increment or decrement to be "uniform" across the electric utility's customer classes. N.C.G.S. § 62-133.2(a) (2005). By an act passed in 2007, the General Assembly eliminated the uniformity requirement, thereby affording the Commission greater flexibility in selecting a fuel cost allocation methodology. An Act to: (1) Promote the Development of Renewable Energy and Energy Efficiency in the State Through Implementation of a Renewable Energy and Energy Efficiency Portfolio Standard (REPS), (2) Allow Recovery of Certain Nonfuel Utility Costs Through the Fuel Charge Adjustment Procedure, (3) Provide for Ongoing Review of Construction Costs and for Recovery of Costs in Rates in a General Rate Case, (4) Adjust the Public Utility and Electric Membership Corporation Regulatory Fees, (5) Provide for the Phaseout of the Tax on the Sale of Energy to North Carolina Farmers and Manufacturers, and (6) Allow a Tax Credit to Contributors to 501(c)(3) Organizations for Renewable Energy Property, S.L. 2007-397, § 5, 2007 N.C. Sess. Laws 1184, 1194–97.

DEC in 2008 to assist industrial customers financially during the Great Recession; however, he testified that the methodology had outlived its usefulness to the detriment of the Utilities' other customer classes.

Additionally, Mr. Lucas asserted that the equal percentage methodology failed to comply with the PBR Statute's "cost causation principle." As noted in section III.A of this opinion, subsection (b) of the PBR Statute allows the Commission to approve PBR applications only if they "allocate[ ] the electric public utility's total revenue requirement among customer classes based upon the cost causation principle." N.C.G.S. § 62-133.16(b).

CIGFUR's expert witnesses supported the Utilities' continued use of the equal percentage methodology, arguing that it had served ratepayers well and that it "levelize[d]" over time any harsh effects on customers. The CIGFUR experts also maintained that the costs recoverable in the fuel rider include certain "capital costs" that are wholly distinct from the cost of fuel. In their view, the recoverability of these non-fuel costs provides additional justification for the equal percentage methodology. Furthermore, in the DEC case, the CIGFUR expert claimed that subsection (g) of the PBR Statute exempts fuel riders from the cost causation principle. *See id.* § 62-133.16(g) (2025) (clarifying that ratemaking mechanisms in a PBR plan "operate independently . . . from riders or other cost recovery mechanisms otherwise allowed by law, unless otherwise incorporated into [the] plan").

The Commission agreed to cease using the equal percentage methodology for reasons set out succinctly in the DEP Order:

> Based on all the evidence in this proceeding, the Commission concludes that use of the equal percentage method of allocating fuel and fuel related costs does not follow the cost causation principle. In reaching this conclusion, the Commission gave substantial weight to the testimony of the Public Staff regarding the cost causation principle set forth in N.C.G.S. § 62-133.16, as well as their demonstration of the distortion that can be created by equal percentage fuel adjustments.

Accordingly, the Commission declared that the equal percentage methodology would no longer be employed in DEP's fuel rider proceedings.

The Commission offered a more thorough explanation of its reasoning in the DEC Order, stating that it gave "substantial weight to the

testimony of [the Public Staff's witness] . . . that the distortion created by the equal percentage fuel adjustment allocation methodology shifts fuel costs away from industrial customers and onto other customer classes." Although the Commission appeared to accept CIGFUR's contention that the PBR Statute's cost causation principle does not apply to the fuel rider, it nonetheless concluded that subsection (f) of N.C.G.S. § 62-133.2 granted it independent authority to approve an allocation methodology consistent with that principle:

> [T]he purpose and intent of N.C.G.S. § 62-133.16(g) is to make clear that [section 62-133.16] does not "limit or abrogate the existing rate-making authority of the Commission." It is not, as CIGFUR would have the Commission interpret, to limit the Commission's authority related to our analyses of appropriate cost allocation methodologies. The Commission has existing authority under N.C.G.S. § 62-133.2(f), the statute that governs the fuel rider proceeding, to determine the appropriate cost allocation methodology of fuel rates in a rate case. Therefore, the Commission is acting within its authority by applying cost-causation principles to fuel costs and determining the appropriate cost allocation methodology within this general rate case.[20]

(Cleaned up). In light of its decision to apply the cost causation principle, the Commission directed DEC "to discontinue use of the equal percentage fuel adjustment methodology [in] its next fuel rider proceeding."

The Commission also devoted space in both final orders to another issue involving the fuel rider. While the Public Staff opposed the Utilities' use of the equal percentage methodology, it supported the use of "voltage differentiated rates." Voltage differentiation adjusts an allocation of fuel costs to reflect the reality that delivering electricity at high voltages is more efficient than delivering it at lower voltages. Put another way, less fuel is consumed in generating and delivering a single kilowatt hour of energy for an industrial customer taking its power at a high voltage than in doing the same for a low-voltage customer. By the time of the evidentiary hearings, DEP had already adopted voltage differentiation in its

20. In the DEC Order, the Commission also considered and rejected CIGFUR's argument that, in discontinuing use of the equal percentage methodology, the Commission was engaging in impermissible single-issue ratemaking.

fuel rider proceedings, and the Public Staff proposed that DEP continue using the mechanism. DEC had not yet adopted voltage differentiation, but it agreed by stipulation with the Public Staff to use voltage differentiation in its 2024 fuel rider proceeding.

The Commission did not issue any direction in the DEP Order regarding voltage differentiation. In contrast, the Commission approved the parties' voltage differentiation stipulation in the DEC Order.

On appeal to this Court, CIGFUR argues that the Commission erroneously "rejected the equal-percentage approach and approved a voltage-differentiated method for recovering fuel and fuel-related costs."[21] According to CIGFUR, the Commission's decision in both cases rested on its incorrect assumption that the PBR Statute's cost causation principle extends to fuel rider proceedings. CIGFUR alleges that the Commission "gave 'substantial weight' to Public Staff witness Jay Lucas's testimony, in which he argued that [subsection (b) of the PBR Statute] required the Commission to adhere to the cost[ ]causation principle." CIGFUR urges us to "vacate the Commission's order and allow it to apply the correct legal standard."

"When an order or judgment appealed from was entered under a misapprehension of the applicable law, an appellate court may remand for application of the correct legal standards." *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 664 (2004) (cleaned up). No such action is warranted here.

Contrary to CIGFUR's assertions, the DEP and DEC Orders and the record evidence do not prove that the Commission based its decision to abandon the equal percentage methodology on the mistaken belief that the PBR Statute required it to apply the cost causation principle to fuel riders. As quoted above, the DEP Order indicates that "the Commission gave substantial weight to the testimony of the Public Staff regarding the [PBR Statute's] cost causation principle . . . , as well as their demonstration of the distortion that can be created by equal percentage fuel adjustments." At first glance, this statement might seem to indicate that the Commission was significantly influenced by Mr. Lucas's purported misstatement of the law. Yet Mr. Lucas's testimony on the cost causation principle went beyond mere legal considerations. Mr. Lucas also testified

21. In its principal brief, CIGFUR mistakenly characterizes voltage differentiation as an alternative method of fuel-cost allocation. In fact, it is merely a mechanism operating within a larger allocation methodology.

about the relative fairness and unfairness of the equal percentage methodology and the cost causation principle. In particular, he described the cost causation principle as more equitable because it ties fuel rates more closely to consumption, whereas the equal percentage methodology "benefit[s] some customer classes at the expense of others."

Moreover, in its subsequent order denying CIGFUR's motion for reconsideration in the DEP case, the Commission expressly rejected CIGFUR's claim that any mischaracterization of the law by Mr. Lucas had significantly influenced its decision:

> For CIGFUR to imply that the Commission relied solely on Public Staff witness Lucas' testimony in which he misstated the statutory language, or that the witness's human error negates all the other evidence of record on which the Commission's conclusion was based, is patently inconsistent with the [DEP] Order and strains credulity. The record as a whole includes ample evidence, including from witness Lucas himself in his direct prefiled testimony, upon which the Commission based its decision and cited in the [DEP] Order. Moreover, the [DEP] Order notes that the Commission afforded substantial weight to the testimony of the Public Staff regarding the cost causation principle set forth in N.C.G.S. § 62-133.16, as well as their demonstration of the distortion that can be created by equal percentage fuel adjustments. . . . The Commission never indicated that it gave that substantial weight to the witness's inaccurate recitations of the statutory language.

CIGFUR's argument fares no better with respect to the DEC Order. As in the DEP case, the Commission gave substantial weight to testimony by Mr. Lucas.[22] However, it emphasized his statements concerning the unfairness of the equal percentage methodology, especially his testimony that the equal percentage methodology distorts fuel rates by "shift[ing] fuel costs away from industrial customers and onto other customer classes." The Commission also deemed "credible" his opinion that the equal percentage methodology should be discontinued because of its rate-distorting effects. The Commission did not state that the PBR

22. Notably, Mr. Lucas clarified in his testimony during the DEC evidentiary hearing that he had misspoken during the DEP evidentiary hearing concerning the PBR Statute.

Statute required it to apply the cost causation principle to fuel riders. On the contrary, it plainly indicated that the decision to do so was one that it had the discretion to make pursuant to N.C.G.S. § 62-133.2(f). It follows from what we have said so far that we see no merit in CIGFUR's contention that the Commission acted under a misapprehension of law.

CIGFUR further argues that the Commission's abandonment of the equal percentage methodology was arbitrary and capricious because it went against the evidence before the Commission. CIGFUR claims to have presented "unrebutted evidence" demonstrating that the Commission's methodological switch would increase—not decrease—interclass subsidies. CIGFUR asks us to vacate the orders because the Commission, when faced with evidence contradicting its conclusions, ignored that evidence and "failed to explain why its decision[s] w[ere] correct."

The "unrebutted evidence" in question consists of testimony by CIGFUR's expert witnesses. In the DEP case, CIGFUR's expert stated in his pre-filed testimony that the equal percentage methodology should be maintained because the fuel rider has grown over time to include expenses less directly tied to the cost of fuel and more appropriately termed "capital costs":

> Many years ago, the fuel adjustment only involved cost recovery for fuel costs. Over time other costs have been included which are basically capital costs. For example, renewable costs, such as purchased power from solar or other renewable energy facilities, are not fuel expenses.

The expert testified that, "[t]o the extent these costs are included in the annual fuel adjustment," DEP should continue to use the equal percentage methodology. He pointed out that DEP's large general service customers continue to subsidize other customer classes, a fact he viewed as "strong evidence that the [equal percentage] methodology results in just, reasonable rates, is not causing an undue cost shift over time, and should be continued." In other words, since on the whole DEP's industrial customers subsidize residential customers, it is only fair that residential customers should continue subsidizing industrial customers in the fuel cost allocation.

CIGFUR's expert witness in the DEC case was similarly concerned about the "capital costs" portion of the fuel rider, as well as the ongoing subsidization of residential customers by other customer classes. He went further than CIGFUR's witness in the DEP case by predicting that "recovery of capital costs through the fuel [rider] will likely increase

in the future" due to measures adopted under the state's Carbon Plan. Categorizing these capital costs as capacity costs,[23] he explained that they do not vary based on energy consumption:

> Capacity costs associated with solar purchases and other costs such as chemical costs and transmission costs are now included in the fuel rider. These costs have no heat content and are not fuel costs. There is no showing that these costs vary by kilowatt-hour of electricity consumed.

CIGFUR's expert argued that DEC should continue utilizing the equal percentage methodology so long as capacity costs make their way into the fuel rider, "since those costs will continue to grow as DEC retires its coal generating capacity and replaces it with solar and other generating resources with zero or reduced carbon emissions."

Adverting to the existing interclass subsidy benefitting DEC's residential customers, CIGFUR's witness stated that eliminating the equal percentage methodology immediately would "exacerbate the worsening affordability challenges affecting industrial customers." He suggested that the Commission should "provide rate mitigation for industrial customers" by "continuing the current cost allocation methodology for fuel and fuel-related costs."

The record belies CIGFUR's assertion that the testimony of its expert witnesses went unrebutted. The rebuttal evidence in each case came in the form of testimony by Mr. Lucas.

On cross examination in the DEP case, Mr. Lucas admitted that the fuel rider covered some "capital costs" that "are not incurred based on the cost of fuel to produce a kilowatt hour of energy," but he asserted that such capital costs made up only a "small component" of the rider. Mr. Lucas also explained that the fuel costs DEC incurred in purchasing energy from renewable generation facilities were not *fixed* costs as CIGFUR maintained:

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23. Capacity costs are those incurred by an electric public utility in ensuring that it has access to enough energy to meet periods of peak demand. For instance, by making a one-time capacity payment to an energy generator, the utility buys the right to reserve a portion of the generator's total energy output at some point in time. In this way, capacity costs are often fixed costs for the utility, whereas energy purchases vary with how much power the utility draws.

> [O]ne thing about solar facilities, you can't just say, "We're going to pay you a capacity payment because it's a 5 megawatt solar facility." Its output is variable. It's not dependent on capacity. And this is true for all renewable energy facilities. The[y] are all paid for kilowatt hours. They get paid more during peak demand for those kilowatt hours, and that sort of acts like a capacity payment.

(Cleaned up).

Put differently, DEP did not make fixed capacity payments to renewable generation facilities that it then recouped in the fuel rider. Rather, DEP purchased power from these facilities on a per-unit basis, with that per-unit cost increasing during periods of peak demand. Hence, DEP's cost to procure power from renewable generators varied depending on customers' consumption. Mr. Lucas added:

> [I]f a solar panel system is not putting out energy, [it is] not getting paid. It's not a fixed cost. It's not like if a solar panel system breaks for a whole year, [it can] come back in and say, "Well, I should get fixed cost anyway, because it cost me to run this solar panel system." If [it doesn't] make kilowatt hours, [it doesn't] get paid.

At the DEC evidentiary hearing, Mr. Lucas testified that, while the fuel rider covered some "capital costs," these were not fixed. When asked by CIGFUR's attorney whether it was "[his] testimony that everything recovered through the fuel rider . . . var[ies] by kilowatt hours consumed," Mr. Lucas responded, "Yes."

"It is not this Court's duty to evaluate the accuracy of complex statistical models, conflicting methodologies, and the opposing expert opinions drawn therefrom. This, instead, is the duty of the Commission which has the special knowledge, experience and training best suited to make such determinations." *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, Inc.*, 323 N.C. 238, 251 (1988) (cleaned up). The Commission properly performed its duty in these cases when confronted by dueling experts from CIGFUR and the Public Staff. Having reviewed their testimony, the Commission gave substantial weight to that of Mr. Lucas and made his testimony a basis for its decision to abandon the equal percentage methodology. CIGFUR's assertion that unrebutted evidence supported the continued use of that methodology—and thus that

the Commission acted arbitrarily and capriciously—ignores the evidentiary record.[24]

The Commission's decision to cease using the equal percentage methodology in fuel rider proceedings conducted pursuant to N.C.G.S. § 62-133.2 "is not affected by error of law and the facts found by the Commission are supported by competent, material and substantial evidence." *Duke Power Co.*, 305 N.C. at 10. We therefore reject CIGFUR's challenges to the Commission's decision.

E. Transmission Cost Allocation Stipulation

[5] The DEP and DEC Orders approve the Transmission Cost Allocation (TCA) Stipulation approved by DEP, DEC, and the Public Staff. CIGFUR challenges that approval in its appeal to this Court.

DEP and DEC pool their energy production under the terms of their Joint Dispatch Agreement (JDA) to satisfy the power demands of their respective customers. Approved by FERC in 2012, the JDA enables each Utility to meet customer demand more efficiently than it could on its own. During periods of peak demand, DEC can draw on DEP's excess power instead of building additional generation facilities, and DEP can draw on DEC's excess power during its own peak demand periods.

In 2021 the General Assembly enacted H.B. 951, authorizing PBR ratemaking and directing the Commission to develop a state-wide Carbon Plan.[25] In 2022, following an evidentiary hearing, the Commission issued a joint Carbon Plan for DEP and DEC, which outlined a multiyear

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24. Similarly, CIGFUR's argument that the Commission failed to adequately explain its decision lacks merit. CIGFUR claims that the Commission's failure to respond to its argument concerning the effect that the voltage differentiated methodology would have on interclass subsidization renders its decision arbitrary and capricious. Yet it is not necessary for the Commission to "comment upon every single fact or item of evidence presented by the parties" in order to comply with N.C.G.S. § 62-79(a). *VEPCO*, 381 N.C. 499, 520 (2022) (cleaned up). "[T]he Commission's summary of the appellant's argument and its rejection of the same is sufficient" if it "enable[s] the reviewing court to ascertain the controverted questions presented in the proceeding." *Id.* at 521 (cleaned up). Here, the Commission summarized CIGFUR's argument and witness-testimony in both cases before providing its conclusion. The mere fact it did not recite one point advanced by CIGFUR does not signal that its decision was either arbitrary or capricious; it suggests that the Commission did not find the point compelling. The Commission said as much in the DEC Order: "The Commission has given due consideration to the arguments proffered by CIGFUR in its post-hearing brief and finds them to be without merit."

25. *See* An Act to Authorize the Utilities Commission to (I) Take All Reasonable Steps to Achieve a Seventy Percent Reduction in Emissions of Carbon Dioxide from Electric

program for reducing carbon dioxide emissions from the Utilities' power generating facilities. *See Order Adopting Initial Carbon Plan and Providing Direction for Future Planning*, Docket No. E-100, Sub 179, at 135 (Dec. 30, 2022). Therein, the Commission expressed concern that the JDA's payment mechanism failed to compensate DEP fully for its energy transfers to DEC. *Id.* at 135.

Primarily covering the eastern half of North Carolina, DEP's service region is a more attractive location for solar generation facilities than DEC's service region, which lies to the west. For this reason, the Carbon Plan placed a disproportionate burden on DEP to increase the number of renewable energy generation facilities in its service region. *Id.* at 126. Likewise, the Carbon Plan required DEP to build extensive new transmission infrastructure to link its new renewable facilities to its own network and that of DEC. *Id.*

At the evidentiary hearing to consider the Carbon Plan, an expert witness for the Public Staff observed that historically DEP's customers have paid higher rates than DEC's customers. *Id.* He voiced concern that DEP's new infrastructure projects would cause the rate disparity between DEP and DEC to grow even more, causing DEP's customers to absorb a disproportionate share of the costs incurred to achieve statewide compliance with the Carbon Plan. *Id.* In response to this concern, the Commission directed the Utilities to "take reasonable steps to mitigate further exacerbation of the rate disparity between DEC and DEP attributable to the Carbon Plan." *Id.* at 128. It further instructed the Utilities to address the growing rate disparity in their next general ratemaking cases. *Id.* at 135.

Acting on the Commission's instruction, the Utilities agreed to shift a portion of DEP's revenue requirement to DEC. The Utilities and the Public Staff memorialized this agreement on 27 April 2023 by executing the TCA Stipulation. Under the TCA Stipulation, DEP's revenue requirement was reduced by roughly $20 million, and DEC's revenue requirement was increased by the same amount.[26] The revenue adjustment was to

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Public Utilities from 2005 Levels by the Year 2030 and Carbon Neutrality by the Year 2050, (II) Authorize Performance-Based Regulation of Electric Public Utilities, (III) Proceed with Rulemaking on Securitization of Certain Costs and Other Matters, and (IV) Allow Potential Modification of Certain Existing Power Purchase Agreements with Eligible Small Power Producers, S.L. 2021-165, § 1, 2021 N.C. Sess. Laws 738, 739–40.

26. The parties to the TCA Stipulation agreed to calculate the precise amount of the adjustment by multiplying the net power transfers from DEP to DEC under the JDA in

become effective in October 2023 and continue until DEP and DEC either merged or implemented new rates following their next general rate cases.

On 27 April 2023, the Utilities and the Public Staff filed the TCA Stipulation in both of the instant ratemaking cases. No party opposed the TCA Stipulation during the DEP or DEC evidentiary hearings, nor did any party raise objections to it in post-hearing briefing. The Commission approved the TCA Stipulation in both cases, concluding that it "establishe[d] a reasonable method to align costs with cost causation principles."

CIGFUR did not appeal the Commission's approval of the TCA Stipulation in the DEP case. In its notice of appeal in the DEC case, CIGFUR alleged for the first time that the Commission lacked authority under both N.C.G.S. § 62-133 and the PBR Statute to approve the TCA Stipulation. According to CIGFUR, the TCA Stipulation essentially compels DEC's customers to subsidize part of DEP's revenue requirement based on the Commission's belief that the JDA is unfair to DEP's customers. CIGFUR maintains that neither N.C.G.S. § 62-133 nor the PBR Statute authorizes the Commission, "in separate proceedings, to distort two separate utilities' revenue requirements to achieve a policy outcome." Despite not having raised the issue in its DEP appeal, CIGFUR asks this Court to vacate the Commission's approval of the TCA Stipulation in both the DEP Order and the DEC Order.

CIGFUR failed to preserve its argument that the Commission exceeded its statutory authority by approving the TCA Stipulation. Hence, the merits of its appeal on this issue are not properly before this Court.

In an appeal from a final order of the Commission, this Court must "review the record and the issues raised in accordance with the rules of appellate procedure[.]" N.C.G.S. § 62-94(a) (2025); *see also* N.C. R. App.

2022 by DEP's non-firm transmission rate in Duke Energy's Joint Open Access Transmission Tariff (Joint OATT). Since 1996, FERC has required electric public utilities owning interstate transmission infrastructure to file "open access non-discriminatory transmission tariffs." *See* Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities, 61 Fed. Reg. 21540, 21541 (May 10, 1996) (to be codified at 18 C.F.R. pts. 35, 385). Those tariffs set the rates and terms under which electric utilities transmit energy wholesale, both the energy the utility itself produces and that produced by third parties. *See id.* Duke's Joint OATT sets the open access transmission rates for both DEP and DEC. *See* Joint Open Access Transmission Tariff of Duke Energy Carolinas, LLC, Duke Energy Florida, LLC, and Duke Energy Progress, LLC, https://www.ferc.duke-energy.com/Tariffs/Joint_OATT.pdf.

P. 1(b) (declaring that the North Carolina Rules of Appellate Procedure "govern procedure . . . in direct appeals from administrative tribunals to the appellate division").

Rule 10(a)(1) of the Rules of Appellate Procedure generally requires parties to preserve issues for appeal by "present[ing] to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desire[s] the court to make if the specific grounds were not apparent from the context."[27] N.C. R. App. P. 10(a)(1). The purpose of Rule 10(a)(1) is "to require a party to call the [trial] court's attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal." *State v. Canady*, 330 N.C. 398, 401 (1991). Without this rule, "a party could allow evidence to be introduced or other things to happen during a trial as a matter of trial strategy and then assign error to them if the strategy does not work." *Id.* at 401–02.

In its reply brief, CIGFUR insists that it twice disputed the legality of the TCA Stipulation before the Commission in the DEC case. The first instance noted by CIGFUR occurred during a cross-examination of two Public Staff witnesses by CIGFUR's counsel. We quote the relevant portion of the cross-examination in full:

> Q: [C]an you point me to any statutory authority supporting the adjustment agreed to in th[e] [TCA] [S]tipulation?
>
> A: [Witness 1] These adjustments recommended by [Public Staff] witness Metz so effect would be—if you want the detail, because it was just statutory, they are not affect, our legal team may be the source—
>
> A: [Witness 2] Neither of us are attorneys so—
>
> A: [Witness 1] Yeah.
>
> A: [Witness 2] —as far as what statute it relates to, I would have to look to my attorneys on that.

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27. Although the first sentence in Rule 10(a)(1) uses the term "trial court," and the Commission is not a court, the rule's third sentence employs the broader term "trial tribunal." N.C. R. App. P. 10(a)(1). The Rules of Appellate Procedure explicitly define "trial tribunal" to encompass "any administrative agencies, boards, or commissions from which appeals lie directly to the appellate division." N.C. R. App. P. 1(d). Thus, the preservation requirements of Rule 10(a)(1) apply to direct appeals from the Commission to this Court.

> Q: Thank you. Can you point me to any precedent for such an adjustment that has been agreed to by this stipulation?
>
> A: [Witness 2] Not from the stand today, no.

This brief exchange hardly satisfies Rule 10(a)(1). CIGFUR's counsel asked two questions about the legal basis for the TCA Stipulation and then dropped the subject. CIGFUR's counsel did not argue that the TCA Stipulation was unlawful, much less ask the Commission to do anything about it. More precisely, CIGFUR's counsel did not present the Commission with "a timely request, objection, or motion, stating the specific grounds for the ruling" CIGFUR wanted the Commission to make. N.C. R. App. P. 10(a)(1).

CIGFUR also points to the post-hearing brief that it filed with the Commission in response to DEC's proposed final order. But CIGFUR did not dispute the lawfulness of the TCA Stipulation in that brief. CIGFUR appears to have in mind the brief's introduction, where it stated that its "silence on any issue in its [b]rief should not be interpreted as . . . waiving any position it took throughout the course of th[e] proceeding." Since CIGFUR did not take a position on the TCA Stipulation during the DEC proceeding, this sentence did nothing to put the issue on the Commission's radar.[28]

By failing to satisfy the requirements of Rule 10(a)(1), CIGFUR waived its argument that the Commission lacked statutory authority to approve the TCA Stipulation. Thus, the issue "is not properly preserved for our review." *Willowmere Cmty. Ass'n, Inc. v. City of Charlotte*, 370 N.C. 553, 561 n.7 (2018).

In its principal brief to this Court, CIGFUR also contends that "the way the Commission approved the [TCA Stipulation] denied [DEC's] customers, like CIGFUR['s] . . . members, due process." After the Commission approved the TCA Stipulation in the DEP proceeding, CIGFUR insists, it had no choice but to do the same in the DEC case: "The process that the Commission afforded to [DEC's] customers was not fair[ ]

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28. CIGFUR further claims that the Utilities waived their waiver argument by failing to cite any authority for it. In support of its position, CIGFUR relies on a single nonbinding case in which a federal circuit court said that "[a] waiver argument . . . can be waived by the party it would help." *United States v. Morgan*, 384 F.3d 439, 443 (7th Cir. 2004). To the best of our knowledge, this Court has never adopted that principle with respect to Rule 10(a)(1), and we decline to do so here.

because the hearing's outcome was predetermined." To the extent that the outcome in the DEC case was predetermined, CIGFUR asserts that it violated procedural due process, which "requires the opportunity to be heard at a fair hearing without a predetermined outcome."

CIGFUR did not raise its due process challenge to the Commission. Ordinarily, a party may not raise a constitutional issue for the first time on appeal. *See State v. Wiley*, 355 N.C. 592, 615 (2002) ("It is well settled that an error, even one of constitutional magnitude, that [the party] does not bring to the trial court's attention is waived and will not be considered on appeal."). This Court has carved out an exception to this prohibition, however, for at least some constitutional challenges in direct appeals from the decisions of administrative agencies to this Court or the Court of Appeals. "When an appeal lies directly to the Appellate Division from an administrative tribunal, in the absence of any statutory provision to the contrary, . . . a constitutional challenge may be raised for the first time in the Appellate Division . . . ." *In re Redmond*, 369 N.C. 490, 497 (2017). This exception recognizes that in many cases it would be pointless to require parties to bring constitutional challenges in administrative proceedings because administrative agencies typically "ha[ve] no authority to decide constitutional questions." *Id.* at 496.

In *Redmond*—unlike here—the constitutionality of a statute was at stake. Yet even if CIGFUR did not have to raise its due process challenge to the Commission, we must still conclude that CIGFUR failed to preserve the issue for our review. Section 62-90 reads in pertinent part:

> Any party to a proceeding before the Commission may appeal from any final order or decision of the Commission within 30 days after the entry of the final order or decision, or within an additional time fixed by the Commission, not to exceed 30 additional days, and by order made within 30 days, if the party aggrieved by the decision or order files with the Commission a notice of appeal *that sets forth specifically the ground or grounds on which the aggrieved party considers the decision or order to be unlawful, unjust, unreasonable, or unwarranted and that includes the errors alleged to have been committed by the Commission.*

N.C.G.S. § 62-90(a) (2025) (emphasis added).

Section 62-94 spells out the consequences of failing to identify the specific grounds for an appeal from a final order or decision of the

Commission: "The appellant shall not be permitted to rely upon any grounds for relief on appeal that were not set forth specifically in the appellant's notice of appeal . . . ." N.C.G.S. § 62-94(c) (2025).

The notices of appeal filed by CIGFUR in the DEP and DEC cases do not allege that the Commission's approval of the TCA Stipulation violated due process. Indeed, CIGFUR's notice of appeal in the DEP case omits any reference to the TCA Stipulation.[29] CIGFUR's notice of appeal in the DEC proceeding alleges that the Commission exceeded its ratemaking authority under N.C.G.S. § 62-133 and the PBR Statute, but it nowhere asserts that the Commission's action constituted a denial of due process. Section 62-94 therefore bars CIGFUR from pursuing its due process claim on appeal.

None of CIGFUR's challenges to the Commission's approval of the TCA Stipulation have been preserved for appellate review. Accordingly, those challenges do not provide a basis for vacating the DEP and DEC Orders.

F. Return on Equity

[6] The DEP Order authorized a 9.8% return on equity (ROE) for DEP, while the DEC Order approved a 10.1% ROE for DEC. The Attorney General and CUCA appeal the Commission's ROE determination in the DEC case.

Section 62-133 directs the Commission to fix a rate of return in a general ratemaking case that

> will enable the public utility by sound management to produce a fair return for its shareholders, considering changing economic conditions and other factors . . . 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).

A utility's ROE "is one of the components used in determining a company's overall rate of return." *State ex rel. Utils. Comm'n v. Cooper*

29. The same is true of the notice of appeal filed by Haywood EMC in the DEP case.

(*Cooper II*), 367 N.C. 430, 432 (2014). "The ROE represents the return that a utility is allowed to earn on its capital investment by charging rates to its customers. As a result, a higher ROE impacts profits for shareholders and costs to consumers." *Id.*

In the DEP case, DEP's ROE expert Dr. Roger Morin, Professor of Finance for Regulated Industry at the Center for the Study of Regulated Industry at Georgia State University, recommended an ROE of 10.4%.[30] This constituted a 0.8 percentage-point increase from DEP's previous ROE of 9.6%. According to Dr. Morin, 10.4% was the "minimum amount needed" to comply with DEP's constitutional rights.[31] He maintained that "declining demand growth, rising operating costs, rising capital costs, [and industry-wide] lower allowed returns" had all led investors to view electric public utilities more negatively, making it difficult for DEP to raise capital. Dr. Morin's ROE recommendation included recovery of estimated flotation costs, which are one-time costs such as accounting and legal expenses associated with issuing new equities.

Several of the intervenors' expert witnesses conducted their own ROE analyses and proposed different ROEs to the Commission. The Public Staff's expert witness proposed an ROE of 9.45%, while CUCA's expert recommended 9.25%. Two other intervenors—the United States Government and the North Carolina Justice Center (NCJC)—recommended ROEs of 9.3% and 6.0%, respectively.[32] CUCA, the Public Staff, and the federal government argued that, if the Commission approved DEP's PBR application and allowed it to increase rates incrementally under the MYRP, the ROE should be even lower; CUCA proposed 9.0%, and the Public Staff suggested 9.25%. The intervenors' expert witnesses also opposed allowing DEP to recover estimated flotation costs through its ROE.

In his rebuttal testimony, Dr. Morin criticized the methodologies used by the intervenors to arrive at their ROE recommendations. He

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30. Dr. Morin initially recommended an ROE of 10.2% but later increased his recommendation due to rising interest rates.

31. "[T]he [l]egislature intended for the Commission to fix rates as low as may be reasonably consistent with the requirements of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States." *State ex rel. Utils. Comm'n v. Duke Power Co.*, 285 N.C. 377, 388 (1974).

32. CIGFUR and another intervenor, the Commercial Group, also recommended ROEs. The Commission placed little weight on these recommendations because, unlike the other intervenors, neither CIGFUR nor the Commercial Group conducted its own ROE analysis.

argued that, given the rise in interest rates and inflation since DEP's last ratemaking case, it was unreasonable for the other experts to propose ROEs lower than DEP's then current rate of 9.6%. Dr. Morin defended his inclusion of flotation costs in his recommended ROE and rejected the other experts' opinion that approval of DEP's MYRP justified a downward adjustment to the ROE.

In a split decision, the Commission awarded DEP an ROE of 9.8%. In reaching this conclusion, the Commission majority observed that its task was to calculate a "zone of reasonableness" for the ROE. That range would be bounded on the low end by the "investor interest against confiscation" and the need to protect DEP's access to capital and on the high end by the "consumer interest against excessive and unreasonable charges for service." Relying on the results of the parties' respective ROE analyses,[33] the majority determined the zone of reasonableness to be 9.75% to 10%. In settling on this range, the majority concluded that (1) DEP should not be permitted to recover estimated flotation costs through the ROE and (2) the Commission's approval of DEP's MYRP did not justify a downward adjustment.

The majority acknowledged its obligation under *State ex rel. Utilities Commission v. Cooper* (*Cooper I*), 366 N.C. 484 (2013), "to inform its selection of [an ROE] within [the range of reasonableness]" by addressing "the impact of changing economic conditions on customers." Consistent with its understanding of *Cooper I*, the majority declared that it must "exercise its subjective judgment so as to balance two competing [ROE]-related factors—the economic conditions facing DEP's customers and DEP's need to attract equity financing on reasonable terms in order to continue providing safe and reliable service."

Regarding the first factor, the majority observed that Dr. Morin "provided detailed data concerning changing economic conditions in North Carolina, as well as nationally," and that these data were already accounted for in Dr. Morin's recommended ROE. Nonetheless, the majority adopted an ROE closer to the low end of the zone of reasonableness. In selecting 9.8%, the majority remarked that, while "some [customers] will struggle to pay the increased rates," an ROE of 9.8% did not pose a serious risk of "undue hardship" to consumers, partly because DEP was simultaneously developing programs to help its low-income residential customers pay their bills.

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33. The Commission discounted NCJC's recommended ROE of 6.0% as an outlier.

Turning to the second factor, the majority concluded that increasing DEP's ROE from 9.6% to 9.8% would sufficiently "allow DEP to compete in the market for equity capital, providing a fair return on investment to its investor-owners." The majority noted DEP's need to respond to "macroeconomic, geopolitical, extreme weather, public health, and other exogenous events beyond [its] control." The majority also observed that DEP faced new operating risks arising from its obligation under the Carbon Plan to transition to greater renewable power generation. In sum, and "taking into account changing economic conditions and their impact on customers," the majority exercised its "independent judgment and discretion" to conclude that its approved ROE of 9.8% would "allow DEP to . . . provid[e] a fair return on investment" and "result in the lowest rates constitutionally permissible."

Three of the seven commissioners dissented because they thought the majority's chosen ROE was too low.[34] The three dissenters would have approved an ROE of 10%, the upper limit of the zone of reasonableness. They expressed concern that the 9.8% ROE approved by the majority would increase costs for consumers over the long term by impairing DEP's ability to compete for capital on the most reasonable terms available.

No party appealed the Commission's decision to approve a 9.8% ROE in the DEP Order. The Commission's membership changed, though, between the issuance of the DEP Order and the DEC Order. Two of the four commissioners in the DEP majority left the Commission, which made the DEP dissenters the majority in the DEC case.

Dr. Morin testified as an expert witness for DEC. His testimony at the DEC hearing largely resembled his testimony at the DEP hearing. As in the DEP case, he recommended an ROE of 10.4%, which included flotation costs. When asked on cross-examination whether he was aware of any "substantive difference[s]" between DEC and DEP that could justify assigning them different ROEs, Dr. Morin said he was not. He also admitted that bond rating agencies had initially reacted favorably to the 9.8% ROE approved by the Commission in the DEC case. Toward the end of his cross-examination, when asked what he thought about giving DEC an ROE of 10.2%: Dr. Morin responded, "It's in my range, but the upper portion of the range. So I wouldn't . . . violently object to that."

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34. A fourth commission member agreed with the majority's ROE determination but dissented from the decision to approve DEP's proposed EV exclusion from the decoupling mechanism.

As in the DEP case, the intervenors' expert witnesses recommended lower ROEs than Dr. Morin, though they uniformly recommended higher ROEs than the ones they had proposed in the DEP case. Instead of 9.45%, the Public Staff's expert recommended 9.55%. CUCA's expert recommended 9.40%, not 9.25%. Despite having recommended 6.00% in the DEP case, NCJC's expert testified that 6.15% would be appropriate for DEC. In his DEC testimony, the Public Staff's expert explained that he recommended a higher ROE for DEC than he had for DEP, not because he saw any difference in risk between the Utilities, but because of changing conditions in capital markets. The intervenors' experts again urged the Commission to exclude estimated flotation costs from the ROE and apply a downward adjustment if it approved the MYRP.

In his rebuttal testimony, Dr. Morin remarked that the other proposed ROEs for DEC were lower than DEC's then-current ROE of 9.6% even though interest rates had risen since DEC's last general ratemaking case.[35] He also observed that in recent months the average ROE authorized for a vertically integrated electric utility in the United States such as DEC was 9.73%, significantly higher than the intervenors' recommendations.

In another split decision, but this time with the DEP dissenters in the majority, the Commission approved an ROE of 10.1% for DEC. Drawing once more on the parties' independent analyses, the majority determined the zone of reasonableness to be 9.99% to 10.37%. The majority, "in its discretion," then selected 10.1%, concluding that substantial evidence supported this ROE. As in the DEP case, the Commission excluded flotation costs and did not apply a downward adjustment for DEC's MYRP.

The Commission again incorporated the customer interest analysis required by *Cooper I* into its ROE determination, copying the customer interest analysis in the DEP Order nearly verbatim. The majority observed that Dr. Morin's testimony took customer interests into account and "provided detailed data concerning changing economic conditions in North Carolina, as well as nationally." As it had in the DEP case, the majority judged that, while "some [customers] will struggle to pay the increased rates," the majority's chosen ROE did not pose a serious risk of "undue hardship" to consumers, due partly to DEC's assistance programs for low-income residential customers.

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35. Specifically, Dr. Morin observed that the yield on the thirty-year Treasury bond was 2.16% when the Commission approved a 9.6% ROE for DEP in 2021; however, at the time of Dr. Morin's rebuttal testimony analysis in the DEC case, the yield on thirty-year treasury bond had risen to 4.02%.

The Commission's analysis of DEC's interests tracked the examination of DEP's interest in the DEP Order. The Commission concluded that "macroeconomic, geopolitical, extreme weather, public health, and other exogenous events beyond DEC's control" necessitated increasing DEC's ROE, as did DEC's new obligations under the Carbon Plan. Echoing the DEP Order, the Commission stated that the 10.1% ROE approved for DEC would "result in the lowest rates constitutionally permissible."

On appeal the Attorney General and CUCA contend that DEP and DEC presented "substantially similar evidence" on their respective risk profiles, and thus it was arbitrary and capricious for the Commission to approve a higher ROE for DEC than it did for DEP. The Attorney General separately challenges the Commission's customer interest analysis in the DEC case, arguing that the Commission failed to consider adequately the effects of DEC's ROE increase on customers.

1. DEC's Higher ROE

The Attorney General covers essentially the same ground as CUCA and then some, so we will focus on the Attorney General's ROE arguments. In claiming that the Commission arbitrarily and capriciously approved a higher ROE for DEC than for DEP, the Attorney General maintains that the evidence before the Commission in the DEC case was "substantially similar" to evidence presented in the DEP case, including evidence on risk profiles, credit ratings, planned capital projects, and proxy groups.[36] The Attorney General also notes that Dr. Morin served as an expert witness for both DEP and DEC and that in each case he recommended an ROE of 10.4% (adjusted to include flotation costs). In fact, much of Dr. Morin's pre-filed testimony at the DEP evidentiary hearing was, by his own admission, "substantially identical" to his pre-filed testimony at the DEC hearing. Dr. Morin used identical economic models, for example, and argued that the same set of financial risks—"declining demand growth, rising operating costs, rising capital costs, . . . [and] lower allowed returns"—threatened both Utilities. When asked at the DEC hearing whether there was any "substantive difference" between DEP and DEC that would justify different ROEs, Dr. Morin said he was "not . . . aware of any difference that would warrant a difference in allowed ROE."

According to the Attorney General, the Commission "use[d] . . . the exact same methodologies and inputs to arrive at a fundamentally

36. The proxy group is a collection of utilities with comparable properties to the subject utility that provides the inputs for the economic models used to calculate an ROE.

different result for a utility with an identical risk profile." This, says the Attorney General, was arbitrary and capricious decision-making. While the Attorney General admits that the Commission need not "always reach precisely the same ROE for utilities that come before it at the same time," he argues that, where the material evidence presented by the utilities is the same, "the Commission must treat identical facts alike unless there is evidence and good reason not to."

The Utilities maintain that the Attorney General's argument is foreclosed by this Court's *VEPCO* decision. We do not think *VEPCO* controls because here the Commission did not fail to explain why it took different positions in rate cases involving comparable facts. When read together, the DEP and DEC Orders unambiguously explain why the Commission approved a different ROE for DEC. Consequently, the Attorney General would not prevail even if this Court had ruled in *VEPCO* that the Commission must spell out its reasoning when it takes different positions in ratemaking cases involving comparable evidence.

In their dissent to the DEP Order, the three dissenting commissioners set out in significant detail the reasons for their belief that the Commission should have approved a higher ROE—10.0%—for DEP. For instance, they expressed concern that some of the models that expert witnesses had used to measure the cost of equity were "inconsistent with the current capital market environment and bias[ed] downward the range of reasonableness."[37] Describing ROE as a "critical component of creditworthiness," the dissenters worried that an ROE of less than 10% would impair DEP's ability to compete for capital "on the most reasonable terms available." They regarded this point as important because, *inter alia*, "DEP faces substantial capital needs over the next several years to comply with environmental requirements, to replace and upgrade aging infrastructure, to construct or acquire new generation resources, to upgrade the transmission system, and to satisfy its debt maturities." The dissenters argued that higher borrowing costs for DEP would eventually lead to increased costs for its customers.

When the dissenting commissioners in the DEP case became the majority in the DEC case shortly thereafter, they confronted ROE evidence that was—to adopt the Attorney General's characterization—"substantially similar" to the ROE evidence they had just analyzed

37. The dissenting Commissioners were especially critical of the expert witnesses' Discounted Cash Flow models. Such models "estimate[ ] the ROE as the sum of expected dividend yield and expected rate of dividend growth." *Cooper II*, 367 N.C. at 434.

extensively in their DEP dissent. Not bound by the outcome in the DEP case, they cast votes in the DEC case in line with the views they had expressed in that dissent less than four months earlier. We see nothing arbitrary or capricious in their conduct. Moreover, it would border on silly for this Court to reverse their decision merely because the DEC Order does not repeat the arguments laid out in their DEP dissent.

Our dissenting colleagues argue that the Commission erred as a matter of law by not picking the lowest ROE within its zone of reasonableness for the DEC case. According to them, "[w]hen presented with a range of reasonable options, the Commission lacks 'discretion' to randomly select a number in that range. Instead, it must select the lowest possible rate consistent with due process."

This argument fundamentally misapprehends the zone of reasonableness. The zone does not represent—as our dissenting colleagues seem to believe—a determination by the Commission that any number within the zone will do. Rather, in delimiting a zone of reasonableness, the Commission narrows the range within which it will search for the lowest, constitutionally permissible rate, much as soldiers use bracketing to close in on artillery targets.

The Commission's ROE analysis in the DEC proceeding confirms our understanding. After identifying the zone's parameters in that case, the Commission went on to conclude, "taking into account changing economic conditions and their impact on customers, that the approved [10.1% ROE rate] will result in the lowest rates constitutionally permissible in th[e] [DEC] proceeding."

Undoubtedly, the Commission's ROE decision involved the exercise of discretion. Such rate-setting determinations always "require[ ] the exercise of subjective judgment." *State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n*, 323 N.C. 481, 490 (1988). The necessity of subjective judgment becomes clear when one considers the mountain of evidence—much of it highly technical—that the Commission examined and weighed before it approved an ROE of 10.1% for DEC. This evidence included an array of mathematical models produced by expert witnesses using various methodologies.[38] Despite relying on many of the same methodologies, the experts recommended

38. As Dr. Morin testified, the experts used multiple methodologies because "[n]o one single method provides the necessary level of precision for determining a fair return." In addition to the Discounted Cash Flow methodology, multiple experts also employed the Capital Asset Pricing Model and Risk Premium methodologies. As Dr. Morin informed

different ROEs for reasons the Commission discussed at length in the more than forty single-spaced pages that the DEC Order dedicates to the Commission's ROE decision. At the end of the day, the Commission had to set DEC's ROE rate based on voluminous, complex, and sometimes contradictory evidence. In performing this task, it had no choice but to exercise discretion.

The Attorney General further asserts that evidence presented at the DEC hearing affirmatively contradicted the Commission's award of a higher ROE for DEC. Dr. Morin testified that "the bond rating agencies ha[d] . . . reacted favorably" following the Commission's approval of a 9.8% ROE for DEP. Such "real-world reactions" to DEP's ROE, says the Attorney General, were "perhaps the best evidence that a 9.8% (or lower) ROE was more than fair to existing investors." Dr. Morin also testified that he wouldn't "violently object" to a 10.2% ROE because it was within the range of what he considered reasonable. The Attorney General describes this testimony as Dr. Morin "recalibrat[ing] his recommendation," essentially adopting a 10.0% ROE when one removes flotation costs. Because no other expert recommended an ROE greater than 10.0%, the Attorney General claims that the Commission's award of 10.1% was not supported by any expert recommendation.

Although Dr. Morin did say in his DEC testimony that he would not "violently object" to an ROE of 10.2%, the fact remains that he recommended an ROE of 10.4%, a number higher than the 10.1% ROE approved by the Commission. The Attorney General's argument therefore lacks merit.[39]

Following the Attorney General's lead, our dissenting colleagues argue that Dr. Morin's testimony, "taken as a whole, fails to support an award higher than 9.8%." Like the Attorney General, they seize upon Dr. Morin's admission that bond markets reacted favorably to the 9.8% ROE approved by the Commission in the DEP proceeding. But this short-term

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the Commission, "all of [these methodologies] are market-based methodologies designed to estimate the return required by investors on the common equity capital committed to DEC."

39. CUCA also challenges as arbitrary the use of a particular ROE methodology by the Commission in its calculation of the reasonable range of ROE estimates. Specifically, CUCA takes issue with how the Commission averaged various expert witnesses' proposed ROEs in calculating what it determined to be the zone of reasonableness. We are unconvinced and, in any event, CUCA has not shown that it was prejudiced by the Commission's methodology. *See* N.C.G.S. § 62-94(c) ("[D]ue account shall be taken of the rule of prejudicial error.").

reaction does little—if anything—to undermine Dr. Morin's ROE recommendation in the DEC case, which rested to a significant degree on long-term financial considerations. Specifically, Dr. Morin tied his ROE recommendation to an uptick in the 30-year U.S. treasury bond yield (3% to 4%), explaining that

> common stocks are very long-term instruments more akin to very long-term bonds rather than to short-term Treasury bills or intermediate-term Treasury notes. . . . The expected common stock return is based on very long-term cash flows, regardless of an individual's holding period. Moreover, utility asset investments generally have very long-term useful lives and should correspondingly be matched with very long-term maturity financing instruments.

Even if one disagrees with Dr. Morin's recommendation, his testimony unquestionably provided more than a scintilla of competent and material evidence supporting the Commission's ROE decision in the DEC proceeding. *See State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 348 N.C. 452, 460 (1998) ("Substantial 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." (cleaned up)).

While our dissenting colleagues accuse us of "burying [our] heads, ostrich-like in the sand, as to the actual evidence below," the real difference between their position and ours is that we are unwilling to usurp the role of the Commission and reweigh the evidence. This Court may not "disturb an order of the Commission merely because [we] would have given [the evidence] a different weight." *State ex rel. Utils. Comm'n v. Duke Power Co.*, 285 N.C. 377, 390 (1974) (cleaned up). If the Commission followed the law and based its decision on competent, material, and substantial evidence, we must uphold its determination, regardless of whether we would prefer a different outcome. To do otherwise would be to appropriate power that does not belong to us and transform this institution into something other than an appellate court.

2. Customer Interest Analysis

The Attorney General separately asks us to vacate the Commission's decision to approve a 10.1% ROE in the DEC case because the Commission "failed to properly consider the impact that its . . . determination would have on DEC ratepayers." The Attorney General's argument depends heavily on *Cooper I*.

While conceding that the DEC Order references the need to protect DEC's customers from excessive rates, the Attorney General insists that it gives only "scant attention" to the interests of DEC's customers and focuses almost exclusively on DEC's need for an ROE high enough to attract investors. He also points out that the customer interest analysis in the DEC Order tracks the DEP Order's analysis "verbatim." The Attorney General regards this "parroting" as another sign that the Commission "failed to acknowledge or consider the unique circumstances facing [DEC's] customers."

In *Cooper I*, this Court construed N.C.G.S. § 62-133 to require the Commission to "take customer interests into account when making an ROE determination." *Cooper I*, 366 N.C. at 495. To satisfy the statute, "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." *Id.* In so doing, the Commission must "treat consumer interests fairly—not indirectly or as mere afterthoughts." *State ex rel. Utils. Comm'n v. Cooper*, 367 N.C. 741, 745 (2015) (cleaned up).

We find the Attorney General's arguments unpersuasive. For starters, his criticism that the DEC Order copies the DEP Order verbatim rings hollow. In arguing that the Commission impermissibly failed to explain its decision to approve a higher ROE for DEC than for DEP, the Attorney General insisted that the evidence in the two cases is "substantially similar." Given this similarity, it is hardly surprising that the Commission would analyze customer interests in both cases in much the same terms.

More importantly, the DEC Order demonstrates conclusively that the Commission duly evaluated customer interests when setting DEC's ROE. Contrary to the Attorney General's allegation that the Commission gave them "scant attention," the Commission devoted considerable attention to customer interests, carefully evaluating and weighing the relevant evidence. To prove the point, we quote the Commission's customer interest analysis at length:

> **Cooper I *Factors and Ultimate Conclusion Regarding Cost of Equity Capital***
>
> Regarding the obligation in accord with the holding in *Cooper I* to inform its determination of a[n] [ROE rate] within that range, the Commission must address the impact of changing economic conditions on customers.

> In this case, all parties had the opportunity to present the Commission with evidence concerning changing economic conditions as they affect customers. The testimony of DEC witness Morin and Public Staff witness [Christopher C.] Walters, an associate with Brubaker & Associates, Inc., addresses changing economic conditions at some length. Witness Morin provided detailed data concerning changing economic conditions in North Carolina, as well as nationally, and concluded that the North Carolina-specific conditions are "highly correlated" with conditions in the broader national economy. As such, witness Morin testified that changing economic conditions, both nationally and specific to North Carolina, are reflected in his [ROE rate] estimates.
>
> Public Staff witness Walters generally agreed with DEC witness Morin that as of the time of the filing of his testimony, economic conditions had improved in North Carolina. As the Commission has noted, customer impact due to changing economic conditions is embedded in [ROE] expert witness analyses. Witness Morin's analysis, which the Commission credits and to which the Commission gives weight, also indicates that even though the North Carolina and U.S. economies have contracted, economic conditions in North Carolina continue to be highly correlated to conditions nationally, and, therefore, continue to be reflected in the analyses used to determine the [ROE rate].
>
> The Commission concludes that based upon the evidence presented in this case, the econometric data relied upon by [ROE rate] expert witnesses captures the effects and impacts of changing economic conditions upon customers and the Commission concludes that based on the evidence presented in this case, it does.

With changing economic conditions in mind, the Commission concluded that an ROE of 10.1% "will not cause undue hardship to customers even though some will struggle to pay the increased rate." The Commission also highlighted programs to assist those DEC customers most affected by the increased rate:

> Indeed, affordability, especially for low-income customers, was a special focus of DEC and the intervening parties to this proceeding. As noted above, the Commission established the [Low-Income Affordability Collaborative (LIAC)] in its April 16, 2021 Order in the 2019 Rate Case and tasked the LIAC with addressing affordability issues for low-income residential customers. The efforts of the LIAC are apparent in this case and include the Affordability Stipulation as previously discussed in this Order.[40] The provisions in the Affordability Stipulation, which include[ ] the development of the [Customer Assistance Program (CAP)] pilot, directly benefit customers with the least ability to pay in the current economic environment. In addition, as previously discussed in this Order, through the Payment Navigator program proposed in this proceeding, DEC will work closely with customers in need of assistance with managing bills and will connect those customers with sources of support and funding, based on the unique situation of the customer. While these programs will not ease the burden that electricity rates will place on certain of DEC's customers, the Commission expects these programs to provide a meaningful level of support to eligible customers. The Commission takes these facts into account in approving the 10.1% [ROE].

The Commission exhorted DEC to continue working to provide financial relief to its customers:

> [T]he Commission also concludes, based on the evidence of record, that efforts to address energy burden and support for customers needing assistance with their bills are continuing to evolve. The LIAC allowed DEC and its stakeholders to generate data that illustrates the depth and breadth of the challenge in North Carolina. Work must continue to reach these customers and

40. In the Affordability Stipulation, DEP and DEC agreed to make $16 million in shareholder financial contributions to programs supporting their low-income customers. DEP and DEC also agreed to report their monthly residential payments ratio, which ostensibly indicates how many customers are unable to pay their power bills.

> provide meaningful support both in terms of assisting customers to use energy more efficiently so that bills are reduced and in terms of providing support to those customers when they are in need of bill assistance. The Commission recognizes the difficulties attendant to solving for these issues but emphasizes that the utility must continue to work with community partners and the LIAC in this work. As has been previously expressed by this Commission, the electric utilities must pursue every opportunity presented by federal funding made available by the IRA and other federal legislation to support customers in need. The Commission has confidence that DEC, the Public Staff and stakeholders will identify such opportunities for customers and will develop programs that take advantage of every federal dollar that is available for customer support.

The Commission also took into account the potential financial benefits to customers from an ROE that allows DEC to compete for capital on reasonable terms:

> The need to invest significant sums to serve its customers requires DEC to maintain its creditworthiness in order to compete for large sums of capital on reasonable terms. In addition, as recent years have demonstrated, macroeconomic, geopolitical, extreme weather, public health, and other exogenous events beyond DEC's control may necessitate and indeed have necessitated the need for DEC to access and invest significant sums during atypical and volatile market conditions. The Commission takes note of [the testimony of] DEC witness [Karl W.] Newlin[, Senior Vice President of Corporate Development and Treasurer of Duke Energy Business Services, LLC,] . . . that particularly in light of DEC's present credit metrics, [ROE rate] is one predicate . . . to the level of creditworthiness necessary to efficiently access the capital markets on reasonable terms during all market cycles, including periods of high volatility, which access ultimately lowers borrowing costs passed through to customers during such time. Witness Newlin testified that high credit quality will benefit customers. Witness Newlin explained that if the credit profile of DEC is weakened,

> customers might pay less in rates in the short-term, but DEC would face higher debt borrowing costs in the long-term that will be passed through to customers. Witness Newlin testified that "it would be risky to do that . . . because I can see — you know, mathematically, you might get some near-term savings, but longer term, I believe it'd be greater cost to customers."

(Cleaned up).

Having examined the evidence, the Commission explained that it was "mindful of the burden" higher electricity rates pose to consumers but that it "must balance the burden against DEC's being in a position to access capital: (1) on reasonable terms, and (2) in moments when DEC most needs capital in order to provide reliable service." The Commission concluded that an ROE of 10.1% "appropriately balances the benefits received by DEC's customers from DEC's provision of safe, adequate, and reliable electric service in support of the well-being of the people, businesses, institutions, and economy of North Carolina . . . with the difficulties that some of DEC's customers will experience in paying DEC's adjusted rate."

Viewed objectively, the customer interest portion of the DEC Order demonstrates that the Commission took *Cooper I* seriously and duly considered customer interests before it approved DEC's ROE. Although the Attorney General finds fault with the Commission's analysis, "[i]t is not this Court's duty to evaluate the accuracy of complex statistical models, conflicting methodologies, and the opposing expert opinions drawn therefrom." *Carolina Util. Customers Ass'n*, 323 N.C. at 251. The General Assembly has assigned that responsibility to the Commission, and the record indicates that the Commission fulfilled its obligation during its ROE deliberations in the DEC case.

Neither the Attorney General nor CUCA has shown that the Commission's ROE determination in the DEC case was "affected by error of law" or unsupported by "competent, material and substantial evidence." *Duke Power*, 305 N.C. at 10. We thus lack any legal basis on which to overturn that determination.

IV. Conclusion

Our careful review of appellants' arguments discloses no grounds for reversing or vacating the final orders entered by the Commission in the DEP and DEC cases. Accordingly, we affirm those orders.

AFFIRMED.

Justice EARLS concurring in part and dissenting in part.

The majority affirms the Utilities Commission's decision to award a rate increase to Duke Energy Carolinas and Duke Energy Progress. Specifically, the Commission awarded Duke Energy Carolinas a higher rate of return on common equity than it had received in the past—higher even than the Commission awarded Duke Energy Progress only three and one-half months earlier. Because the majority affirms these decisions, Duke Energy will charge consumers in the western part of the state more than consumers in the eastern part of the state for identical electrical services. I dissent from the majority's decision to approve this disparate treatment. In my view, the Commission's decision in the Duke Energy Carolinas rate case is quite plainly unlawful and arbitrary.

Before diving into the weeds of the particular legal challenge here, it is useful to start with a fifty-thousand-foot view of this Court's role, especially regarding North Carolina's new framework of performance-based regulation of public utilities. Under the old system, each time a utility wanted to increase rates, it would have to file a new application with the Commission. Under the new system, certain public utilities can apply once to increase rates over three years. N.C.G.S. § 62-133.16(a)(5), (c) (2025). Each such rate order is now of even greater consequence: It represents the Commission's one-time decision on what North Carolinians will pay for essential services for multiple years, and the Commission can effectively pre-approve rate hikes for all customers. This Court will typically have only one chance to review such orders on direct appeal. *Id.* §§ 7A-29(b), 62-90 (2025). Because the stakes are higher and chances for review fewer, this Court must exercise utmost diligence when determining the Commission's compliance with its legal obligations in these proceedings.

Yet today, the majority blanketly rejects nine distinct challenges to the Commission's orders in two such ratemaking cases.[1] In doing so,

1. Those nine challenges are, by my count: (1) whether the Commission's decision to award Duke Energy Carolinas a 10.1% return on common equity was arbitrary, capricious, unlawful, or unsupported by substantial evidence; (2) whether the Commission adequately accounted for consumer interests in the Duke Energy Carolinas return on common equity award; (3) whether the Transmission Cost Allocation stipulation in the Duke Energy Carolinas order was permissible; (4) whether the Commission erred by admitting supplemental testimony by the Public Staff; (5) whether the Commission erred by adopting a 10% interclass subsidy reduction; (6) whether the Commission erred by abandoning the equal percentage method of allocating increased fuel costs in fuel rider proceedings; (7) whether the Commission erred by excluding incremental electric vehicle revenues

the majority appears to transform appropriate deference to the Commission's technical expertise into an exercise in largely taking the Commission at its word. Our critical review requires more. Ratepayers across North Carolina deserve more.

I would not so sweepingly affirm the Utilities Commission. Instead, I would vacate the Duke Energy Carolinas award of a 10.1% rate of return on common equity as well as reverse the Commission's decision to treat hazard tree removal as a capital expense. As to the return on common equity, I conclude that the Commission's order fails to follow the law's mandate that attention be given to the consumers' interests. The record is replete with evidence that rising energy costs are hurting North Carolina consumers. Yet Duke Energy seeks to increase rates even while it posts record profits.[2] Here, even though Duke Energy Carolinas and Duke Energy Progress have the same capital risk profile, have previously been awarded the same rates of return, and soon may even be the same company, the Commission authorized Duke Energy Carolinas to give shareholders a thirty basis point higher rate of return on common equity than that awarded to Duke Energy Progress.[3]

The majority concludes that this decision is permissible because the Commission's composition changed between the two rate orders. The Commission majority's award in the Carolinas case was consistent with the dissent's view in the Progress case, it reasons—implying that Duke Energy Progress should have been able to charge its consumers more, too.

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from the residential decoupling mechanism; (8) whether the Commission erred by treating hazardous tree removal as a capital expense; and (9) whether the Commission erred by treating transmission and distribution projects as eligible for rate base treatment.

2. That includes a requested rate increase that succeeds this one. Liz McLaughlin, *Duke Energy seeks rate hike as customers push back on rising bills*, WRAL https://www.wral.com/news/local/duke-energy-residential-rate-hike-public-hearing-march-2026 (Apr. 2, 2026, 2:19 PM).

Notably, Duke Energy Carolinas appears to give shareholders a higher return on common equity than is allowed by the Commission, depending on the underlying metric. Duke Energy Carolinas recently reported achieving a rate of return on common equity of 11.1%, or 150 basis points above the return on common equity authorized in its 2019 Rate Case (9.6%). Letter from Jack E. Jirak, Deputy General Counsel for Duke Energy Corporation, to A. Shonta Dunston, Chief Clerk, North Carolina Utilities Commission, Re: 2025 Quarter 4 E.S.-1 Report (filed on 2 March 2026 in Docket No. M-1, Sub 12DEC), starw1.ncuc.gov/NCUC/ViewFile.aspx?Id=c7f6bb18-5c0a-4664-ab05-92cfa2cee017 (last visited May 11, 2026).

3. A "basis point" is "[o]ne-hundredth of 1%; .01%." *Basis point*, *Black's Law Dictionary* (12th ed. 2024).

It is true that the Utilities Commission's composition has recently changed, in part because of recent acts by the legislature that are still undergoing judicial review. *See Stein v. Hall*, No. COA 25-745, slip op. at 19–24 (N.C. App. Jan. 7, 2026), *appeal and filed and disc. rev. pending*, No. 53P26. But this change in composition is not a valid or rational basis for awarding a higher return on common equity to Duke Energy Carolinas. Namely, the Commission does not have discretion to randomly select a rate of return on common equity. The Commission is required to award a rate that poses the lowest possible cost to the using public for quality service while being sufficient to maintain shareholder investment. The Commission's failure to award the lowest reasonable return, or to find facts and state reasons consistent with Chapter 62 for deviating from that baseline, is legal error.

As to the hazard tree removal program, the Commission acted in excess of its statutory authority by awarding rate base treatment to the routine vegetation management practice of removing hazard trees. I fail to see why routinely trimming trees is an operating expense while routinely cutting trees down on property adjacent to Duke Energy's facilities is a capital one. Because Chapter 62 limits rate base treatment to only those qualifying "capital investments" and "property used and useful" during the rate period, the Commission acted in excess of its authority by allowing Duke Energy Carolinas a return on these costs.

As to the remaining challenges, I respectfully concur.

I. Rate of Return on Common Equity

A. First Principles

It bears emphasizing that public utility regulations must robustly protect the consuming public. That is a core purpose of a regulated public utility.

A public utility company is granted a "legal monopoly upon a service vital to the economic well being and the domestic life of the people of a large territory." *State ex rel. Utils. Comm'n v. Gen. Tel. Co. of the Se.*, 281 N.C. 318, 335 (1972). Because "[a]n uncontrolled legal monopoly in an essential service leads, normally and naturally, to poor service and exorbitant charges," *id.*, the state must check the utility's worst impulses which would otherwise threaten harm to consumers, other business industries, and the state writ large. The Public Utilities Act thus tasks the Utilities Commission with protecting the public interest by carefully setting the rates that public utilities can charge to customers. N.C.G.S. §§ 62-1, -2(a)–(b) (2025). In this way, regulation by the

Commission substitutes for traditional market competition to control costs. *See* Frank W. Hanft, *Control of Electric Rates in North Carolina*, 12 N.C. L. Rev. 289, 290 (1934). The Commission is trusted to carry out North Carolina's public policy to fairly regulate public utilities and "promote adequate, reliable and economical utility service to all of the citizens and residents of the State." N.C.G.S. § 62-2(a)(1), (3).

To that end, the Utilities Commission must set rates high enough that utilities can ensure reliable service to customers, including by paying shareholders for the cost of accessing necessary capital, but low enough to be fair to consumers. *Id.* § 62-133(b)(4) (2023); *State ex rel. Utils. Comm'n v. Thornburg*, 316 N.C. 238, 242 (1986). Above all, the "primary purpose [of this regulatory scheme] 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." *State ex rel. Utils. Comm'n v. Gen. Tel. Co. of the Se.*, 285 N.C. 671, 680 (1974) (emphasis added). Rather, the statutes exist "to assure the public of adequate service at a reasonable charge." *Id.*

As the majority notes, one step in the process of setting rates is for the Commission to determine the utility's overall rate of return, or the percentage the utility will earn on certain of its capital investments. *See* majority *supra* Section III.C; *State ex rel. Utils. Comm'n v. Thornburg*, 325 N.C. 463, 467 n.2 (1989). One of the most important components of that overall rate of return is the rate of return on common equity. N.C.G.S. § 62-133(b). Specifically, that figure represents what "a utility [must] earn to induce investors to hold and to continue to buy common stock." Charles F. Phillips, Jr., *The Regulation of Public Utilities* 394 (3d ed. 1993) [hereinafter Phillips, *Regulation of Public Utilities*]. This is not a question of investor expectations generally. Rather, it captures the expectations of those investors seeking the type of "minimal risk of loss of principal" attendant to investing in a fully regulated public utility. *Gen. Tel.*, 281 N.C. at 338. Return on common equity in this context is synonymous with the cost of equity capital for a public utility specifically.

Because the rate of return on common equity is a matter of expectations of investors in this particular type of equity, among the most important evidence is the rate of return for similar utilities: the "return[ ] on investment[ ] in other enterprises having corresponding risks." *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944). Regulators must look to comparable returns, or those "generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding

risks and uncertainties." *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 692 (1923). Because the utility has "no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures," *id.* at 692–93, the high-water mark for a public utility's return on common equity is that which is "commensurate with returns on investments in other enterprises of corresponding risk." Phillips, *Regulation of Public Utilities* 381. Simply put, because the rate of return on common equity for one utility is closely tied to the returns being awarded to comparable entities, regulators must take account of those comparable returns.

Accurately calculating the proper rate of return on common equity is "extremely important" because "it is the most expensive form of capital accumulation" and is "ultimately borne by the ratepayer." *State ex rel. Utils. Comm'n v. Pub. Staff* (*Public Staff I*), 322 N.C. 689, 697–98 (1988). Each increase in the rate of return on common equity triggers substantial costs for consumers. *See State ex rel. Utils. Comm'n v. Cooper* (*Cooper I*), 366 N.C. 484, 485 n.1 (2013) ("The higher the [return on equity], the higher the resulting rates that customers will pay to the utility.").

Indeed here, a single basis point alone is worth millions of dollars. For a typical residential customer receiving 1000-kilowatt hours of service who had a $123 energy bill, roughly $24 of that amount would go to paying the return on common equity—i.e., shareholders—according to one estimate. As Duke Energy's own expert witness agreed, shifts in the rate of return on common equity cause "real-world impacts on people's bills." If the rate of return on common equity is set *higher* than the cost of capital, the Commission will, in effect, unlawfully transfer wealth from ordinary consumers to Duke Energy's shareholders—essentially exploiting captured customers for shareholders' gain. *See* Phillips, *Regulation of Public Utilities* 375, 387–88.

In light of these factors, the Commission has limited discretion to set rates, including the rate of return on common equity. The Commission must "fix rates *as low as* may be reasonably consistent with the requirements of the Due Process Clause of the Fourteenth Amendment to the Constitution . . . [and] those of the State Constitution, Art. I, § 19." *State ex rel. Utils. Comm'n v. Duke Power Co.*, 285 N.C. 377, 388 (1974) (emphasis added); *see also id.* (noting that the federal and state constitutional requirements are "the same in this respect"); *State ex rel. Utils. Comm'n v. Pub. Staff* (*Public Staff II*), 323 N.C. 481, 490 (1988) (observing that case law on the overall rate of return applies to the rate of return

on common equity and that rates must be "as low as may be reasonably consistent with" due process (cleaned up)).

In addition to adhering to this baseline, the Commission must also directly consider consumer interests. It is required to evaluate "the impact of changing economic conditions on customers" when making a return on equity determination. *Cooper I*, 366 N.C. at 495.

These requirements mean that, when presented with a range of reasonable options for a return on common equity, the Commission's compass must always point downward. Rates must be set at the "lowest possible cost to the using public for quality service" while assuring "sufficient shareholder investment in utilities." *Id.* at 494 (quoting *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n* (*CUCA I*), 348 N.C. 452, 458 (1998)). Ultimately, "[w]hat constitutes a fair rate of return on common equity is a conclusion of law that must be predicated on adequate factual findings." *CUCA I*, 348 N.C. at 462 (citing *Public Staff I*, 322 N.C. at 693).

In turn, our Court is responsible for directly reviewing whether the Commission complied with these legal obligations. *See* N.C.G.S. §§ 7A-29(b), 62-90 (2023). Although the Commission has authority and expertise to determine which rates are reasonable, *CUCA I*, 348 N.C. at 462, this Court is obligated to critically review "the evidentiary underpinning for the Commission's findings and whether the findings support its conclusion regarding this figure." *State ex rel. Utils. Comm'n v. Pub. Staff* (*Public Staff III*), 331 N.C. 215, 223 (1992). We must set aside an order fixing a return on common equity when the decision is "not supported by adequate findings of material facts," *Public Staff I*, 322 N.C. at 693, not supported by "substantial evidence in the record as a whole," *Public Staff III*, 331 N.C. at 222, or arbitrary or capricious, N.C.G.S. § 62-94(b)(6) (2025). Substantial evidence is "more than a scintilla" of evidence; it means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State ex rel. Utils. Comm'n v. Cooper* (*Cooper III*), 367 N.C. 644, 648 (2014) (quoting *CUCA I*, 348 N.C. at 460). We must also reverse the Commission for errors of law. N.C.G.S. § 62-94(b)(4) (directing that the reviewing "court shall decide all relevant questions of law" and "may reverse or modify" a decision "[a]ffected by other errors of law"). We review the Commission's conclusions of law de novo. *E.g.*, *State ex rel. Utils. Comm'n v. Va. Elec. & Power Co.*, 381 N.C. 499, 515 (2022).

B. Challenges to the Duke Energy Carolinas Return on Common Equity

Here, the Utilities Commission awarded Duke Energy Carolinas (Carolinas) a return on common equity of 10.1% merely three and one-half months after it awarded Duke Energy Progress (Progress) a return on common equity of 9.8%. No one disputes that the two utilities are materially identical. Yet this decision means that, according to one estimate, North Carolinians in the central and western parts of the state will pay over $129 million more than others in the central and eastern parts of the state—millions more for the same services from the soon-to-be same company.[4]

The Attorney General, on behalf of the using and consuming public, *see* N.C.G.S. § 62-20 (2023), and Duke Energy Carolinas' customers objected to this decision. They advanced three distinct challenges: they argued that the Commission's award of a 10.1% return on common equity was arbitrary or capricious, unsupported by substantial evidence in the whole record, and inconsistent with *Cooper I*'s requirement to take account of customer interests. *See id.* § 62-94(b)(4)–(6) (2023). I agree and would vacate on these bases.

1. The Award Is Unsupported by Substantial Evidence

The Commission's conclusion that a 10.1% return on common equity was the lowest possible rate consistent with due process is unsupported by "substantial evidence in the record as a whole" and must be set aside. *Public Staff III*, 331 N.C. at 222. As the Commission's order acknowledged, the only expert witness whose return on common equity recommendation supported a 10.1% award was Duke Energy's own Dr. Roger Morin. Every other expert witness recommended an award below 10%—indeed even below 9.8%.[5] Thus Dr. Morin was the sole expert upon whose testimony the Commission could have based its decision. But his testimony, taken as a whole, fails to support an award higher than 9.8%.

Dr. Morin was Duke Energy's rate of return expert in both the Progress and the Carolinas rate cases. He was also the only one of Duke

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4. One estimate by the Public Staff calculated that a one-basis-point "impact on the consolidated revenue requirement" is in the range of $4.3 million per year, for "three years," or $129 million over three years for a thirty-basis point increase.

As the majority notes, Duke Energy Progress and Duke Energy Carolinas are in the midst of a "complex merger" that they hope will be final "at the end of 2026."

5. Two of those witnesses further recommended twenty-basis-point downward adjustments in the rate of return if multiyear rate plans were approved, as they were here.

Energy's return on equity witnesses who conducted his own quantitative analysis.[6] Dr. Morin concluded that Duke Energy Progress and Duke Energy Carolinas were entitled to the same return on common equity, in part because of their materially identical risk profiles and similar other inputs.[7] Other witnesses corroborated that both Progress and Carolinas had the same long-term Moody's Investors Service (Moody's) credit rating of A2. For Carolinas, Dr. Morin calculated that a return between 9.8% and 10.9%, including flotation costs—which may not be awarded to Carolinas under this Court's precedent, *see Public Staff I*, 322 N.C. at 696–701—would be reasonable in both cases. He ultimately recommended the midpoint of that range: 10.4% including improper flotation costs, or 10.2% excluding them.

After Dr. Morin's initial testimony in the Carolinas case, the Commission announced that it would award Progress a 9.8% return on common equity. Dr. Morin was then questioned about how that development affected his recommendations for Carolinas. After all, the cost of equity capital for one public utility depends in part on the comparable returns of peer public utilities.[8] How the market received Duke Energy Progress's award was thus some of the best comparable evidence of investors' likely expectations for Duke Energy Carolinas.

In light of the Commission's award of 9.8% to Duke Energy Progress, Dr. Morin acknowledged that 9.8% for Duke Energy Carolinas was

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6. Duke Energy Carolinas also offered testimony from rebuttal witness James M. Coyne, but Mr. Coyne did not conduct an independent rate of return on common equity analysis.

7. Dr. Morin recommended 10.4% in both his Carolinas and Progress testimony. Notably, the president of Duke Energy Progress and Duke Energy Carolinas, Kendal C. Bowman, referred to the two companies as one—"our Carolinas utilities"—and described risks to company operations specific to North Carolina generally.

8. *E.g.*, *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) ("[T]he return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks."); *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 692–93 (1923) ("A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public *equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties*; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures." (emphasis added)); Phillips, *Regulation of Public Utilities* 381 (noting that the public utility rate of return on equity must be high enough to, in part, "provide a return on common equity that is commensurate with returns on investments in other enterprises of corresponding risk").

"reasonable." Indeed, he conceded that this figure was at the "bottom of [his recommended] range." He further conceded that "bond rating agencies . . . reacted favorably" to Progress's 9.8% award. He again affirmed that he was not "aware of any [substantive] difference that would warrant a difference in allowed [return on equity]" between the two public utilities.

Thus, the testimony of the only expert who supported a rate of 10.1% or higher added that 9.8% was also reasonable and that Duke Energy Carolinas and Duke Energy Progress were entitled to the same return. Indeed, his conclusion that 9.8% was reasonable was bolstered by early indications that the market too thought this figure was reasonable and that concerns voiced by the dissenters in Duke Energy Progress about the utility's possible downgrading did not materialize. The Commission in Carolinas found no facts to support that the two companies exhibited different risk profiles warranting a greater return on common equity for one of them. It also offered no specific reasons for rejecting Dr. Morin's testimony that 9.8% was the lowest rate within the range of reasonableness.

Instead, after identifying its own "zone of reasonableness of 9.99% to 10.37%" based on various averages of witness testimony, "the Commission in its discretion" selected a number in the "approximate midpoint of this range." This is an error of law. *See Public Staff I*, 322 N.C. at 693. When presented with a range of reasonable options, the Commission lacks "discretion" to randomly select a number in that range. Instead, it must select the lowest possible rate consistent with due process. *See Duke Power*, 285 N.C. at 388; *Cooper I*, 366 N.C. at 494. If it does not select the lowest possible rate consistent with due process, it must provide reasons why it is departing from that figure—reasons that (1) comport with legal requirements governing the return on common equity and the Commission's mandates under Chapter 62, and (2) are factually supported by substantial evidence. *See Gen. Tel. Co.*, 285 N.C. at 680. The Commission failed to do so here.

The majority waves away this evidence (or lack thereof). It concludes simply that "the fact remains that [Duke Energy's witness] originally recommended an ROE of 10.4%, a number higher than the 10.1% ROE approved by the Commission." *See* majority *supra* Section III.F.1. But our job here is not to ask whether *any* evidence supported the Commission's conclusion. Rather, we must assure ourselves that there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Cooper III*, 367 N.C. at 648. Reasonable minds surely do not focus myopically on an initial, top-line recommendation to support a particular conclusion, irrespective of intervening evidentiary developments

and underlying assumptions. Summary approval of the Commission's determination here amounts to little more than the majority burying its head ostrich-like in the sand as to the actual evidence below.

Speaking of the actual evidence below, not only did the Commission fail to provide reasons for departing from the lowest reasonable rate, but its higher award was unsupported in light of the ample record evidence showing the harmful likely impact of the proposed rate increase on customers. The Commission heard testimony that "[n]early 20 percent of North Carolina residents were unable to pay their electric bills at least once in 2021." For the "90,000 workers in this state [who make] at or below the minimum wage," a rate increase would pose a serious hardship, "just pil[ing] onto housing costs that have gone out of control." Consumers reported that they would have difficulty affording a higher rate, especially those who are living on fixed or low incomes, and that they are concerned about inflation and the general state of the economy. Others expressed alarm that a company "which reported a $2.56 billion profit last year" had grounds to demand more revenue from ratepayers, particularly in light of "ongoing economic challenges caused by the pandemic."

Testimony illuminated the disproportionate burdens imposed by new rate increases. Seniors and others on fixed or low incomes "do not receive sufficient annual income increases to cover the financial burden of potentially[ ]approved requested rate hikes" and have experienced a profound burden from ongoing requests for rate increases that "never seem to stop." The Commission heard testimony that Hispanic households, as well as Black and Native American households, spend a larger share of their income on energy bills, putting them at a higher risk of utility shutoffs should rates go up. Multiple witnesses expressed concern that Duke's initially proposed rate increase would raise the average customer's bill more than $240 a year by 2026, requiring thirty-three more hours of work for someone being paid at the minimum wage.

In personal terms, consumers told the Commission that their utility bills are "very stressful" and that the "rate increase hike is just going to be even more detrimental." A rate increase could pose the risk of having insufficient funds to "meet[ ] other essential needs like food and medicine" or not allowing a child to participate on a sports team. Increasing rates would place "an undue burden on those who are already struggling financially" and force the too "many North Carolinians who already have to make tough decisions [to choose] between paying utility bills or other basic necessities." Testimony reflected that those individuals and others "simply [can]not afford a rate increase."

In light of this evidence, the Commission's decision to depart from the lowest recommended "reasonable" rate and to instead award a return thirty basis points higher than that—without offering any reasons consistent with Chapter 62 for doing so—is affected with legal error and unsupported by the record, and therefore must be set aside.

In a tacit acknowledgement that the evidence before the Commission in this case does not support its ultimate award, Duke Energy offered post hoc justifications. Specifically, Duke argued, and the majority agrees, that the Commission's change in composition justified its larger return on common equity award in Carolinas. As the majority puts it, the Commission acted reasonably because the new commissioners "cast votes in the [Carolinas] case in line with views they had expressed in that dissent [in Progress] less than four months earlier." *See* majority *supra* Section III.F.1.

To start, this observation about the change in the Commission's composition is beside the point. The Commission's rate order never cited its change in composition as the reason it adopted a different position on the rate of return on common equity. There is no discussion about the different membership of the Commission's decision-making panel or explanation of how that different composition changed the underlying inquiry as to the legal conclusion regarding the lowest possible rate of return consistent with due process.

As a general matter, judicial review of agency actions is limited to those "grounds invoked by the [Commission]" when it took the challenged action. *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 63–64 (1986) (cleaned up). This Court should not affirm an agency's decision because we can conceive of a legal basis to support it; to do so would be to abandon the critical review called for in our statutes and precedent, *e.g.*, *Public Staff III*, 331 N.C. at 222–23; N.C.G.S. § 62-94(b), in favor of a hyper-deferential hypothetical rational basis review. For the majority now to rely on reasons to affirm the Commission's decision that were not stated in the Commission's decision contradicts basic principles of judicial review of agency actions.

Second, while the majority concludes that "it would border on silly for this Court to reverse [the Commission's] decision merely because the [Carolinas] Order does not repeat the arguments made in the [Progress] dissent," *see* majority *supra* Section III.F.1, that conclusion ignores the reality that some of the reasoning in the Progress dissent did not and could not justify the Carolinas return on common equity order. Namely,

the evidence of how the bond rating agencies reacted to the Progress order undermined the Progress dissenters' reasoning and thus could not apply to the Carolinas order. The dissenting commissioners in the Duke Energy Progress case were specifically concerned that the market would not react well to the 9.8% award. The primary dissent in the Progress rate order feared that a return on equity lower than 10.0% could result in a "downgrade" in creditworthiness specifically from credit rating agencies like Moody's. The favorable reaction by bond rating agencies to the Progress award was thus contemporaneous evidence that the earlier dissenters' concerns were misplaced. The reasoning from the earlier order's dissent could not be uncritically copied over to the later order in light of this new information. Put simply, it is no justification that "[the Commissioners] cast votes in the [Carolinas] case in line with the views they had expressed in that dissent [in Progress] less than four months earlier." When intervening evidence undermined those views.

Third, the majority gestures to changed economic conditions that developed in the three and one-half month interim between the Progress award and the Carolinas award. *See* majority *supra* Section III.F. Duke argued, and the majority apparently agrees, that the higher return on equity in Carolinas was supported because all expert witnesses raised their recommendations in the later rate order in light of changed economic conditions. Under the actual facts of this case, though, this argument is without merit. The Commission never acknowledged the earlier 9.8% Progress award *and* tied its greater award to Carolinas to different economic conditions, so this cannot be grounds to affirm the Commission's decision. *See Godfrey*, 317 N.C. at 63–64. Moreover, no expert's recommended increase accounted for the full variation between the Commission's two rate orders.

Looking at the witness testimony, all experts increased their recommendations by ten to twenty basis points at most. The difference in the Commission's ultimate award to Carolinas was thirty basis points. We do not improperly override the Commission's expertise by merely observing that its math does not add up. Our responsibility to review the Utilities Commission's action demands more than simply concluding that "the witness's numbers got bigger, so the Commission's bigger number was justified."

Party – Witness	**Progress**	**Carolinas**	**Difference**
Duke Energy Progress/ Carolinas – Morin	10.4%[9]	10.4%	0 pts
Public Staff – Walters[10]	9.45%	9.55%	10 pts
CUCA – O'Donnell (Progress) and LaConte (Carolinas)	9.25%	9.40%	15 pts
NCJC et al. – Ellis	6.00%	6.15%	15 pts
Commission Award	**9.8%**	**10.1%**	**30 pts**

It bears emphasizing that shifts in "economic conditions" were the only factual basis Duke Energy itself was aware of that would justify a different cost of equity capital for Carolinas than for Progress. When pressed about the grounds for awarding a different return to Carolinas than for Progress, a Duke Energy executive responded as follows:

> [Question from attorney for Public Staff:] [W]e know that this Commission ordered a 9.8 ROE in the DEP case, and DEP covers, let's say, Wake County, for example. So, when DEC is asking for a 10.4, 60 more basis points [than its current award], when we go to Graham County and people say why is – why am I paying 60 basis points more than people in Wake County, what answer do I give?
>
> [Answer from Duke Energy executive Laura Bateman:] I think from the Company's perspective we requested the same ROE in both – both – for both utilities and, obviously, there is slightly different

9. Dr. Morin originally recommended a 10.2% return on common equity in his first Progress direct testimony, and he later updated his recommendation in each case to 10.4% based on an "increase in forecast interest rates." So Dr. Morin still recommended the companies receive the same return on common equity award, but he calculated that the interest rate changes required a more modest increase of twenty basis points—still less than the Commission's thirty. Dr. Morin's 10.4% figure includes flotation costs, which are omitted from other witnesses' testimony.

10. Mr. Walters and Mr. O'Donnell recommended a downward adjustment in the rate of return on common equity if Duke Energy's multiyear rate plan was approved. The chart shows the witnesses' recommended figures without those downward adjustments, which the Commission rejected in both cases despite approving the multiyear rate plan for Carolinas and Progress.

> timing of the cases, slightly different contents to the cases, but I think primarily the timing would have an impact or could have an impact.

So Duke Energy itself cannot explain to Graham County consumers why they must pay more than Wake County consumers for the same services. How the Commission still determined that such disparate treatment was justified is a mystery. The majority does not explain or identify the substantial evidence it believes supports this disparate treatment. In my view, it cannot, because the Commission's conclusion here is unsupported and unlawful.

Furthermore, according to Duke Energy's own evidence, economic changes in the intervening three months should not account for a substantially different return on equity between these two arms of Duke Energy. Dr. Morin conceded that "day-to-day fluctuations in interest rates and current spot circumstances" should not be reflected in the "allowed rate of return," in that the rate of return on common equity is "to remain in effect typically for the next several years." So again, the only witness whose recommendation supported an award of 10.1% also thought short-term economic shifts (maybe over three months) should not bear heavily in the Commission's award. Short-term changes cannot account for the 10.1% award, and this further bolsters that the award itself is unsupported and must be set aside. *See Public Staff III*, 331 N.C. at 226 (setting aside Duke's rate of return on common equity where "the Commission went beyond the boundaries established by the evidence").

2. The Award is Arbitrary and Capricious

I also dissent from the majority's conclusion that the Commission's return on equity award to Carolinas was not arbitrary or capricious.

"Decisions are arbitrary and capricious when, among other things, they indicate a lack of fair and careful consideration or fail to display a reasoned judgment." *State ex rel. Utils. Comm'n v. Thornburg*, 314 N.C. 509, 515 (1985). Here, the Commission's analysis shows a lack of careful consideration and reasoned judgment because it affirmatively relied on the Progress rate order sometimes and other times acted like the Progress rate order did not exist, apparently without any good or consistent reason for doing so.

Specifically, throughout its Carolinas order, the Commission used its Progress rate order as a point of comparison. That included multiple times *in its very analysis of the return on common equity. E.g.*, Order Accepting Stipulations, Granting Partial Rate Increase, Requiring Public

Notice, and Modifying Lincoln CT CPCN Conditions, *In re Application of Duke Energy Carolinas, LLC for Approval to Construct a 402 MW Natural Gas-Fired Combustion Turbine Electric Generating Facility in Lincoln County & for Adjustment of Rates and Charges Applicable to Electric Service in North Carolina and Performance Based Regulation*, Docket Nos. E-7, SUB 1134 & 1276, slip op. at 199 (N.C.U.C. Dec. 15, 2023) ("The Commission notes also that it rejected downward adjustment [of the return on common equity in light of North Carolina's adoption of performance-based regulation] only a few months ago in the [Duke Energy Progress] Rate Case . . . ."); *id.* at 203 (rejecting reliance on "the sustainable growth methodology" and the "Multi-Stage DCF" methodology, "just as [another witness] himself accorded [those methods] no weight in the [Duke Energy Progress] Rate Case"); *id.* at 206 ("The Commission rejected these [additional calculations of] beta measures in the [Duke Energy Progress] rate case and does so again here." (cleaned up)); *id.* at 213 ("*Based on similar evidence*, the Commission declined to allow recovery of flotation costs in the [Duke Energy Progress] rate case. The Commission similarly declines to allow recovery of flotation costs in this case." (emphasis added)); *id.* at 214 ("Accordingly, as [the Commission] did based on *virtually identical evidence* in the [Duke Energy Progress] Rate Case, the Commission rejects the downward adjustment theory." (emphasis added)).

Yet despite finding the Duke Energy Progress award a probative baseline for some parts of the rate of return on common equity analysis, the Commission strangely omitted any reference to its earlier choice to award Progress a 9.8% return on common equity.

This selective omission is further suspect because the Commission carefully analyzed returns on common equity for peer utilities. The Commission looked at the range of "currently authorized rates of return on common equity for vertically integrated electric utilities in the United States," including the overall average of "9.73% so far in 2023." It specifically considered comparable rates across the southeast, including Duke Energy Progress's rate of return on common equity from 2023 in South Carolina as well as its rate of return from 2021 in North Carolina.[11] Nevertheless, the Commission inexplicably refused to look at the most

11. Specifically, the Commission analyzed data showing an "Authorized [Return on Equity] Comparison of Peer Utilities in the Southeast since 2020," which featured Progress's 2021 North Carolina rate as well as Progress's 2023 South Carolina rate (9.60%).

recent version of the same data: Progress's 2023 North Carolina return. So even as the Commission insisted that the Carolinas award must be sensitive to the fact that the utility "is in competition for equity capital with other utilities," it blatantly ignored what was arguably the best comparable indication of the market for this kind of equity capital. Such selectivity is clearly arbitrary.

Notably too, the Commission discounted some witnesses' return on common equity recommendations where the award would have been "below any rate of return on equity ever approved by this Commission for [Duke Energy Carolinas]." The Commission credited Dr. Morin's testimony that Carolinas' last return was 9.6% and his testimony that the cost of equity capital was at least as great as that figure. So the Commission apparently relied on historical precedent where it justified a higher return but ignored historical precedent when that evidence counseled in favor of a lower one. Again, seemingly random selectivity shows "a lack of fair and careful consideration" and dooms the Commission's reasoning as arbitrary and capricious. *Thornburg*, 314 N.C. at 515.

To be clear, this is not a case in which a party complains that the Commission only "sparse[ly]" addressed relevant evidence. *Conservation Council*, 312 N.C. at 62. The Progress rate order's return on common equity award was essential data even under the Commission's own criteria and analysis. Yet the Commission inexplicably disregarded "the actual experience of a utility in the attraction of capital" in estimating a materially identical utility's ability to attract capital. *Gen. Tel.*, 281 N.C. at 371. Its conspicuous failure to account for that relevant data, which contradicted its ultimate outcome, shows "a lack of fair and careful consideration" and reasoned decision making. *Thornburg*, 314 N.C. at 515. The Commission is not bound by stare decisis. *Va. Elec. & Power*, 381 N.C. at 524. Even so, it is not permitted to willfully disregard evidence obviously relevant to the inquiry at hand—particularly when doing so renders its resulting rate order internally inconsistent.

Our holding in *Virginia Electric & Power Co.* is consistent with this conclusion. There we held that the Commission validly exercised its discretion to consider "other material facts" under N.C.G.S. § 62-133(d), that its findings were "supported by competent, substantial evidence," that its conclusions "were adequately explained in its order," and that the Commission's order accurately reflected "North Carolina ratemaking law as set out in prior decisions from this Court." *Va. Elec. & Power*, 381 N.C. at 526 (cleaned up). That case has little relevance here, where

the return on common equity portion of the Commission's order was not adequately supported or reasoned and evinces errors of law.[12]

3. The Award Fails to Account for Consumer Interests

Finally, the majority concludes that "the customer interest portion of the [Carolinas] Order demonstrates that the Commission took *Cooper I* seriously and duly considered customer interests before it approved [Carolinas'] [return on equity]." *See* majority *supra* Section III.F.2. The majority quotes the Commission's conclusions at length, including its determination that the 10.1% rate of return "will not cause undue hardship to customers even though some will struggle to pay the increased rate," and that Duke Energy Carolinas has some supplementary programs to help customers "with the least ability to pay," aided by funding from the federal Inflation Reduction Act. *See id.* The majority apparently reaches this conclusion even as it agrees with the Attorney General that the Carolinas order's customer interest analysis was a near verbatim copy of the Progress order.

Contrary to the majority, I find it difficult to conclude that the Commission adequately took account of customer interests in the Carolinas rate order where the Commission's analysis was substantively the same as in the Progress order yet the former was thirty basis points higher. The Commission apparently employed the exact same analysis to reach different results. By analogy, the Commission determined that 1+1 = 2 in the first order and 1+1 = 3 in the second. This does not, in my view, show that the Commission took its obligations to customers "seriously" and "duly considered" their interests. I would vacate and remand.

II. Rate Base Treatment to Hazardous Tree Removal

Although less consequential, I also dissent from the majority's decision to affirm the Utilities Commission's treatment of a hazard tree removal program as a capital expense. In my view, this kind of vegetation management practice is indistinguishable from other routine vegetation management practices that are properly classified as operating expenses. It does not meet the statutory criteria for a capital expense

12. The majority's related statement that the Attorney General's challenge fails even under the reasoning of the dissent in *Virginia Electric* is hard to follow. If the dissenters there would have held that the Commission "needed to explain why it departed from its reasoning in two cases that were decided less than two years prior, had materially similar facts, and were brought to the Commission's attention," *State ex rel. Utils. Comm'n v. Va. Elec. & Power Co.*, 381 N.C. at 530 (Barringer, J., dissenting), surely the same is true with identical circumstances occurring less than four months apart.

eligible for return. I would vacate this part of the Commission's decision too and remand for removal of this project from the rate base and for recalculation of Duke Energy Carolinas' operating expenses to account for this change.

Public utilities have a significant financial incentive to classify their expenses as "capital" rather than "operating" because only capital expenses earn a return for the utility. *Thornburg*, 325 N.C. at 475. Capital expenses are distinct from "operating expenses" under traditional rate-making and performance-based regulation. N.C.G.S. § 62-133(b)(1), (3) (2023) (distinguishing "property used and useful" from "reasonable operating expenses" and affording rate base treatment to the former only); *id.* § 62-133.16(c)(1)(a) (2023) (distinguishing "capital investments" from "operating benefits, including operation and maintenance savings"). So while classifying an expense as "capital" or "operating" can be an accounting question, in this case it is also a question of statutory interpretation. The Commission only has that power delegated to it by statute, *Gen. Tel.*, 281 N.C. at 336, and the statutes govern when the Commission can award a return to certain capital expenses. N.C.G.S. §§ 62-133, -133.16 (2023). Statutory interpretation is a question of law reviewed de novo. *See Va. Elec. & Power*, 381 N.C. at 515.

The Attorney General and the Carolina Utility Customers Association challenge the Commission's order for improperly allowing Carolinas' hazard tree removal program to be treated as a capital project. They allege that this decision was in excess of the Commission's statutory authority because the program is quintessentially an operating program to manage vegetation growth and maintain the utility's provision of services. *See* N.C.G.S. § 62-94(b)(2) (2023). I agree and would hold that the Commission does not have statutory authority to award a return on this operating program estimated to cost $71.6 million.

The record showed that Duke Energy Carolinas' hazard tree removal program is one aspect of its overall vegetation management program. This overall program has been routine, or "cycl[ical]" since after 2013. Other parts of Carolinas' vegetation management program are classified as operating expenses, according to the Commission. Trimming trees along existing property lines, for example, is routine maintenance and classified as an operating expense. Similarly, "herbicide management" and "post outage vegetation management" are routine maintenance and thus are operating expenses not entitled to a return.

Within this vegetation management program, the hazard tree program manages trees "which lie[ ] outside [Duke Energy Carolinas']

rights-of-way." The program identifies and removes "structurally unsound, dying, diseased, leaning or otherwise defective trees that could strike electrical lines or equipment" from beyond Carolinas' existing property. This routine maintenance of existing corridors is distinct from Carolinas' efforts to clear trees to construct a new right-of-way or building. The costs of clearing trees for a new right-of-way are statutorily classified as eligible for rate base treatment. N.C.G.S. § 62-133(b)(1a), (4), (4a) (2023) (allowing a return for some newly purchased rights-of-way and costs related to new construction in progress). In contrast, hazard tree removal maintains existing rights-of-way and is "performed in conjunction with normal trimming cycles."

This type of routine tree management is a classic operating expense not eligible for rate base treatment. *See operating expense*, *Black's Law Dictionary* (12th ed. 2024) ("An expense incurred in running a business and producing output."). Just as the costs associated with trimming trees are operating expenses, so are the costs associated with routinely cutting them down. Federal regulators have concluded the same.[13] Thus, the latter is not a "capital investment" eligible for rate base treatment. N.C.G.S. § 62-133.16(c)(1)(a).

Nor is it "property used and useful." *Id.* §§ 62-133(b)(1), -133.16(c)(1)(a). Cutting down trees on someone else's property is hardly usefully using your own property under the ordinary meaning of those words.

Notably, the Commission offered no reasons why it classified costs associated with maintaining trees *on* the right-of-way as operating while those *off* the right-of-way are capital. Why does the tree being on someone else's property transform this operating expense into a capital one? The Commission did not say nor does any evidence in the record appear to provide an explanation.

The majority gestures to the "permanent" or long-term benefit of cutting down these trees that helps the company maintain services. *See* majority *supra* Section III.C. But whether something is permanent

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13. The director of the Office of Enforcement for the Federal Energy Regulatory Commission confirmed that "[u]nder the Commission's accounting regulations," "costs to trim trees, remove trees, prune, and clear brush specifically to ensure the reliability of the transmission system by preventing vegetation-caused failures" are "maintenance expense[s]." Letter from Norman C. Bay, Director, Office of Enforcement, Federal Energy Regulatory Commission, to Harvey L. Wagner, Vice President, American Transmission Systems, Inc. 16–17 (Apr. 24, 2013) (Docket No. FA11-8-000) (accession number 20130424-3026), https://elibrary.ferc.gov/eLibrary/search (last visited Sept. 25, 2025).

is not a useful standard for whether an item is a capital or operating expense. Surely any routine efforts to maintain reliable service for a business whose main asset is physical property has a long-term benefit. Of course, routinely maintaining physical equipment redounds to a long-term benefit—but cleaning equipment or periodically changing the oil for an expensive machine, for example, are classic operating expenses, not capital ones. Such a broad interpretation of a "capital investment" would allow public utilities to impermissibly aggrandize their returns. And Chapter 62's particularly phrased language—"capital investments, net of operating benefits, associated with a set of discrete and identifiable capital spending projects to be placed in service during the first rate year . . . [and] used and useful during [subsequent] rate years"—is not so expansive. *See* N.C.G.S § 62-133.16(c)(1)(a).

In any event, it is curious to me that anything associated with vegetation management could in fact be "permanent." Presumably Duke Energy is not in the habit of constructing power lines next to hazardous trees. The issue is simply that vegetation grows. Saplings become trees, and trees can eventually become "hazardous." Public utilities may not categorize operating expenses as capital ones on the mistaken premise that some kinds of vegetation will somehow remain static.

III. Electric Vehicle Charging Decoupling and Interclass Subsidy Reduction

As to the other issues on appeal, I concur with the majority's analysis and write separately to underscore narrow points.

Regarding the majority's interpretation of incremental electric vehicle charging to be exempt from the decoupling mechanism, I concur with the majority that the clear legislative intent here was to "preserve the electric public utility's incentive to encourage electric vehicle adoption." *See* majority *supra* Section III.B & n.9. I also agree with the Attorney General that this language must mean that the public utility cannot simply sit back and take no action at all while reaping the benefit of new electric vehicle adoption. The statute clearly contemplates that the utilities will act "to encourage electric vehicle adoption" in order to take advantage of this exclusion opportunity. *See* N.C.G.S. § 62-133.16(c)(2) (2025).

As the majority notes, here Duke Energy stipulated in both rate orders that it would work with the Public Staff and industry representatives to develop and file electric vehicle tariffs and programs to obtain accurate estimates of revenue from electric vehicle charging usage. The record also indicated that Duke Energy operates public-facing programs

that educate consumers about costs and opportunities associated with electric vehicle adoption, including the Make-Ready Credit Program, through which Duke Energy "will defray part of the cost of installing the infrastructure necessary to charge [electric vehicles]." *See* majority *supra* Section III.C n.11. This stipulation and record evidence supports that procedures have been agreed upon that will position Duke Energy to continue incentivizing electric vehicle adoption in order to have the benefit of excluding these revenues from the decoupling mechanism, consistent with legislative intent.

Second, on the Commission's approval of the 10% reduction in interclass subsidies for Duke Energy in both rate orders, I agree with the Majority's explanation of why the Commission did not err here, particularly as it relates to the scope of the word "practicable" in the context of this statute and the interrelation of subsections (b) and (d). *See* majority *supra* Section III.A; N.C.G.S. § 62-133.16(b), (d) (2025). In my view, the Carolina Utility Customers Association's argument that the Commission erred by approving the 10% reduction without having established that uniform reductions between 10% and 25% were not practicable is particularly unpersuasive in light of the long-standing burden-shifting framework that applies in utilities cases.

By statute, the public utility has the burden of proof to show that a proposed rate change "is just and reasonable." *Id.* § 62-134(c) (2025). Nonetheless, "the reasonableness and prudence of those costs is 'presumed' unless the Commission or an intervenor adduces sufficient evidence to cast doubt upon their reasonableness or prudence, at which point the burden to make an affirmative showing of the reasonableness of the costs in question shifts to the utility." *State ex rel. Utils. Comm'n v. Stein*, 375 N.C. 870, 908 (2020) (citing *State ex rel. Utils. Comm'n v. Intervenor Residents of Bent Creek/Mt. Carmel Subdivisions*, 305 N.C. 62, 76 (1982)).

Because we generally assume the legislature knows the law and legislates in reference to it, *see C Invs. 2, LLC v. Auger*, 383 N.C. 1, 13 (2022), I would expect similar burden-shifting principles to apply in this context and under the new performance-based regulation framework unless the legislature indicates otherwise.

As the majority explains, the Carolina Industrial Group for Fair Utility Rates II proposed a 25% uniform interclass subsidy reduction, which the Commission rejected as impracticable and likely to cause severe rate shock. *See* majority *supra* Section III.A. The Commission instead adopted a 10% reduction as practicable after hearing evidence

to that effect. *See id.* Absent some quantum of affirmative evidence that a percentage reduction between 10% and 25% was the appropriate rate to "minimize[ ]" interclass subsidies "to the greatest extent practicable," neither the Commission nor Duke Energy had the affirmative responsibility to prove a negative—*i.e.*, that some unspecified other percent reduction would not also work.

IV. Conclusion

I dissent in part from the majority's decision to affirm the return on common equity award, which I conclude unlawfully fails to give weight to the considerable consumer interests at stake and is the result of arbitrary and capricious reasoning and conclusions that are unsupported by substantial evidence in the record and inadequately took account of customer interests. I also dissent from the Commission's decision to award rate base treatment to Duke Energy Carolinas' routine vegetation management practice of removing hazard trees. As to the Majority's other conclusions, I respectfully concur.

Justice RIGGS joins in this dissenting opinion.

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