

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. E-100, SUB 178

In the Matter of)	Reply Comments Concerning
Rulemaking Proceeding to)	Multiyear Rate Plan Projects and
Implement Performance-Based)	CPCN Requirements
Regulation of Electric Utilities)	

NOW COMES THE PUBLIC STAFF - North Carolina Utilities Commission (Public Staff), by and through its Executive Director, Christopher J. Ayers, and respectfully submits these reply comments in response to Ordering Paragraph Four of the North Carolina Utilities Commission's (Commission) Order Adopting Commission Rule R1-17B issued on February 10, 2022, in the above-captioned docket (PBR Order). Specifically, the Public Staff respectfully submits these comments in response to the Joint Initial Comments filed on March 16, 2022, by Dominion Energy North Carolina, Duke Energy Carolinas, LLC, and Duke Energy Progress, LLC (together, the Utilities) addressing the interplay between the consideration of capital projects proposed for cost recovery as part of a Performance-Based Ratemaking (PBR) Application and the statutory requirements of a Certificate of Public Convenience and Necessity (CPCN).

1. On March 16, 2022, the Public Staff filed a letter in lieu of initial comments supporting the Joint Initial Comments of the Carolina Utility Customers Association, Inc. (CUCA) and the Carolina Industrial Group for Fair Utility Rates I, II, and III (CIGFUR), filed on the same day, addressing the interplay of the CPCN

process with the approval of capital projects as part of the PBR process. These reply comments address the three questions of the Commission as follows:

Question 1: May the Commission approve cost recovery within a MYRP for capital projects for which a CPCN is required but has not been granted as of the date the PBR Application is approved?

2. In their joint initial comments, CUCA and CIGFUR noted that Section 62-133.16(c)(1)(a) requires that a multi-year rate plan (MYRP) include "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." Further, pursuant to this section, for years two and three of the MYRP, the rates would be based on capital investments that "will be used and useful during the rate year." CUCA and CIGFUR noted that the statute requires certainty, and that such certainty is impossible until and unless the CPCN has been obtained. They also noted that under the Commission's PBR rules, there is no mechanism to refund amounts paid by ratepayers for projects that are unable to obtain a CPCN or are delayed in obtaining a CPCN such that the project is not put into service in the rate year.

3. In their joint initial comments, the Utilities maintain that requiring a CPCN before a capital project could be included in a MYRP would "inject inefficiency" into the PBR. They further contend that the assessment of need and cost required in a PBR proceeding is essentially the same as that which is required in a CPCN proceeding.

4. The Public Staff does not agree. As noted by CUCA and CIGFUR, the assessment of “public convenience and necessity” required for a CPCN and the consideration of a proposed capital project in a PBR proceeding differ. The CPCN process set out in N.C. Gen. Stat. §§ 62-110.1 and -101 and Commission Rules R8-61 and R8-62 requires that the Commission find a public need for the proposed project and determine that the public convenience and necessity are best served by the generation or transmission option being proposed by the applicant. As explained by the Commission, in considering whether to approve a CPCN, “the Commission must focus upon an element of public need for the facility and emphasize a policy that favors the orderly expansion of electric generating capacity that both creates a reliable and economical power supply *and* prevents the costly overbuilding of generation resources.”¹ Furthermore, the doctrine of public convenience and necessity is elastic and rests on the facts of each case. The specific considerations and policy goals underlying a CPCN proceeding are notably absent from the requirements set out in Commission Rule R1-17(B) for a proposed capital project.

In addition, Commission Rules R8-61 and R8-62 set out a detailed list of information required in a CPCN application,² whereas Commission Rule R1-

¹ Order Denying Certificate of Public Convenience and Necessity for Merchant Generating Facility, Docket No. EMP-105, Sub 0 (June 11, 2020) (emphasis in original).

² For example, Commission Rule R8-61 requires, among other information:

- a map or photo “showing the proposed site boundary and layout, with all major equipment, including the generator, fuel handling equipment, plant distribution system, startup equipment, planned and existing pipelines, planned and existing roads, planned and existing water supplies, and planned and existing electric facilities;”

(continued ...)

17B(d)(2)(j) merely requires the filing of a PBR project's "reason," "scope," "timing," "depreciation life," and impact on the utility's financial statements. While some of this information overlaps with the information required in a CPCN proceeding, the information required for a CPCN application is more detailed and aimed at the specific and unique question of public convenience and necessity.

Further, the data may well have changed between the time of a PBR proceeding and the CPCN proceeding. As the Commission is aware, the current rate of inflation is much higher than in the recent past, there are issues with supply chains, and the unemployment rate is low. These factors make it likely that cost information and timelines could be significantly altered between the two proceedings, especially if the CPCN is not obtained until the second or third year of the MYRP. Additionally, in a PBR proceeding, the Public Staff will not only be required to conduct its usual investigation into the application for a base rate increase, but also to investigate the need for and costs of proposed capital projects for three years in the same time allowed for a general rate case. This will

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- "[i]nformation concerning geological, aesthetic, ecological, meteorological, seismic, water supply, and local population;"
 - "[a] list of all agencies from which approvals will be sought covering various aspects of any generation facility constructed on the site . . . ;"
 - "[a] statement of existing or proposed environmental evaluation programs to meet the applicable air and water quality standards;"
 - "[a] statement of how the facility would contribute to resource and fuel diversity . . . ;"
 - "[a]n explanation of the need for the facility, including information on energy and capacity forecasts;"
 - "[a]n explanation of how the proposed facility meets the identified energy and capacity needs, including the anticipated facility capacity factor, heat rate, and service life;" and
 - Detailed cost and construction information.

significantly impact the Public Staff's ability to assess proposed capital projects with the amount of detail typically required in a CPCN proceeding.

5. Under the PBR rules, if the utility does not implement its capital projects as approved, the only protections for ratepayers are the earnings cap and the ability of the Commission or Public Staff to seek review of the MYRP. But there is no refund to customers of rates they paid for projects that were delayed, canceled, or came in under budget. To allow the utility to put into its MYRP a capital project for which it has not already obtained a CPCN would unfairly burden ratepayers with even more risk. The interests of ratepayers should not be sacrificed in the interest of "flexibility and efficiency" for the utility.

Question 2. If a capital project is approved for cost recovery in an approved PBR Application and a CPCN has not been granted, may the approval of the project in the PBR Application be considered in the CPCN approval process?

6. As discussed in the comments on the prior question, the requirements for approval of a project in a MYRP and for approving a CPCN differ. Moreover, in the time between the two proceedings, costs and timelines could have changed. As a result, the investigations in the two types of proceedings may differ.

Should the Commission find that it is appropriate to approve a project without a CPCN for inclusion in an MYRP, in the later CPCN proceeding the Commission could take notice of its findings in the earlier PBR proceeding.

However, that prior determination should in no way be used to supplant or abbreviate the detailed CPCN process and the Commission's nuanced determination of whether a project is in the public interest and required by public convenience and necessity, nor should parties be prevented from asserting different or more nuanced positions.

Question 3. May a PBR Application request cost recovery approval for capital projects which the utility filing the PBR Application does not yet own, and therefore, for which a party other than the utility filing the PBR Application would be filing the application for the CPCN?

7. As noted by CUCA and CIGFUR, approving a capital project plan that includes a project owned by a third party from whom the utility expects to acquire the project is speculative, regardless of whether the third party has or has not received a CPCN. As discussed above, assuming that a project will receive a CPCN at all or by a certain date is not assured, and the risk that the CPCN is not granted or that approval is delayed should not be borne by ratepayers. To compound the risk, there is an additional assumption that a transfer will be approved. It would be unwise to take the Commission's approval of a CPCN or a transfer for granted. The utility controls the timing of its filing for approval of CPCNs and transfers; when determining when to file an application for PBR, the utility should take into consideration when it will fulfill conditions precedent, such as receipt of CPCNs and approval of transfers. The utility then will properly bear the risk if it does not meet these conditions precedent as initially anticipated.

8. The Utilities' initial comments conflate the approval of projects in a PBR application and the granting of a CPCN. While similar, they are not identical. Further, the Utilities repeatedly chant the mantra of "efficiency and flexibility." These are certainly considerations, but even more important is accountability. The Utilities, not ratepayers, should bear the risk that their initial projections or plans do not come to fruition as anticipated when they do not already have CPCNs for or ownership of the projects.

9. CIGFUR and CUCA provided the Public Staff a draft of their joint reply comments, and the Public Staff supports their analysis and arguments in those comments.

Respectfully submitted, this 13th day of April, 2022.

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CERTIFICATE OF SERVICE

I certify that a copy of these reply comments has been served on all parties of record or their attorneys, or both, in accordance with Commission Rule R1-39, by United States Mail, first class or better; by hand delivery; or by means of facsimile or electronic delivery upon agreement of the receiving party.

This the 13th day April, 2022.

Electronically submitted
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