

STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH

DOCKET NO. E-100, SUB 176

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of:  
Petition to Revise Commission Rules )  
R8-63 and R8-64 ) CIGFUR’S REPLY COMMENTS

NOW COME the Carolina Industrial Group for Fair Utility Rates I, II, and III (collectively, CIGFUR), pursuant to the Commission’s September 20, 2021 Order Requesting Comments and its November 24, 2021 Order Granting Extension, and respectfully submit the following reply comments in the above-captioned docket. At the outset, CIGFUR notes that it endeavors to paint with broad strokes with the following reply comments, providing limited general comments at a high level rather than taking a deep dive with the same level of granularity as the other parties to this proceeding:

- As alluded to by other parties to this docket, CIGFUR acknowledges that the law governing interconnection and affected system network upgrade costs caused by electric merchant plant (EMP) facilities, and whether such costs may be appropriately considered in a State-jurisdictional proceeding as one of many factors considered when determining the need and cost-effectiveness of an EMP facility, is presently unsettled at the State level and continues to evolve at the Federal Energy Regulatory Commission (the FERC).<sup>1, 2</sup>

<sup>1</sup> See *State ex rel. Utilities Commission v. Friesian Holdings, LLC, et al.*, No. COA 20-867.

<sup>2</sup> See, e.g., *Edgecombe Solar Energy LLC v. Duke Energy Progress, LLC, Duke Energy Carolinas, LLC, and Duke Energy Florida, LLC*, Docket No. EL21-73-000; see also *Order Rejecting Affected System Operator Agreement*, Docket No. ER21-1955-002, 177 FERC ¶ 61,001, at 15 (Oct. 1, 2021).

- CIGFUR further acknowledges that additional rule amendments may very well become necessary in the future as State and federal law related to these issues continues to evolve. Be that as it may, however, one can only speculate as to when the North Carolina Court of Appeals will issue an opinion deciding the pending *Friesian* appeal or when, let alone if, open questions at the federal level related to interconnection and network upgrade costs will be resolved in a manner that allows all parties greater certainty and predictability in future State- and FERC-jurisdictional matters. In the meantime, applications for a certificate of public convenience and necessity (CPCN) for new EMPs continue to be filed with the Commission pursuant to Commission Rules R8-63 and R8-64, as those rules are currently written. Moreover, CIGFUR further notes that recent policy and market developments in North Carolina will almost certainly result in an increase to the number of CPCN applications by electric merchant generators in the coming years. CIGFUR also notes that there are certain rule amendments proposed by the Public Staff which appear to be supported by the other parties to this docket, so ostensibly there is at least tacit acknowledgement by all intervening parties filing comments in this docket that the applicable Commission Rules are in need of a refresh. For all these reasons, CIGFUR is of the opinion that the current timing is appropriate to proceed with amending Rules R8-63 and R8-64 as the Commission sees fit, as opposed to waiting for the FERC and/or our State's appellate courts to issue decisions that may (or may not) resolve relevant matters of law that may currently be unsettled.
- CIGFUR also recognizes that on October 13, 2021, Governor Cooper signed into law House Bill 951 (S.L. 2021-165), which requires the Commission, among other things,

to develop a Carbon Plan applicable to Duke Energy Progress, LLC (DEP) and Duke Energy Carolinas, LLC (DEC) that maintains or improves reliability of electric service and complies with least-cost principles. CIGFUR further recognizes that the enactment of House Bill 951 (H951) and the resulting implementation of the Carbon Plan may very well necessitate additional rule amendments in the future as it relates to CPCNs. CIGFUR is of the opinion that this prospect is not, in and of itself, a reason to delay amending Commission Rules R8-63 and R8-64, particularly in light of the fact that the Public Staff's impetus for proposing such amendments seems in large part to be in response to the Commission's own orders instructing CPCN applicants to file additional information and further in response to the Commission's analysis and decision-making as reflected in orders it has issued in various EMP dockets.<sup>3</sup>

- CIGFUR emphasizes the Commission's authority – with or without the rule amendments requested by the Public Staff – to require the filing of additional testimony and exhibits by an applicant which has requested a CPCN be issued to an EMP. CIGFUR further notes that the Commission has done exactly that in various recent EMP dockets<sup>4</sup> in which the Commission ordered the applicant to provide some of the same or substantially similar information as the Public Staff is now seeking to require by amending Rules R8-63 and R8-64. Practically speaking, if the Commission is going

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<sup>3</sup> See, e.g., Order Requiring Filing of Additional Testimony, Docket No. EMP-92, Sub 0 (June 9, 2020); Order Denying Certificate of Public Convenience and Necessity, Docket No. EMP-105, Sub 0 (June 11, 2020); Order Requiring Filing of Additional Testimony, Docket No. EMP-101, Sub 0 (Aug. 20, 2020); Order Requiring Filing of Additional Testimony, Docket No. EMP-102, Sub 0 (Oct. 5, 2020); Order Requiring Further Additional Testimony, Docket No. EMP-102, Sub 0 (May 7, 2021); Order Consolidating Dockets, Scheduling Hearings, Requiring Filing of Testimony, Establishing Procedural Guidelines, and Requiring Public Notice, Docket No. EMP-119, Subs 0 & 1 (Sep. 24, 2021);

<sup>4</sup> See, e.g., Order Consolidating Dockets, Scheduling Hearings, Requiring Filing of Testimony, Establishing Procedural Guidelines, and Requiring Public Notice, Docket No. EMP-119, Subs 0 and 1, pp. 2-3 (Sep. 24, 2021).

to require substantively the same or substantially similar information as that which the Public Staff is seeking through rule amendments, would it not both serve the interests of efficiency and also behoove the applicant if such expectations were codified and made known at the outset by way of the actual application itself, rather than at the time the Commission issues its scheduling order setting the matter for hearing?

- Finally, as a group of some of the largest retail ratepayers taking electric service from North Carolina's investor-owned electric utilities, CIGFUR notes the importance of Commission oversight and its duty to protect retail ratepayers, particularly in light of the ever-increasing and unprecedented upward pressure on rates for electric service. To that end, CIGFUR highlights the following important, succinct history and background as particularly illuminating of the confluence of factors that precipitated the instant docket:

Prior to the Federal Energy Regulatory Commission's open access transmission rule, Order No. 888, and the formation of regional transmission organizations, the Commission would not approve siting of a true merchant plant. When the Commission adopted Rule R8-63 and opened the door for the construction of merchant generating facilities, it was assumed that the developer of a facility would bear all of the financial risk and that no costs would be imposed upon retail ratepayers other than those costs that would flow from the purchase of power from the facility by a utility under least cost principles. When that is still the case, the LCOT analysis is less important. Whatever costs are caused are borne by the developer and recovered through the sale of power, which is bounded either by such least cost principles if in a traditional bilateral wholesale power market such as most of this State or by the market clearing price in a restructured market, such as PJM. When that is not the case, it is the Commission's role and obligation to protect retail ratepayers from unreasonable costs.<sup>5</sup>

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<sup>5</sup> Concurring Opinion, Chair Charlotte A. Mitchell, Docket No. EMP-107, Sub 0, p. 2 (Sep. 2, 2020).

- It is with ratepayer protection in mind that CIGFUR agrees with the Public Staff's position to require applicants for merchant plant CPCNs to complete interconnection and cluster studies. As the results of such studies are relevant and material to the Commission's evaluation of various factors – including potential affected system ratepayer impact – in considering whether a proposed merchant plant is in the public interest and meets the applicable test for the public convenience and necessity standard.
- For all of these reasons, CIGFUR appreciates the need to amend the pertinent Commission Rules and is generally supportive of the amendments advocated for by the Public Staff.

WHEREFORE, CIGFUR respectfully requests that the Commission consider the foregoing reply comments in consideration of the above-referenced docket.

Respectfully submitted this the 14th day of December, 2021.

**BAILEY & DIXON, LLP**

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CERTIFICATE OF SERVICE

The undersigned attorney for CIGFUR hereby certifies that she served the foregoing CIGFUR's Reply Comments upon the parties to this proceeding, as listed on the service list available on the NCUC's online docket system, by electronic mail.

This the 14th day of December, 2021.

/s/ Christina D. Cress  
Christina D. Cress