

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-100, SUB 178

In the Matter of:) **REPLY COMMENTS SUBMITTED**
Performance Based Regulation of) **ON BEHALF OF NORTH**
Electric Utilities) **CAROLINA JUSTICE CENTER,**
) **NORTH CAROLINA HOUSING**
) **COALITION, SIERRA CLUB, AND**
) **SOUTHERN ALLIANCE FOR**
) **CLEAN ENERGY**

I. Introduction

The timetable for PBR implementation set forth in HB951 is very challenging. As a result, whatever rules are adopted by the Commission to comply with the statutory deadline of February 10, 2022, will not resolve all the important issues that the Commission will ultimately need to decide in order to implement a successful performance-based ratemaking (PBR) regime. As NC Justice Center, NC Housing Coalition, Southern Alliance for Clean Energy (SACE), and Sierra Club pointed out in our Initial Comments, much of the statutory focus for rulemaking is focused more on cost-recovery for the utility than on achievement of the policy goals included in the law. But as several intervenors noted in their initial comments, the Commission's authority is not diminished by the new law. The Commission can use its undiminished authority in this rulemaking, in other related dockets, and in stakeholder processes to shape the requirements for any future multiyear rate plan (MYRP) application. In brief, the Commission can and should develop a policy framework that shapes future PBR applications from covered electric public utilities to ensure that any such applications serve the public interest components of the law.

The rules agreed to by several intervenors, including Carolina Utility Customers Association, Inc. (CUCA), Carolina Industrial Group for Fair Utility Rates I, II, and III (CIGFUR), North Carolina Sustainable Energy Association (NCSEA), along with NC Justice Center, NC Housing Coalition, SACE, and Sierra Club, establish an important starting place for the effective implementation of PBR in North Carolina (“Joint Proposed Rules”). The Commission should build on the foundation provided by the Joint Proposed Rules by committing to a further elaboration of the policy goals and related performance incentive mechanisms (PIMs) that it finds are most important for fulfilling the statutory goal of moving towards an effective PBR framework in North Carolina. For residential customers, we urge the Commission to require electric utilities to consider new rate designs and innovative decoupling mechanisms that will improve the affordability of electric service and induce energy efficiency, demand-side management, and the adoption of DERs such as rooftop solar and battery storage. As noted in our initial comments, these policy goals are not only enumerated in HB951, but have been enshrined in North Carolina public utilities law since Senate Bill 3 was enacted in 2007. See, e.g., N.C. Gen. Stat. § 62-2(a) (3a).

In addition to the Joint Proposed Rules, we recommend that the Commission consider: (1) adopting an additional statement of the basis and purpose for PBR that establishes the central role of the Commission and the importance of achieving public policy goals under a PBR framework; (2) following the “Policy Docket” proposed in the Joint Rules, ordering that PBR applications include certain Required PIMs to encourage achievement of key policy goals; and

(3) adopting a requirement for utilities to consider new rate designs and alternative mechanisms for the decoupling credit that are designed to foster affordability for low-income customers and encourage additional energy efficiency savings.¹

II. Reply Comments

A. Commission Authority and Initiative – Policy Goals

HB 951 authorizes the Commission to approve a PBR plan upon application by a utility. But the statute does not diminish existing Commission authority to regulate utilities in the public interest. As discussed at length in our Initial Comments, successful implementation of PBR will require active leadership and direction from the Commission. Although HB951 can be read to assume that a utility would be the first mover when it comes to potential PIMs, that assumption need not become the default, as we set forth in more detail below.

The Tech Customers, in their initial comments, stressed that “PBR should be viewed as a tool related to the achievement of the overall policy goals” set forth in HB951, and noted that the “overriding purpose of the legislation is to authorize...new regulatory mechanisms that create flexibility around the achievement of specified policy goals.” Tech Customers at 2-3. NCSEA also stressed the importance of establishing policy goals, PIMs, and performance tracking metrics for successful implementation of PBR. NCSEA Initial Comments at 6-7. In their initial comments, Duke Energy likewise acknowledged that

¹ As with our Initial Comments, these Reply Comments were developed with the assistance of Ronald Binz, former chair of the Colorado Public Utilities Commission, and draw on his decades of experience in the field of regulatory reform, PBR, and decoupling.

achieving important policy goals, such as reducing carbon pollution and enabling deployment of DERs, are the key reason for establishing PBR. Duke Energy at 3-4. But the Companies' proposed rules would not allow the Commission to require or even encourage the achievement of such policy goals and would instead leave the development of any potential PIMs to the utilities. We urge the Commission to reject Duke Energy's recommendation to "not add additional requirements" related to PIMs. The Duke recommendation would severely limit the ability of the Commission to achieve the public policy goals that should be at the heart of PBR implementation. Duke Energy comments at 12.

To make explicit the Commission's important role in PBR, NC Justice Center, NC Housing Coalition, SACE, and Sierra Club recommend elaboration of the initial purpose provision at the outset of the PBR rule that it ultimately adopts:

(a) Purpose. – The purpose of this rule is to establish procedures and guidelines for the implementation of performance-based regulation (PBR) of electric public utilities consistent with G.S. 62-133.16. This rule reflects the significance of PBR and its connection to the achievement of the policy goals identified in G.S. 62-133.16, the Public Utilities Act, and as hereafter established by the Commission. Accordingly, this rule describes the role and responsibility of the Commission to ensure that PBR is successful. G.S. 62-133.16 accords to the utility the decision of whether to submit a PBR application. The Commission will exercise its authority to ensure that any PBR application filed by an electric utility contains the elements needed for the Commission to fairly assess the application. The Commission's review will be especially focused on how well the utility's PBR proposal meets the public policy goals identified in law and by the Commission and assures that no customer or class of customers is unreasonably harmed.

One central means by which the Commission can assert its leadership on policy goals was described in our Initial Comments. NC Justice Center, NC Housing Coalition, SACE, and Sierra Club recommended that the Commission establish Required PIMs relating to key policy goals as part of this rulemaking, in part to ensure that those be established “prior to and independent of” any future PBR applications. Initial Comments at 16-17. The Joint Proposed Rules expand upon a related idea, initially recommended by the Public Staff (App. A, p. 30 of Initial Comments of Public Staff) and NCSEA (NCSEA’s Initial Comments at 5-7) to establish a separate docket to establish policy goals that would form the basis for PIMs to be included in a PBR application. We fully support the establishment of a separate policy docket as set forth in the Joint Proposed Rules. But we also continue to urge the Commission to be prepared to go further and establish by order specific, Required PIMs that a utility would need to include in its PBR application.

As noted in our Initial Comments, the statute defines “policy goals” broadly and allows for the inclusion of “standards the Commission has established by order prior to and independent of a PBR application.” N.C. Gen. Stat. § 62-133.16(a)(8). Thus, it is important to use the proposed “policy docket” to adopt policy goals “prior to and independent of” any future PBR applications. Id. Policy goals relating to reducing low-income energy burdens, encouraging use of DERs and energy efficiency, and reducing carbon pollution should be developed to bring about cost savings for all ratepayers and improve operational efficiency. To create an opportunity for consumer benefits in any future PBR application, we endorsed two

additional policy goals that should lead to required PIMs; one targeting utility cost reductions and one that protects the existing system reliability. These consumer-facing PIMs directly serve the goals of “cost-savings, or reliability of electric service” found in Section § 62-133.16 (a)(8) of the new law and are rightfully a common feature of PBR plans.

NCSEA also noted the central importance of establishing a policy goal and related PIM to address the affordability of electric service for low- to moderate-income residential customers. NCSEA Initial Comments at 8. NCSEA recommended that:

The Commission’s rules should allow the utility to leverage third-party investments in LMI programs if they are necessary to attain the policy goals contained in a PIM, especially if government funds are available or third-party investments would be less costly than the utility investing its own capital in LMI programs.

Id. This idea is set forth in the Joint Proposed Rule in the “policy docket” section, which would explicitly allow government funds or other third-party investments to “be leveraged for the direct financial benefit of ratepayers to achieve policy goals.” In addition, we ask the Commission to consider how the future recommendations of the Low-Income Affordability Collaborative (currently due in July 2022) could inform specific policy goals related to low-income energy burdens. We suggest that these future recommendations could be implemented as a Required PIM for any future PBR application. Initial Comments at 21-24; N.C. Gen. Stat. 62-133.16(d)(2)(d).

In short, we urge the Commission to take additional initiative following the initiation of the policy docket and consider ordering utilities to include certain

Required PIMs for Commission consideration. The Joint Proposed Rule also allows intervenors to put forward PIMs for Commission consideration that would address approved policy goals. This provision will create another opportunity for the PBR mechanism to advance important policy goals to the benefit of ratepayers.

In addition, as noted in our Initial Comments, the Commission has authority to fashion processes and requirements that go beyond the statute's requirement for a technical conference, and may require a supplemental rulemaking process to address issues that remain unresolved following the adoption of initial rules by February 10, 2022, as required by HB951.

B. Decoupling

The method of decoupling required by HB951 (revenue per customer) is familiar to regulators and there are resources that the Commission can draw from for tariff language that has been used elsewhere.² One of the purposes and effects of decoupling is to dull the “throughput incentive” facing utilities and thereby remove a barrier to aggregate customer adoption of DERs, including energy efficiency. HB951 may be unique because the decoupling adjustment is overlain onto an existing DSM/EE cost-recovery mechanism that includes a net lost revenues provision. This situation raises two key questions: 1) is there a danger of double recovery; and 2) will decoupling weaken the impact of the incentives in

² “Revenue Regulation and Decoupling: A Guide to Theory and Application,” Regulatory Assistance Project (June 2011) (<https://www.raponline.org/wp-content/uploads/2016/05/rap-revenueregulationanddecoupling-2011-04.pdf>).

existing tariffs? Both of these issues are addressed in the Joint Proposed Rules and the following Reply Comments.

In HB951, the decoupling adjustment is required to be applied only to the residential rate class. This limitation presents no special difficulties with the identification of the revenues to be considered. However, it raises the issue of how to collect or refund decoupling adjustments. This question is similar to the familiar “rate design” issues in other contexts. In our Initial Comments, we offered one example of how rate design could be used to collect or refund the correct decoupling adjustment while effecting an improvement in equity among the residential customer class.

In our Partial Proposed PBR rules, we recommended that, in its PBR application, the utility should be required to model the distribution of decoupling credits or surcharges in a manner that favors low-use customers. Since lower-income customers tend to be lower users of electricity, rates designed to favor smaller users over larger users will tend to favor low-income customers. It is important to note that this rate design is not targeted to low-income customers: it is non-discriminatory since all customers will face the same rate design. In one approach, set forth in our Initial Comments, decoupling credit could be distributed based on the customer’s first 500 kWh of monthly usage; a decoupling surcharge could be distributed based on a customer’s monthly usage in excess of 500, 1,000, or 1,500 kWh per month. Consistent with this request, NCSEA asked the Commission to consider how any decoupling adjustments would affect energy

burdens of low-to-moderate income residential ratepayers and equitability of rates among residential customers. NCSEA at 30.

Under the Joint Proposed Rules, the utility would be required to set forth “Alternative methods for distributing the decoupling credit or surcharge on a volumetric basis, for Commission consideration, that take into account the rate impact of residential customers at various usage levels.” We would ask the Commission to require the inclusion of the specific alternatives that we set forth in our Partial Proposed Rules (as modified herein and included in Exhibit A to these Reply Comments) as an amendment to the requirements for the E-1 application used in connection with PBR. As a general matter, the E-1 questions will need to be updated to contend with a MYRP application under PBR, and modeling the effects of the decoupling credit based on usage would be a natural place for providing that information for the Commission’s consideration. By the same token, the E-1 could be modified to require modeling of the effects of different residential rate designs under a decoupling mechanism that significantly reduce or eliminate the fixed customer charge. Initial Comments at 35.

The utility is in a unique position to do this modeling and we urge the Commission to use this opportunity to bring forward options for the Commission’s consideration. Note that it would be difficult to achieve a similar result from intervenor data requests. In addition to being a collection mechanism for decoupling-related adjustments, such rate designs can bear directly on the statutory consideration of “Reduc[ing] low-income energy burdens” in Section 62-133.16(d)(2).

We also support Duke Energy's proposal to set forth in rules relating to decoupling a requirement that the utility include "a plan to ensure that there is not double collection of net lost revenues through the DSM/EE rider and the Decoupling Rate-making Mechanism." Duke Energy Initial Comments, Ex. A, at 14. In the Joint Proposed Rule, we included a similar requirement that the utility provide in its PBR application a "statement of whether and how the design of the decoupling mechanism will ensure there is no double recovery of revenues." In addition, we continue to recommend that the Commission make clear that, for the residential class, "the lost revenue adjustment mechanism associated with the existing DSM/EE mechanism will no longer be needed and will need to be removed by the Commission" following the initiation of a decoupling mechanism. Initial Comments at 35.

C. Filing Requirements

It is important that the Commission's Rules clearly state the filing requirements for any utility seeking approval for of a PBR plan. First, the Commission will need a lot of information to assess the application. The timeframe is too short to try to obtain missing information after the 300-day clock starts. Instead, the Commission's rules should make clear what information is fully required to evaluate a PBR application. Second, listing filing requirements is the most direct way for the Commission to ensure that certain issues are brought

forward for consideration. It would be a mistake to passively await a utility's filing and hope the utility has inferred the Commission's preferences.

As suggested above, one way to achieve this goal (beyond provisions of the Joint Proposed Rule) would be to amend the information required to be submitted as part of the Form E-1 information that utilities are required to provide when filing a PBR application.

D. Carbon Plan

On parallel tracks, HB951 authorizes a version of PBR while it also mandates that the Commission "shall take all reasonable steps to achieve a seventy percent (70%) reduction in emissions of carbon dioxide." While PBR and decarbonization could theoretically be pursued separately, in practice it would not be a good use of Commission, utility, Public Staff, or intervenor resources to grapple with a PBR application, including an evaluation of planned, new capital investments, before there is an approved carbon plan and updated, interrelated integrated resource plans. There is too much interdependence between these dockets to responsibly allow a PBR application to commence before the Carbon Plan is completed.

In its initial comments, NCSEA recommended that the rules make clear that any capital investments allowed under a MYRP be synced with the approved carbon reduction plan. NCSEA Initial Comments at 13. Such an approach would help to ensure that those investments were part of a least cost pathway for achieving the carbon plan and would "ensure efficient use of both Commission and

stakeholder time and resources.” Id. By the same token, our Initial Comments stated “it would be reasonable and prudent for the Commission to require completion of the carbon plan under Part I of the HB951 before moving forward with consideration of . . . a MYRP” in order to ensure that capital expenditures in connection with a PBR application “are not at cross-purposes with carbon reduction targets mandated” by the new law. Initial Comments at 24.

The Joint Proposed Rules accomplish this goal by not allowing a utility to initiate the technical conference required under N.C. Gen. Stat. 62-133.16(j)(3) as a precursor to any PBR application until no sooner than January 1, 2023. We note that this requirement also satisfies the recommendation in our Initial Comments to delay acceptance of any PBR application until after Commission receipt and consideration of the recommendations of the Low-Income Affordability Collaborative, which is due to submit its final report and recommendations by July 2022. Initial Comments at 21-24.

E. Accounting and Rates

As prescribed by HB951, the NC implementation of PBR will involve some important ratemaking decisions by the Commission. While the law purports to be “performance-based regulation,” in fact it is a very slight move away from cost-of-service regulation. The statute establishes a 3-year rate period (a typical feature of PBR regimes), but also permits numerous rate interventions by the utility and the regulators outside the formulaic rate changes. These opportunities for changing rates outside the PBR structure are at odds with recognized essential

elements of PBR regimes. As noted in the Synapse Report submitted by CUCA with its Initial Comments, the ability of the utility to file a rate case in the event that its earnings “fall below the authorized rate of return on equity” obviates the “stay out” theme of typical MYRPs.³ Similarly, the utility’s ability to request expense deferrals during the MYRP creates a very large loophole that would enable the utility to exceed the 4% statutory cap on year-to-year rate changes. In other words, instead of tightening its belt in face of an increased expense item, the utility can seek an order deferring the expense, to be collected after the MYRP ends.

In the other direction, HB951 permits the Commission to second-guess the interim results during the MYRP. Specifically, the Commission is allowed:

At any time prior to expiration of a PBR plan period, the Commission, with good cause and upon its own motion or petition by the Public Staff, may examine the reasonableness of the electric public utility's rates under the plan, conduct reviews of and hearings on the plan, or adjust base rates or PIMs as necessary.

N.C. Gen. Stat. § 62-133.16(e). While there is some attraction to the authority of the Commission to review and step in to modify rates, each such instance would punch a big hole in the MYRP concept. To induce firm efficiency, utilities under PBR are pressured to be efficient to keep earnings from falling and given the upside opportunity to increase earnings. As we argued in initial Comments, the design of PBR in HB951 presents at best weak incentives toward efficiency. What little there is will be eliminated if the regulator and the utility are each permitted to intervene to change rates, up or down, during the MYRP.

³ Melissa Whited, *Implementing PBR in North Carolina*, Synapse Energy Economics, Inc. at 5 (2021) (“Synapse NC PBR Report”).

Duke Energy invites the possibility of seeking Commission authorization for “additional deferrals between rate cases for extraordinary costs not otherwise recognized in rates.” Duke Initial Comments, Ex. A, Proposed Revised Rule R1-17 at 15. While Duke Energy’s proposed rule would be permissible under the statute, the Commission should, if it enacts a comparable rule, state its unambiguous intention to limit such interventions to truly rare and extraordinary situations. N.C. Gen. Stat. § 62-133.16(e). Otherwise, such a provision creates a large loophole and defeats one of the main purposes of PBR, which is to incentivize the utility to become more efficient. Instead, PBR plans typically require utilities to tighten their belt in a circumstance like this, the way a family would do if inflation unexpectedly raised prices.

We recommend that the Commission adopt two other accounting recommendations made by CUCA: (1) a method for returning any under-spend to customers; and (2) make an annual filing that identifies the differences between projected investments and actual expenditures for capital spending. Synapse NC PBR Report at 11-12. The proposed one-way reconciliation mechanism should help protect customers from costs associated with any inflated cost forecasts. Id. Rates are allowed to change year-on-year during the MYRP for only a few reasons, the main one being the addition of planned capital spending to base rates. Without a true-up of the estimates of plant additions to actual additions, the utility will have an incentive to overstate its capital expense estimates. The capital expense should be trued down to actuals. Otherwise rates in the rate year will be higher than the PBR formulation allows.

We urge the Commission to reject an accounting rule proposed by Duke Energy: a requirement that the Commission authorize deferred accounting allowing the utility to recover supposed “revenue shortfalls” including “carrying costs” resulting from an implementation delay beyond the 300-day suspension period allowed by law. Duke Initial Comments, Ex. A, Proposed Revised Rule R1-17 at 15-16. If Duke Energy were to elect not to put new proposed rates into effect at the expiration of 300 days, that is its choice, but there should not be a requirement that the Commission must allow the utility to recover any supposed costs that are related to such a delay.

III. Conclusion

NC Justice Center, NC Housing Coalition, SACE, and Sierra Club respectfully request that the Commission consider these Reply Comments along with the Joint Proposed Rules submitted concurrently with CUCA, CIGFUR, and NCSEA when adopting PBR rules for North Carolina.

Respectfully submitted this the 17th day of December, 2021.

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Appendix A

Additional Information to be included in the Form E-1 submission by an electric public utility that submits a PBR application relating to residential decoupling:

1. The results of modelling, for Commission consideration, of the following methods of distributing the decoupling credit or surcharge:
 - a. The rate impact on customers at various usage levels of an allocation based on total energy use in a month for each customer; and
 - b. The rate impact on customers of various usage levels of an allocation based on the following:
 - i. Any decoupling credit is allocated on the first 500 kWh per month for each customer; and
 - ii. Any decoupling surcharge is allocated on all usage in excess of either
 - a. 1,500 kWh per month for each customer; or
 - b. 1,000 kWh per month for each customer; or
 - c. 500 kWh per month for each customer.
2. The results of modelling, for Commission consideration, of an alternative new default residential rate design that reduces (to the level that would be justified under the basic customer method) and/or eliminates the fixed customer charge and shifts recovery of those charges to the volumetric, per kWh rate and model the effect of those alternative rate designs on:
 - a. increasing participation in energy efficiency;
 - b. increasing deployment of DERs; and
 - c. bills for customers at different usage levels
3. The results of modelling, for Commission consideration, of an inclining block rate design for the volumetric rate for residential customers and the effect of that inclining block rate on:
 - a. increasing participation in energy efficiency;
 - b. increasing deployment of DERs; and
 - c. bills for customers at different usage levels

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Comments on behalf of North Carolina Justice Center, North Carolina Housing Coalition, Sierra Club, and Southern Alliance for Clean Energy as filed today in Docket No. E-100, Sub 178 has been served on all parties of record by electronic mail or by deposit in the U.S. Mail, first-class, postage prepaid.

This 17th day of December, 2021.

/s/ David L. Neal