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January 5, 2022

VIA ELECTRONIC FILING

Ms. A. Shonta Dunston, Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4300

RE: Duke Energy Carolinas, LLC and Duke Energy Progress, LLC's Supplemental Reply Comments
Docket No. E-100, Sub 178

Dear Ms. Dunston:

Pursuant to the Commission's December 30, 2021 *Order Granting, In Part, Motion for Leave*, enclosed for filing in the above-referenced docket are Duke Energy Carolinas, LLC and Duke Energy Progress, LLC's Supplemental Reply Comments Regarding Commission Rules to Implement Performance-Based Regulation of Electric Utilities.

If you have any questions, please do not hesitate to contact me. Thank you for your assistance with this matter.

Sincerely,

Jack E. Jirak

Enclosure
cc: Parties of Record

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-100, SUB 178

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Rulemaking Proceeding to Implement Performance-Based Regulation of Electric Utilities	**DUKE ENERGY CAROLINAS, LLC AND DUKE ENERGY PROGRESS, LLC'S SUPPLEMENTAL REPLY COMMENTS**

NOW COME Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP") (collectively, the "Companies"), by and through their legal counsel, and respectfully submit the following Supplemental Reply Comments in accordance with the North Carolina Utilities Commission's ("Commission") December 30, 2021 Order Granting, In Part, Motion For Leave.

I. Introduction

1. The Companies appreciate the Commission's willingness to accept these supplemental reply comments. The new recommendations and proposals raised on reply by the Public Staff and intervenors that are addressed herein should be rejected for many of the same reasons articulated by the Companies in their reply comments. Many of these new recommendations and proposals are flawed because they:

- have little or no basis in the actual text of N.C. Gen. Stat. § 62-133.16 ("PBR Statute");[1]
- impose onerous one-sided, inequitable constructs that harm the utility;

[1] And the mere fact that many of the new recommendations are "jointly" supported by certain intervenors does not alter the fact that such recommendations have no basis in law nor should those "joint" recommendations be viewed as any sort of meaningful compromise where the "joint" parties were already substantially aligned in terms of substance.

- create misaligned incentives;
- unnecessarily constrain through hard-coded rules the ability of the Commission to evolve the performance-based regulation ("PBR") process through lessons learned; and
- decrease rather than increase the efficiency of the regulatory process.

2. One of the many purposes of PBR—indeed a key consideration in the enactment of HB 951—is to improve regulatory efficiency and reduce the administrative burden and expenses of frequent general rate cases and related regulatory proceedings, in part, to facilitate the smaller capital investments necessary to facilitate the energy transition (such as for grid improvements and distributed energy resource enablement).[2] In stark contrast to this legislative goal, the combined proposals of Public Staff and certain intervenors, when taken together, would result in a PBR process that is essentially a non-stop, ongoing litigated regulatory process continuing into the indefinite future, with onerous and unprecedented reporting requirements. This inefficient process would require substantial new long-term resources from both the Companies and the Commission, impose additional regulatory costs that far exceed the benefit, and would actually constrain the ability of the Companies to manage the business for the benefit of their customers.[3]

[2] The need for such new and more efficient regulatory tools has been recognized by the Commission. *See* FN 35.

[3] *See e.g.*, Public Staff Initial Comments at Appendix A, p. 3 (proposing a "policy goals" determination proceeding to begin no later than April 1, 2022 and recurring generic proceeding every three years, but also that policy goals may be revisited at any time); NCSEA Initial Comments at 13 and 15 (advocating for a six-month process to occur prior to PBR application to set PIMs and a six-month docketed proceeding prior to PBR application for approval of projected capital projects; discovery during technical conference process); Environmental Groups Initial Comments at 4 (requesting an additional supplemental rulemaking to incorporate additional information from the Technical Conference, the Carbon Reduction Plan and the Affordability Collaborative into further PBR rule development); CIGFUR Initial Comments at 6-8 (proposing pre-approval of capital investments before the PBR proceeding involving full evidentiary hearings and that an entirely separate rule is needed to govern the pre-approval process and further advocating that PBR cure process results in a full new PBR proceeding); Joint Intervenors Reply Comments at Appendix B, R8-(c) (proposing entirely separate policy dockets occurring every three years, imposing onerous and regimented filing requirements in connection with technical conference; full evidentiary proceeding for annual review proceedings); AGO Reply Comments at 3 (advocating for "a separate proceeding for the purpose of establishing policy goals" and "a separate docketed proceeding to further outline and articulate

Although the Companies absolutely support efficient and constructive regulation and recognize that there will be a learning curve to implementing PBR, the Companies also believe that the PBR rules should set the Commission and utilities on a glide path to an efficient regulatory process that appropriately balances effective regulatory oversight with the need to allow the utility to exercise discretion in managing the business for the benefit of customers and fulfilling the utility's obligation to provide safe and reliable service.

3. As noted in its report included with the Companies' reply comments, the Pacific Economics Group Research LLC ("PEG"), an industry-recognized expert in the field of utility economics, and in particular, in PBR and other alternatives to traditional rate regulation, concluded that the PBR Statute "provides for a thoughtful and cautious transition to PBR in North Carolina" and represents "a fair balance between utility and stakeholder interests."[4] PEG further noted that a "more efficient regulatory system should free up resources to address more carefully the continuing swirl of new regulatory issues."[5] Not only do many of the new recommendations of Public Staff and intervenors have no basis in the PBR Statute, in many cases such recommendations run counter to the policy and regulatory goals underlying PBR, as was succinctly summarized by PEG. In fact, PEG noted that intervenors proposed "filing requirements, policy proceedings, and implementation proceedings that are not specifically authorized in House Bill 951" and that "[m]any of these additional requirements and proceedings would offer limited value

guiding principles and criteria to inform alternative regulatory mechanism design within a utility's PBR application" and undefined separate pre-PBR application "opportunity to review proposed capital investments.").

[4] PEG Report at 1.

[5] *Id*.

and could significantly reduce the regulatory efficiency of MYRPs or even make MYRPs less efficient than current regulation."[6]

4. The following sections address the specific new policies and recommendations of Public Staff and intervenors raised in reply comments identified by the Companies in Paragraphs 13-15 of the Motion.

II. The Public Staff Reply Comments

A. Depreciation Study Filing Requirement

5. The Public Staff's revised proposed rule modifies its initially proposed filing requirements to include a depreciation study completed within 180 days of the filing of the PBR application.[7] The Companies agree with the Public Staff's observation that in most cases, a utility would file a new depreciation study when it files a PBR rate case,[8] and have no objection to doing so. However, to the extent that the Commission decides to adopt this filing requirement, the Companies recommend modifying it as follows: "A new depreciation study ~~completed~~ prepared within the prior 180 days." In prior rate cases, the Commission has made modifications to the Companies' proposed depreciation studies in its rate case order, so the Companies would want to avoid a requirement that the study be

[6] *Id.* at 2.

[7] *See* Appendix B to Public Staff Reply Comments at 11, Public Staff Revised Proposed Rule R8-__(e)(2)(t) (redlining in original):

> PBR Application. – An electric public utility seeking approval of PBR shall file, along with its application for a general rate increase pursuant to G.S. § 62-133 and Commission Rule R1-17, all of the following: …
>
> An application for an MYRP that includes the following: ….
>
> A new depreciation study completed within the prior 180 days.

[8] *See* Public Staff Reply Comments at 8.

"completed" insofar as that word connotes that the study would be final before the Commission order in the rate case.

B. Comprehensive, Asymmetrical True-up for Capital Spending Projects

6. The Public Staff's initial comments and original proposed rule included a recommended refund procedure for cancelled or postponed Commission-authorized capital spending projects, which the Companies opposed in their reply comments.[9]

7. In its reply comments and revised proposed rule,[10] the Public Staff further modifies this construct, rendering the proposal even more objectionable. Whereas its original proposed rule addressed cancellation, postponement, and substitution of projects, the Public Staff's revised rule has morphed into a comprehensive, asymmetrical true-up for capital spending projects. Under this new proposal, a utility would have to recalculate the revenue requirement each year of the MYRP to reflect actual costs of capital spending projects and issue a refund if the newly calculated revenue requirement for any individual project is lower than was projected (even if the utility has not exceeded the earnings cap or even if it is earning below the Commission-authorized return on equity). However, if the new revenue requirement based on actuals for any individual project is greater than the projected revenue requirement, the utility would not be entitled to collect any additional revenue from customers.

8. As an initial matter, both the original and modified proposals by Public Staff (and similar or identical proposals submitted by other intervenors) are not supported by N.C. Gen. Stat. § 62-133.16 (as was confirmed by PEG with respect to Public Staff's

[9] Duke Energy Reply Comments at 24-30.
[10] *See* Public Staff Reply Comments at 9-10; Appendix B to Public Staff Reply Comments at 16-19.

original proposal[11]), and Public Staff has not even attempted to identify what provision in the PBR statute authorizes a capital true-up, let alone an asymmetrical one.

9. Under the PBR statute, a "MYRP" is defined as "a rate-making mechanism under which the Commission sets base rates for a multiyear period that includes authorized periodic changes in base rates without the need for the electric public utility to file a subsequent general rate application pursuant to G.S. 62-133, along with an earnings sharing mechanism." N.C. Gen. Stat. § 62-133.16(a)(5). As defined, a MYRP consists of a series of approved "periodic changes in base rates" over a multiyear period that are authorized by the Commission (if found to be in the public interest) at the time that it approves the PBR application (with modifications, if necessary). That is, it is very clear under the PBR Statute that the approved periodic rate changes for each rate year of the MYRP are approved as part of the PBR application process. In addition, the PBR statute pairs the MYRP with an earnings sharing mechanism ("ESM"). Finally, the General Assembly authorized a defined annual review process during the MYRP.

10. However, the PBR Statute does not authorize a mechanism or construct to reassess or modify the authorized periodic changes under an MYRP, as has been proposed by the Public Staff. Instead, the MYRP authorization is expressly paired with a narrow-band ESM, the tool authorized by the General Assembly to prevent potential over-earning. Further, the MYRP construct authorized by the PBR statute is intended to provide for "authorized periodic changes in base rates *without the need for the electric public utility to file a subsequent general rate case application.*" Finally, the annual review process authorized under N.C. Gen. Stat. § 62-133.16(c)(1)(c) is conducted by the Commission.

[11] PEG Report at 11 ("House Bill 951 does not appear to provide for such clawbacks.").

11. Thus, Public Staff's proposal violates the PBR Statute in three ways. First, the proposal would require the Commission to revisit the "authorized periodic changes in base rates" even though there is nothing in the PBR statute that suggests the General Assembly intended that outcome, much less authorized the Commission to do so.[12] Had the General Assembly intended that the previously-authorized periodic changes were to be revisited by the Commission on an annual basis, it would have said so—but it did not because such an approach is contrary to the intent of the MYRP and turns the MYRP essentially into a capital tracker.[13] Instead, the General Assembly paired the MYRP with an ESM, which is the authorized tool to prevent potential over-earning. Second, Public Staff's proposal would essentially result in an annual mini-rate case with respect to each "authorized periodic change" (albeit a one-sided rate case as detailed below) in contravention of the PBR statute's expressed intention to allow for periodic rate changes without a subsequent general rate case. Under Public Staff's proposal, the utility would be required to calculate the actual revenue requirement of each capital project on annual basis—precisely the type of analysis that is required in a general rate case. Third, Public Staff's proposal would essentially read into N.C. Gen. Stat. § 62-133.16(c)(1)(c) an additional review process that is not authorized by the General Assembly. N.C. Gen. Stat. § 62-133.16(c)(1)(c) clearly and precisely outlines the scope of annual review process, and

[12] The North Carolina Supreme Court has stated that it must "first look to the words chosen by the legislature and 'if they are clear and unambiguous within the context of the statute, they are to be given their plain and ordinary meanings." *Union Carbide Corp. v. Offerman*, 351 N.C. 310, 315 (2000). The Commission is a creation of the legislature and has no authority except that given to it by statute. *State ex rel. Utils. Comm'n v. Edmisten*, 291 N.C. 451, 464, 232 S.E.2d 184, 192 (1977); *State ex rel. Utils. Comm'n v. State*, 243 N.C. 12, 16, 89 S.E.2d 727, 730 (1955) ("The Utilities Commission is not a policymaking agency of the State. That prerogative rests in the General Assembly.").

[13] *See e.g.*, PEG Report at 11.

the additional requirements proposed by Public Staff simply have no basis in the annual review process established by the General Assembly.

12. Moreover, the modified proposal from Public Staff is one-sided, resulting in a reduction in rates when actual costs are lower than projections and not permitting increases in rates when actual costs exceed projections. Putting aside the fact that Public Staff has failed to identify any basis at all in the PBR Statute for their recommendation, there is also no logical or equitable reason why a true-up of actual capital spending should be entirely one-sided. Such a construct actually discourages efficiency and results in a host of potential pitfalls, as outlined by PEG.[14]

13. Even more egregious is the fact that the Public Staff proposes to apply this asymmetrical true-up on a project-by-project basis. Under the Public Staff's proposal, for example, if ten hypothetical projects go into service in a rate year, and for five of them, the actual costs were higher than budget – due to no imprudence on the utility's part – and for the other five, the actual costs were lower than budgeted, the utility would need to refund money to customers and lower rates, even if the overall revenue requirement has not changed at all. In other words, the utility would be required to lower rates to a level that is below its cost to serve. Such a result would be punitive to the utility even though the utility had not acted imprudently. Another hypothetical scenario that illustrates how unfair and illogical the Public Staff's proposal is as follows: Assume the Commission approves a Carbon Plan that contains a certain number of solar generation MWs to be placed in service in Rate Years 2 and 3, and assume that the utility competitively procures its ownership

[14] PEG Report at 11 (noting a number of "pitfalls" of the clawback approach, including that "Capex containment incentives would be weakened" and the potential for the process to be "administratively burdensome.").

percentage. If the final costs of the competitively-procured solar projects placed in service in Year 2 were greater than the original projections and the final costs of the competitively-procured projects placed in service in Year 3 were less than the original projections by the same amount, the overall Year 3 revenue requirement would be approximately the same as what the Commission originally approved. However, the Public Staff's proposal would still result in required refunds and reduction of rates with absolutely no basis. Again, the Public Staff's proposal would be punitive to the utility even when the utility had not acted imprudently. Under the HB 951 construct, the utility bears the risk of actual costs varying from projections and must be able to manage this risk. As PEG noted, "[t]he integrity of a capital budgeting process should be assessed based on its overall reasonableness, not the utility's ability to project each in-service date and investment cost with 100 percent accuracy."[15] The ESM is the mechanism that the statute put in place to prevent excessive earnings by the utility that could result if a utility consistently over-projected capital costs of approved projects.

14. As was explained in the Companies' reply comments,[16] it is essential and entirely consistent with North Carolina law that the Companies retain discretion to manage the business.[17] Concerns that the Companies will "game" the MYRP process to obtain

[15] *Id.*

[16] Duke Energy Reply Comments at 27-28.

[17] The Synapse Reply Report actually cites to another state in which the utility has the flexibility to modify investments approved in an MYRP. *See* Synapse Reply Report at 4. In fact, the utility commission decision cited by Synapse reflects the exact same policy conclusions previously described and supported by the Companies. *See New York Public Service Commission, Order Adopting Terms of Joint Proposal and Establishing Electric And Gas Rate Plan*, Cases 19-E-0065 and 19-G-0066, January 16, 2020, at 37 ("As is common in utility rate plans, while the amounts are set by forecasts for specific projects, the Joint Proposal allows Con Edison flexibility to adjust its spending based on the need to reprioritize and address evolving situations. This flexibility is important as it provides the Company the ability to make adjustments to its plans to maintain safe, adequate and reliable service especially where situations develop during a rate plan that require a shift in resources. However, the Company is always required to make only those investments that are prudent and necessary to serve its customers.").

approval of capital projects for their own financial benefit and then substantially alter those plans in a manner that is detrimental to customers are unfounded and divorced from the reality of the regulatory process.[18] Again, the narrow-band ESM would protect customers from a utility attempting to "game" the system in such a manner. In addition, if the Public Staff or the Commission ever did think the originally approved MYRP rates were no longer reasonable, House Bill 951 gives the Commission the right to initiate a proceeding at any point to adjust base rates or PIMs as necessary.

C. Timing of Prudence Review and Double Prudence Review

15. The Public Staff's revised rule on reply addresses prudence review in new ways. Although it is not entirely clear what they propose, it appears that the Public Staff envisions some amount of prudence review to occur within the annual review process under N.C. Gen. Stat. § 62-133.16(c)(1)(c).[19] Once again, the intent of the MYRP is to allow for rate recognition of Commission-authorized capital investments without the need for the filing of new base rate cases, and the scope of the annual PBR review process is narrowly and clearly defined by N.C. Gen. Stat. § 62-133.16(c)(1)(c). Turning the annual review process into a full prudence review is contrary to this intent of the MYRP construct and also not supported by N.C. Gen. Stat. § 62-133.16(c)(1)(c). As the Companies explained in their initial comments: "the annual review process should not be a 'mini rate case' in between rate filings, but rather should be a verification of the calculations in pre-approved

[18] Contrary to Synapse's claims in its Reply Report (see Pg. 1), an earnings cap of 50 basis points is actually not a strong incentive to encourage utilities to overstate their forecasts of capital expenditures, as much of the retained revenues from underspending would likely be refunded to customers. In any event, if the utility consistently overstated its capital expenditures forecasts, it would have difficulty convincing the Commission that its forecasts were an appropriate basis for rates in future MYRPs.

[19] Similar provisions were included in the Joint Intervenors' proposed rules.

templates."[20] The Commission retains the option to initiate a proceeding for a more comprehensive review if necessary.[21]

16. But if the Commission were to authorize prudence review during the annual review process, Public Staff's revised rule also adds an entirely new provision which appears to allow reasonableness and prudence of capital expenditures to be reviewed and ruled upon twice – once during the annual review process under the MYRP and then again in the utility's next rate case.[22] Similar provisions were added by the Joint Intervenors.[23] However, contrary to the Public Staff's new proposed rule, if the Commission approves the reasonableness or prudence of revenues, expenses, or items of rate base during the MYRP through the annual review process, absent a showing of changed circumstances, the Public Staff, intervenors, and the Commission are precluded from revisiting the reasonableness and prudence of the same items in the utility's next rate case.

17. In the Northbrook Hydro decision, the Commission rejected a similar "two bites at the apple" attempt from the Public Staff, and held that it cannot reopen inquiry into capital costs after such costs have been approved and are being recovered in rates, absent a successful motion pursuant to N.C. Gen. Stat. § 62-80.[24]

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[20] Duke Energy Initial Comments at 14.
[21] *See* N.C. Gen. Stat. 62-133.16(e); *see also* Duke Energy Proposed Rule R1-17(m)(6)b.
[22] *See* Appendix B to Public Staff Reply Comments at 24, Public Staff Revised Proposed Rule R8-__(l)(6) (redlining in original):

> No actions or recommendations of any intervenor in any MYRP earnings review and audit conducted pursuant to subsections (i)(2) or (i)(5) of this Rule regarding the reasonableness or prudence of revenues, expenses, or items of rate base, nor any conclusion, finding, or ordering language of the Commission regarding such, shall preclude an investigation or Commission action in the utility's next general rate case regarding the reasonableness and prudence of the same items of cost of service.

[23] Joint Intervenor Reply Comments at 9-10.
[24] *Order Allowing Deferral Accounting, Denying Public Staff's Motion for Reconsideration, Granting Transfer of CPCNs, and Qualifying the Transferred Facilities as New Renewable Energy Facilities*, Docket

18. As background to the Northbrook Hydro decision, in DEC's general rate case in Docket No. E-7, Sub 1146, the bulk of the capital expenditures of the Company's hydroelectric plants from 2015-2017 was included in DEC's cost of service. Neither the Public Staff, nor any other party, challenged the reasonableness or prudence of these capital expenditures. In its order setting new rates, the Commission approved DEC's recovery of the capital expenditures on the hydro plants, and those capital expenditures were recovered by DEC in rates as a depreciation expense on the plants.

19. When DEC later proposed to sell certain hydro facilities, in the Northbrook Hydro docket, the Public Staff acknowledged that the Commission had completed its investigation of DEC's most recent general rate application and issued an order setting new rates in Sub 1146, but that it viewed DEC's proposal to sell the facilities as new information that created special circumstances meriting further consideration. Therefore, the Public Staff moved to reopen and preserve the ability of the Public Staff to investigate the 2015-2017 capital costs of the hydro facilities and hold open the issue of the reasonableness of recovery of the costs until DEC's next general rate case.

20. The Commission denied the motion, finding that DEC had met with and informed the Public Staff of the intended sale prior to and during the Sub 1146 rate case proceeding and that "the Public Staff must provide some evidence that there has been a change of circumstances, or a misapprehension or disregard of the facts regarding the Commission's approval of DEC's recovery of the capital expenditures in the Sub 1146

Nos. E-7, Sub 1181, SP-12478, Sub 0, SP-12479, Sub 0 (June 5, 2019) at pages 21-27 ("Northbrook Hydro") (concluding that "the Commission cannot arbitrarily or capriciously rescind, alter or amend a prior order. Rather there must be some change in circumstances or a misapprehension or disregard of a fact that provides a basis for the Commission to rescind, alter or amend a prior order.") (citing *State ex rel. Utils. Comm'n v. N.C. Gas Serv.*, 128 N.C. App. 288, 293-94, 494 S.E.2d 621, 626 (1998)).

Rate Order," and that the Public Staff had made no such showing.[25] One of the questions presented in that case was whether the Public Staff had a reasonable opportunity during the rate case to understand and in some manner address the significance of the capital expenditures on the hydro plants in relation to DEC's plan to sell the plants.[26] Because the Public Staff had an adequate opportunity to evaluate the hydro capital expenditures or at least preserve the prudence question for future review and did not make a showing of changed circumstances or misapprehension of the facts, the Commission declined to allow them a chance to revisit the prudence determination.[27]

21. The Public Staff seeks to memorialize their now-rejected position in the rule. The proposed provision would allow the Public Staff, intervenors, and the Commission to review prudence during the annual review process *and* preserve the issue of prudence for a future rate case. Consistent with the Commission's holding in Northbrook Hydro and prior cases, absent evidence of changed circumstances, parties should not be given another bite at the apple.[28] Parties should not be able to have it both ways—turning the annual review process into a mini-rate case assessing the prudence of each capital investment while then simultaneously asserting that such review is meaningless and can be completely revisited at a later date. The Companies absolutely support the right of the Commission and all parties to assess the reasonableness and

[25] *Id*. at 25, 27.
[26] *Id.* at 25.
[27] *Id*. at 27.
[28] While not entirely clear, to the extent that either the Public Staff or the Joint Intervenors are asserting that not only should they be given a "second bite at the apple" but that any future second prudence review resulting in a finding of imprudence would give rise to a retroactive rate adjustment, such a recommendation is prohibited under law. *State ex rel. Utils. Comm'n v Nantahala Power & Light Co*, 326 N.C. 190, 206 (1990) ("Retroactive ratemaking has been defined as adjustments to future rates to rectify undue past profits….it has also been defined as occurring when an additional charge is made for the use of utility service or the utility is required to refund revenues collected, pursuant to then lawfully established rates for such past use").

prudence of its investments, but the need to have multiple opportunities to do so is not supported by the PBR statute, the Commission's precedent or regulatory efficiency and common sense.

D. Test Period Definition

22. In its new revisions to its proposed rule, the Public Staff also makes a very significant change to its proposed "Procedure Upon the Filing of a General Rate Case That Includes a PBR Application." Public Staff made no attempt to explain the basis in the PBR Statute for this significant change nor even offer an explanation of their intent behind the change.

23. As background and as the Commission is well aware, base rates in North Carolina are established on a historical test year, defined in N.C. Gen. Stat. § 62-133(c) as follows:

> The original cost of the public utility's property, including its construction work in progress, shall be determined as of the end of the test period used in the hearing and the probable future revenues and expenses shall be based on the plant and equipment in operation at that time…The test period shall consist of 12 months' historical operating experience prior to the date the rates are proposed to become effective, but *the Commission shall consider such relevant, material and competent evidence as may be offered by any party to the proceeding tending to show actual changes in costs, revenues or the cost of the public utility's property used and useful*, or to be used and useful within a reasonable time after the test period, *in providing the service rendered to the public within this State, including its construction work in progress, which is based upon circumstances and events occurring up to the time the hearing is closed.*[29]

24. The PBR Statute specifically references N.C. Gen. Stat. § 62-133 in connection with setting base rates for the first year of a MYRP, stating: "[t]he base rates for the first rate year of a MYRP shall be fixed in the manner prescribed under G.S. 62-

[29] N.C. Gen. Stat. § 62-133(c) (emphasis added).

133, including actual changes in costs, revenues, or the cost of the electric public utility's property used and useful, or to be used and useful within a reasonable time after the test period…"[30]

25. As an initial matter, there is no reason that the PBR rule needs to restate the test period definitions set forth in N.C. Gen. Stat. § 62-133 or 62-133.16—the statutes speak for themselves.

26. However, Public Staff's initial rule included a test period provision that largely[31] mirrored the relevant statutes. But in its revised rule filed on reply, Public Staff fundamentally changes the test period definition to now include "*estimated changes* in costs, revenues, or the cost of the electric public utility's property used and useful *expected to be experienced* in the MYRP rate years" and then also deleted the statutory requirement tying the updates to those occurring up to the time the hearing is closed.[32]

27. These changes are wholly inconsistent with the PBR Statute. Once again, the PBR Statute contemplates that base rates for the first year will be fixed using the traditional test period and then adjustments will be made solely for projected capital investments to be made during the MYRP. In contrast, the Public Staff rule would give rate recognition for any "estimated cost… expected to be experienced in the MYRP rate

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[30] N.C. Gen. Stat. § 62-133.16(c)(1)(a)

[31] Even Public Staff's initial proposal differed from the existing statutes in contemplating the consideration of "actual changes in…the cost of the electric public utility's property used and useful in the MYRP rate years." This is nonsensical because at the time of a PBR application decision, it is not possible to know what the "actual changes in the cost" will be in the future (*i.e.*, in future MYRP rate years).

[32] *See* Appendix B to Public Staff Reply Comments at 16 Public Staff Revised Proposed Rule R8-__(f)(7) (redlining in original):

> The Commission shall consider such relevant, material, and competent evidence as may be offered by any party to the proceeding tending to show actual or estimated changes in costs, revenues, or the cost of the electric public utility's property used and useful expected to be experienced in the MYRP rate years, in providing the service rendered to the public within this State~~, including its construction work in progress, which is based upon circumstances and events occurring up to the time the hearing is closed~~.

years"—which is a fully forecasted test period for the entirety of the MYRP. While this broader forward-looking test period might actually be more beneficial to the Companies, it is not contemplated by the PBR Statute.

28. In summary, there is no need to restate in the PBR rules the test period that is expressly established by statute. If the test period requirements established by statute need to be restated in the rules, the rules should largely be verbatim what is established by the statute and additions should be based on and consistent with the statutory framework. Public Staff's proposal on reply has no basis in the statutory framework and is inconsistent with the PBR Statute.

E. Revisions to Earnings Review Process

29. The new provisions that the Public Staff has added for the earnings review process are confusing and potentially problematic. For example, referring to proposed reductions in rates and refunds due to changes to capital spending projects (which, as discussed at length above, the Companies vigorously oppose), Public Staff Revised Proposed Rule R8-__(i)(4)(c) states, "The reduced rates implemented pursuant to subsection (i)(4)a[33] above shall be considered base rates of the utility, and not a temporary rider, and will not be subject to the 50-basis-point band established for earnings sharing by G.S. § 62-133.16(c)(1)c.1." And then referring to the earnings review process, Public Staff

[33] *See* Appendix B to the Public Staff's Reply Comments at 18, Public Staff Revised Proposed Rule R8-_(i)(4)a (redlining in original):

> To the extent that the newly calculated total annual revenue requirement for a Capital Spending Project for any of the three MYRP years, as approved by the Commission, is less than the annual revenue requirement previously approved for that project and that year pursuant to sections (f) and (i) of this Rule, the Commission shall reduce the MYRP portion of base rates effective for any MYRP years affected, and will make appropriate provisions to refund the difference to the affected customers. If a Capital Spending Project is approved for substitution for another, the comparison of revenue requirements for each year shall be between those two projects.

Revised Proposed Rule R8-__(i)(4)(e) states, "The determination of any refunds related to earnings sharing shall be calculated after taking into account the adjustments to revenue requirements and rates approved pursuant to subsection (i)(4)a above."

30. These two statements seem to contradict each other. While the Companies opposes the Public Staff's recommendation of refunds and rate reductions when any individual project's actual costs are less than the estimate, it would be even more egregious to require a refund, and then potentially require the same amounts be refunded a second time by not including the reduction when determining the earnings for the ESM . For example, if a project's actual costs come in lower than originally projected and this lower actual cost causes the utility's return on equity to exceed the high end of the earnings band, the reduction in cost that caused the over-earnings should not be refunded multiple times. Under the Companies' proposal, it would be refunded once through the ESM. Under the Public Staff's new proposal, it is not clear if it would be refunded once or twice. In any event, the Public Staff's Revised Proposed Rule should be rejected.

F. PBR Rate Case Timing

31. In its initial proposed rule, the Public Staff proposed that a utility request a technical conference no later than 90 days before it intends to file its notice of intent to file a general rate case that includes a PBR Application, or 120 days before a utility files its PBR Application. The Companies noted in their reply comments that they had no objection to this timeline. However, the Public Staff's revised proposed rule increases its recommendation to 120 days prior to a utility filing a notice of intent;[34] this would result in a utility being required to file its technical conference request 150 days prior to

[34] *Id.* at 4.

submitting a rate case application. The Public Staff also adds a new recommendation that the Commission prohibit utilities from requesting a technical conference until the Carbon Plan has been finalized.

32. If the Commission accepts both Public Staff recommendations, the earliest a utility could file a PBR application would be June 1, 2023, and the earliest effective date for new rates would be April 2024. If the Commission were also to accept the Public Staff's recommendation that rate cases for the three electric utilities must be staggered, such that only one PBR rate case may be filed in a year, then the next utility in line would not be permitted to file a PBR application until June 1, 2024, with rates effective April 2025. Those dates would be June 1, 2025 and April 2026, respectively, for the third utility.

33. It is simply inconceivable that the General Assembly, having authorized the use of modernized ratemaking tools and requiring rules to be adopted within 120 days of the legislative enactment and expressly stating that such rules would apply to any PBR application filed after such 120 day period, could have intended that such modernized ratemaking tools not actually be put to use for nearly three years for the first utility and nearly five years for the last utility. Furthermore, if the Commission were to accept this proposed timing that would delay by years the point in time at which the Companies could avail itself of HB 951's modernized ratemaking tools, the Companies would have no choice but to file traditional base rate cases under N.C. Gen. Stat. § 62-133 (*i.e.*, without PBR applications) prior to those dates.[35]

[35] Since the grid deferrals approved in the Companies' most recent rate cases expire at the end of 2022, DEC and DEP would likely need to request new deferrals for grid improvement projects if they were forced to file traditional rate cases in the interim. As Commissioner Clodfelter observed in his partial dissent in DEC's most recent rate case, he would prefer that there were more alternative ratemaking tools in the Commission's tool kit to address items like grid investments, but since there were not, he was "constrained by the tools that

F. Post-MYRP Rates

34. In its initial proposal, Public Staff agreed with the Companies in reaching the conclusion that the PBR Statute allows for MYRP base rates effective at the end of the 36 month plan period to remain in effect,[36] in contrast with those intervenors that argued in initial and reply comments that the MYRP base rates must be eliminated at the end of the MYRP.[37] In its reply comments, the Companies responded to intervenor's initial comments on this issue, affirming that the MYRP base rates in effect at the end of the 36 month "plan period" remain in effect, along with the ESM and the residential decoupling rider.[38] Indeed, it is clear from the PBR Statute that the rates set through the MYRP are base rates, established on a set of reasonable and prudent projected investments approved by the Commission, and it would be an unprecedented outcome for base rates to be automatically adjusted downward without any hearing or Commission finding or an express direction to do so in the PBR Statute. It is worth noting that the Joint Intervenors

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we have been given by the General Assembly until they are changed." *See Order Accepting Stipulations, Granting Partial Rate Increase, and Requiring Customer Notice*, Docket No. E-7, Sub 1214 (March 31, 2021) (Clodfelter, D., partially dissenting) at 9-10 ("Increasingly, our present statutes governing ratemaking are proving to be poorly suited to address the types of investments that utilities are making and must continue to make in order to transition the electricity grid to the new world of distributed generation from renewables, non-wires solutions to grid reliability and capacity issues, and the two-way power flows that result from these first two trends, not to mention looming electrification of the transportation and real estate sectors and new challenges to grid reliability and resiliency due to cyberattacks and severe weather events."). Now that the legislature has given the Commission these tools, the Commission should not – as the Public Staff urges – choose to limit its discretion to use those tools by creating hurdles that do not exist in the legislation.

[36] *See* Public Staff Initial Proposed Rule R8-__(n) ("Rates following Expiration of PBR Ratemaking Mechanisms – Following the expiration of the multiyear plan period, the rates for the current MYRP rate year shall remain in effect until further order of the Commission.").

[37] It is worth noting that while CUCA joins the Joint Intervenors in arguing that the PBR Statute makes clear that "every aspect of a PBR application should expire together at the end of the maximum 36-month term" (*see* Joint Intervenors Reply Comments at 4), its own consultant, Synapse appears not to agree with this interpretation, concluding instead that the PBR Statute is "is silent regarding how rates should be adjusted following the conclusion of the MYRP term." Synapse Reply Report at 5.

[38] Duke Energy Reply Comments at 37-38.

were simply incorrect in their assertions in reply comments that the Companies were proposing that the MYRP base rates would remain in effect at the conclusion of the "plan period" without also continuing the ESM.[39]

35. In reply comments, the Public Staff reaffirmed their interpretation of the PBR Statute, finding that "N.C. Gen. Stat. § 62-133.16(c)(1)a. includes the language 'subsequent changes in base rates in the second and third rate years of the MYRP . . .', indicating that the base rates change in each year of the MYRP" and that it would thus "be inconsistent to require that the rates be reset to the base rates set in the general rate case instead of continuing at the then existing base rates."[40] Public Staff further recognizes the common sense policy basis for its recommendation, asserting that that "the practical effect of setting rates back to those set in the general rate case would likely force the utility to file a rate case."

36. However, on reply, the Public Staff introduced an entirely new proposal that functionally defeats the statutory interpretation and policy arguments that Public Staff's own reply comments affirm.

37. That is, while affirming that the PBR Statute does not contemplate the reversion of base rates to pre-MYRP rates or forcing a rate case where not needed, Public

[39] Joint Intervenor Reply Comments at 8 ("If Duke were permitted to extend the rates of an MYRP while the earnings-sharing mechanism expired, the utility could inadvertently be granted a windfall at the expense of ratepayers who would continue to pay rates set pursuant to forecasted costs with no protection in place against overestimating forecasted costs, and by extension an over-recovery and overearning by the utility on those same costs, if third-year MYRP rates were allowed to continue in perpetuity until the applicable utility elects to file its next general rate case.); *contra* Duke Energy Initial Comments, Exhibit A, Rule R1-17(m)(10)(g) ("If the electric public utility does not file a general rate case or successor PBR application to become effective after the final Rate Year, any approved PIM(s) shall expire but the base rates, Earnings Sharing Mechanism, and Decoupling Rate-making Mechanism effective for the final Rate Year will continue until the effective date of Commission-approved base rates from a subsequent general rate case"); Duke Energy Reply Comments at 38 ("The Public Staff and the Companies agree that Year 3 Rates should stay in effect upon expiration of the PBR plan period. This position minimizes rate cases while preserving customer protection and preventing utility overearning *through continuation of the ESM*.") (emphasis added).

[40] Public Staff Reply Comments at 12.

Staff's new proposal on reply would essentially force a rate case. Specifically, Public Staff revised its proposed rule to *require* the Commission to initiate a review of rates under N.C. Gen. Stat. § 62-133.16(e) if the utility does not intend to file a rate case at the end of the MYRP, and to establish new base rates effective upon expiration of the MYRP.[41] This is, in essence, a new requirement for a mandatory rate case during the final year of the MYRP. This proposed requirement has no basis in the statute and Public Staff, having affirmed that the PBR Statute does not require a post-MYRP rate reset and that forced rate cases are not good policy, does not even attempt to explain a statutory basis for this mandated rate investigation (effectively, a mandated rate case).

38. N.C. Gen. Stat. § 62-133.16(e) provides that "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 an electric public utility's rates under a plan, conduct periodic reviews with opportunities for public hearings and comments from interested parties, and initiate a proceeding to adjust base rates or PIMs as necessary" (emphasis added).

39. In its revised proposed rule, the Public Staff converts the permissive "may" in the statute into an obligatory "shall"[42] and ignores that there must be "good cause" for

[41] *Id.* at 26-27, Public Staff Revised Proposed Rule R8-__(o)(redlining in original):

> At least 300 days prior to the expiration of a MYRP, the electric public utility must notify the Commission when it intends to file a new application for a general rate case pursuant to G.S. 62-133 with or without an application for PBR and the requested effective date of new base rates. If the requested effective date of new base rates is after the expiration date of the MYRP, the Commission shall, as provided in G.S. 62-16(e), review the reasonableness of the electric public utility's rates under the MYRP and establish new base rates for the period immediately following expiration of the MYRP.

[42] *See Chisum v. Campagna*, 376 N.C. 680, 699, 855 S.E.2d 173, 187 (2021) (use of "may" generally connotes permissive or discretionary action and does not mandate or compel a particular act).

such investigation: "the Commission *shall*, as provided in [*sic*] G.S. 62-16(e), review the reasonableness of the electric public utility's rates under the MYRP and establish new base rates for the period immediately following expiration of the MYRP."[43] It is unclear why the Public Staff's proposed rule suggests that this process is "as provided in [*sic*] G.S. 62-16(e)," because § 62-133.16(e) (presumably, what the Public Staff intended to refer to) provides for no such thing. Had the General Assembly intended to for the rate investigation authorized under N.C. Gen. Stat. § 62-133.16(e) to be mandatory, it would have so established—but it did not.

40. Furthermore, the "reason" cited by Public Staff for this new and unsupported requirement is the "possibility of the utility overearning if the rates continued at the rate set in the last year of the MYRP and the difficulty with bringing a utility in for a rate case in such a situation."[44] Yet, the General Assembly has provided a completely new tool that is specifically designed to prevent any potential over-earning—the ESM. So there is no scenario in which the utility will earn an amount above that authorized in the PBR Statute, even after the end of the PBR plan period. Furthermore, requiring a rate case after the end of the MYRP term actually discourages[45] a utility from investigating or

[43] Public Staff Revised Proposed Rule R8-__(o)(emphasis added).

[44] Public Staff Reply Comments at 13. It is worth noting that that there is in inherent contradiction in this position in the Joint Intervenors' reply comments, which simultaneously suggest that the Companies may seek to avoid a future rate case in order to overearn (even though that would not occur under the Companies' actual proposal due to the continuation of the ESM) and yet the "current day circumstances" provide tremendous and unprecedented upward pressure on electric rates.

[45] In its 2017 whitepaper for Lawrence Berkeley National Laboratories, PEG compared the productivity trends of power distributors that had avoided rate cases for extended periods of time to the full US sample. PEG found that "that multifactor productivity growth of utilities during extended rate stayouts exceeded that of the full U.S. sample during the same period by 29 basis points on average. Operation and maintenance and capital productivity growth were both superior. During other years of the full 1980–2014 sample period, MFP growth of these utilities exceeded MFP growth of the full U.S. sample by less than a basis point on average. This evidence suggests that extended rate stayouts lowered distributor costs." Lowry, M.N., Makos, M., Deason, J., and Schwartz, L., 2017. "State Performance-Based Regulation Using Multiyear Rate Plans for U.S. Electric Utilities," for Lawrence Berkeley National Laboratory, Grid Modernization Laboratory

pursuing cost saving initiatives in the latter years of the MYRP plan term or that would have longer payback periods.[46]

41. Moreover, N.C. Gen. Stat. § 62-133.16(d)(3) provides that a utility "shall not make any changes in any rate or implement a PBR except upon 30 days' notice to the Commission…and the Commission may suspend the effect of the proposed base rates and PBR implementation upon investigation…for no longer than 300 days." Likewise, § 62-134(a) provides that "Unless the Commission otherwise orders, no public utility shall make any changes in any rate...except after 30 days' notice to the Commission…" The Commission may suspend rates for a non-PBR rate case for 270 days. Aside from these provisions, there is no statutory authority which requires a utility to divulge the timing of its general rate cases.

42. Putting aside the fact that the Companies continue to believe that the PBR Statute permits the MYRP base rates to remain in effect at the end of the MYRP (paired with the ESM) and that there is no basis in the PBR Statute to impose a mandatory obligation on the Commission to conduct a rate investigation, it is also worth noting the new notice requirement imposed on the Companies under Public Staff's proposal is both objectionable and unnecessary. Specifically, Public Staff's proposal requires the Companies to notify the Commission 300 days prior to the MYRP expiration of the Companies' timing plan for a future rate case, whether the Companies are planning a

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Consortium, U.S. Department of Energy, https://eta.lbl.gov/sites/default/files/publications/multiyear_rate_plan_gmlc_1.4.29_final_report071217.pdf, p. 6.27. These findings contradict the notion that avoiding a rate case for an extended period is inherently bad for customers.

[46] Furthermore, even if the ESM terminates at the end of the MYRP period, as some intervenors have argued, if the Public Staff or Commission believed that a utility had excessive overearnings, it could initiate an investigation into the existing rates pursuant to a Commission-ordered "show cause" proceeding pursuant to N.C. Gen. Stat. §§ 62-130(d), 62-133(a), 62-136(a), and 62-137.

traditional rate case or a PBR rate case. The proposal is objectionable because the timing of the Companies' rate cases is highly confidential information (and has been treated as such by the Commission) and is subject to continual refinement. A requirement to provide notice of filing so far in advance if the Companies are not planning on filing for rates effective at the end of the MYRP would depart substantially from the current statutory pre-filing notice requirements, trigger U.S. Securities and Exchange Commission disclosure requirements and otherwise potentially artificially constrain the flexibility of the utility to adjust rate case timing. In essence, this requirement would rewrite the current pre-filing statutory rate case notice requirements. In addition, the proposal is unnecessary because under the Company's proposed PBR rules, the Companies would have had to provide notice over a year prior to expiration of the MYRP if it, in fact, intended to seek new rates effective at the end of the MYRP. Therefore, by 300 days in advance of the expiration of the MYRP, the Companies would have already passed the point in time at which it would have needed to provide notice of a PBR application with rates effective at the end of the MYRP, rendering Public Staff's notice largely meaningless.

43. The Public Staff's initial position, which aligns with the Companies' and was seemingly affirmed by Public Staff on reply – that base rates during the final year of an MYPR should continue until the next rate case – is a far more reasonable approach. Of course, if the utility does not file a rate case at the end of the MYRP and the Commission finds good cause to do so, the Commission *may* initiate an investigation into base rates at that time.

III. Attorney General's Reply Comments

A. Additional Proceedings

44. The AGO contends that the statutorily prescribed 300-day timeline governing PBR application review and approval is too short, and recommends additional proceedings and rules which would effectively sidestep this timeline.[47] More specifically, the AGO recommends a separate policy goals proceeding in which the Commission would establish a "goal-outcome hierarchy" and "further outline and articulate guiding principles and criteria to inform alternative regulatory mechanism design within a utility's PBR application."

45. With respect to the "goal-outcome hierarchy," the AGO lays out a needlessly complex process involving flow charts, foundational frameworks, complicated scorecards, and a published list of pre-approved goals and outcomes.[48] As the Companies emphasized in their reply comments, having a separate policy goals proceeding that is separate from a PBR application will not lead to the best outcome, as it does not allow the Commission to review policy goals and PIMs in the context of the specific utility and the specific rate request. Further complicating the process, as the AGO recommends, would constrain the parties and the Commission with an overly rigid framework that would prolong the proceedings and rob the parties and Commission of the flexibility needed to take a thoughtful and measured approach to PBR implementation.

46. According to the AGO, a separate proceeding is also necessary because "there are numerous alternative regulatory mechanism design decisions that will need to be made in the process of developing a PBR application" and "[a]dequately assessing and vetting the myriad design decisions bound up in alternative regulatory mechanism design is complex. If attempted while simultaneously evaluating all other aspects of a base rate

[47] *See* AGO Reply Comments at 6-20.
[48] *See id*. at 8-17.

case and a PBR application in the confines of a 300-day rate case timeline, important issues will likely fall by the wayside."[49]

47. First, it is unclear what design decisions the AGO is referring to – the General Assembly has already designed the alternative regulatory mechanism that is available to electric utilities in North Carolina, and it is fully described in N.C. Gen. Stat. § 62-133.16. The AGO references the Appendix to its Reply Comments, specifically AGO Appendix Items #2 and #12, as containing the proposed rules implementing this recommendation. However, Item #2 merely outlines the procedure for the recommended policy goals proceeding discussed above, and Item #12 is a laundry list of policy-driven evaluation criteria that are not in the PBR Statute that the AGO would like the Commission to adopt. In short, while the AGO vaguely alludes to design criteria that must be sorted out prior to the filing of a PBR application, it never gives a concrete example of any one of "numerous design decisions" that would necessitate a separate proceeding in advance of a PBR rate case.

48. Second, the PBR Statute contains a timeline (300 days) which is longer than the timeline for a traditional base rate case under § 62-133 (270 days), presumably because a PBR rate case is more complex. Nevertheless, the AGO urges the Commission to implement rules that would result in an end-run around the 300-day timeframe. The AGO argues:

> The Commission and parties are simply at a structural disadvantage if they are required to evaluate all potential design decisions at the same time that proposed capital investments and other aspects of a PBR application are under scrutiny. Having to assess and modify structurally deficient alternative regulatory mechanisms in the context of a PBR application review, that is, a 300-day window, will strain the resources

[49] *Id*. at 18.

> of the Commission, Public Staff, and parties alike. A more prudent approach would be for the Commission to, prior to submission, proactively establish guiding principles and design criteria…

This attempt to negate the 300-day timeframe is not even thinly veiled – the AGO is expressly asking the Commission to split off individual pieces of a PBR rate case to be decided in separate proceedings that must be concluded before a utility is even allowed to file its PBR application, so that the parties will have more time to review a utility's PBR plan. This is a delay tactic that conflicts with the PBR Statute and should not be allowed. In any event, evaluating these issues in the context of a PBR application is most efficient and the most effective way to establish policy goals and PIMs that are tailored to the specific utility and the facts in the record.

B. Authorization of Investments for PBR

49. The AGO recommends adding specific provisions in the PBR rules to prioritize PBR proposals that are "optimal in timing and generation and resource mix for advancement of the carbon plan and effective for integrated resource planning [("IRP")] purposes."[50] In that same vein, the AGO recommends that the Commission direct utilities to submit, in conjunction with their IRP and Carbon Plan filings, a detailed capital investment plan for those projects that would be eligible and authorized for inclusion in a subsequent PBR application and proposed MYRP.

50. Under the AGO's proposal, it is unclear how the timing and interaction of the IRP, Carbon Plan, and PBR filings would work and how and in which proceeding the Commission would decide which capital spending projects would be approved as part of an MYRP. For instance, the AGO's proposed rule would require DEC and DEP to file, as

[50] *See* AGO Reply Comments at 4, 27; Appendix to AGO Reply Comments at 1-3, 5.

part of the initial Carbon Plan proposal filed May 16, 2022, an "investment project plan" that describes planned investments over five or more years, including a detailed description of all discrete and identifiable capital spending projects that may be proposed for authorization as part of a multi-year rate plan and dates when projects are expected to be placed into service."[51] The proposed rule also requires each of the Electric Utilities to submit this information with every IRP filed thereafter.[52] Under the proposed rule, interested parties then would be able to comment on the utility proposals and submit alternative investment project proposals both as part of the Carbon Plan development and IRP processes and as part of the PBR rate case.

51. The AGO's rationale for dispersing the capital project decisions into multiple proceedings will sound familiar: "thoughtful planning will be required to identify optimal investment projects for the PBR plan, and these also need to be considered in separate proceedings that are not buried by the complex factors litigated in rate cases. To that end, the AGO recommends that specific proposals for investment projects should be identified in a separate process, e.g., as part of the Carbon Plan and Integrated Resource Plans."[53]

52. A MYRP will include many projects that are part of the Carbon Plan that go in service during the term of a proposed MYRP. As explained below, the Carbon Plan process can occur, if necessary, in parallel with a PBR application and will actually lessen the amount of review needed in the PBR review process by assessing those capital investments proposed as part of the Carbon Plan. However, a MYRP may also include

[51] Appendix to AGO Comments at 3.
[52] *Id*.
[53] AGO Reply Comments at 3.

projects that are not part of the Carbon Plan but that may be required for other reasons (reliability, safety, customer service, etc.). For projects that are not part of the Carbon Plan, there is no need to establish yet another separate docket to review those projects. They should be reviewed as part of the rate case docket, consistent with N.C. Gen. Stat. § 62-133.16(c)(1)(a), which links the rate setting aspect of the PBR process with the authorization of projected capital investments.

53. Finally, it worth reaffirming in light of the AGO's recommendations that, beyond the fact that delaying a PBR application until after Carbon Plan approval is not contemplated by the PBR Statute, there are also no practical impediments to a PBR application being filed prior to Carbon Plan approval. For instance, in the case of a PBR application filed in the summer of 2022, the final results of the Carbon Plan docket can be incorporated into the rate case through a supplemental filing well in advance of the close of the traditional update period and prior to the rate case hearing, allowing ample opportunities for parties to review such updates and the Commission to render a decision. Furthermore, the Carbon Plan will lessen the need for review of certain capital investments in the PBR docket, since those investments that are part of the Carbon Plan will be reviewed in the Carbon Plan docket and the Commission's final approved Carbon Plan will simply be incorporated through an updated into the PBR process.

54. The following table shows the timeline for the last DEC rate case prior to any COVID-related delays. The next column shows a hypothetical timeline for a future rate case, where the rate case is filed before the Carbon Plan is final and the supplemental filing is after. The final column adds an additional 30 days to the timeline as provided for in House Bill 951 for rate case dockets that include a PBR application.

	DEC Case (E-7 Sub 1214) - Original/ non-delayed timeline	Hypothetical future case with similar timeline	Hypothetical future case with PBR application (30 days added)
Initial Case Filing	9/30/2019	8/29/2022	7/30/2022
Supplemental Filing	2/14/2020	1/13/2023	1/13/2023
Commission Order Due	7/26/2020	6/25/2023	6/25/2023
New Rates Effective	8/1/2020	7/1/2023	7/1/2023

55. Under this hypothetical timeline, the Carbon Plan could be final before the hearing in the rate case and before the Commission's order. Because the Carbon Plan projects will be fully vetted in the Carbon Plan docket and approved by the Commission, there will be no need for additional extensive vetting in the rate case docket. As such, the extensive delays proposed by intervenors are unnecessary, contrary to the statute, and should be rejected.

C. Cap on Annual Rate Increases

56. N.C. Gen. Stat. § 62-133.16(c)(1)(a) provides that "the amount of increase in the second rate year under the MYRP shall not exceed 4% of the electric public utility's North Carolina retail jurisdictional revenue requirement that is used to fix rates during the first year of the MYRP pursuant to G.S. 62-133 excluding any revenue requirement for the capital spending projects to be placed in service during the first rate year." Similarly, the statute provides that "the amount of increase for the third rate year under the MYRP shall not exceed…4% of the electric public utility's North Carolina retail jurisdictional revenue requirement that is used to fix rates during the first year of the MYRP pursuant to G.S. 62-133, excluding any revenue requirement for the capital spending projects placed in service during the first rate year. N.C. Gen. Stat. § 62-133.16(c)(1)(a).

57. The AGO argues that the statutory cap on overall annual rate increases should be applied so the rate increase for each individual customer class cannot exceed 4%.[54] That is not what the statute says and the AGO offers no justification – statutory or otherwise – for this recommendation.

58. In addition, such a rule could directly conflict with the statutory provision that that authorizes the Commission to approve a PBR application "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." *See* N.C. Gen. Stat. § 62-133.16(b). Applying the cost cap to each customer class could handcuff the Companies, and the Commission, from addressing interclass subsidies and designing rates based on cost causation. As such, the AGO's proposed rule that the "4% cap on revenue increases during a multi-year rate plan shall apply overall and for each rate class" should be rejected.

D. Decoupling

59. The AGO makes several recommendations relating to decoupling that are new, not made in response to any party's initial comments or rules, and that are not permitted by North Carolina law.[55] Most notably, the AGO argues that decoupling shifts

[54] *Id*. at 21.

[55] *Id*. at 22-24. NCSEA also raises this recommendation in its Reply Comments and, similar to the AGO, does not make even a cursory attempt to reconcile this recommendation with the plain language of N.C. Gen. Stat. § 62-133.2(a) or to ground the recommendation in the text of HB 951. NCSEA Reply Comments at 21.

risk[56] from the utility to residential customers, and the Commission should shift some risk back to the utility by fixing the fuel costs over the three-year period.[57] This recommendation – that the Companies be prohibited from utilizing their fuel riders for the duration of a MYRP – is brazenly contrary to the law and directly contravenes N.C. Gen. Stat. § 62-133.2(a), which provides as follows:

> The Commission shall permit an electric public utility that generates electric power by fossil fuel or nuclear fuel to charge an increment or decrement as a rider to it 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 electric public utility's previous general rate case on the basis of cost per kilowatt-hour.

The AGO ignores the mandatory nature of this statute and does not acknowledge or even grapple with the fact that the legislature, in passing House Bill 951, did not repeal or otherwise abrogate N.C. Gen. Stat. § 62-133.2(a). *See State ex rel. Utils. Comm'n v. Town of Kill Devil Hills*, 194 N.C. App. 561, 567, 670 S.E.2d 341, 345, *writ allowed*, 636 N.C. 583, 681 S.E.2d 344 (2009), and *aff'd*, 363 N.C. 739, 686 S.E.2d 151 (2009) ("[R]epeals by implication are not favored ... and the presumption is always against implied repeal.");

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[56] Once again, the PBR Statute already specifies the manner in which any increase or decrease in risk resulting from PBR should be considered in setting authorized return, and a rulemaking process is not the appropriate forum for such decisions. All parties can address the net impact of any specific PBR plan on the utility's risk in the PBR proceeding itself. There is no need in this rulemaking proceeding to reach high-level directional conclusions about the impact of PBR on utility risk until all aspects of a specific plan can be evaluated. Furthermore, it is worth pointing out that empirical studies have shown that revenue decoupling does not have a statistically significant impact on a utility's cost of capital. *See "Decoupling and the Cost of Capital,"* Joe Wharton and Michael Vilbert, The Electricity Journal, Volume 28, Issue 7, August/September 2015.

[57] It should also be noted that there is no policy nexus between revenue decoupling and the recovery of fuel costs. Almost all utilities in the United States that provide generation services to retail customers have a fuel cost adjustment to capture changes in fuel costs between rate cases. The reason is that these costs meet the usual criteria for recovery through adjustment clauses or riders: fuel costs are significant, often volatile, difficult to predict, and largely outside of the Company's control. Revenue decoupling has no impact on these policy reasons for implementing fuel cost adjustment, as it applies to revenues from base rates rather than revenues addressed by fuel cost trackers. Further, while the AGO posits a "quid pro quo," the magnitude of the risk reduction attributable to residential decoupling is not commensurate with the magnitude of the risk attributable to eliminating the fuel adjustment clause. The financial community would undoubtedly react to such a drastic change by requiring a higher return to invest in the utility's securities.

see also Ry. Co. v. City of Raleigh, 277 N.C. 709, 712, 178 S.E.2d 422, 424 (1971) (Court will not construe general legislative enactment as repealing existing statutes without express legislative intent). In fact, House Bill 951 specifically states, "In all respects, the alternative rate-making mechanisms, designs, plans, or settlements shall operate independently, and be considered separately, from riders or other cost recovery mechanisms otherwise allowed by law, unless otherwise incorporated into such plan." N.C. Gen. Stat. § 62-133.16(g). In many respects, it is not an efficient use of the regulatory process to be required to respond to recommendations such as these that are wholly inconsistent with well-established law and that are completely devoid of any attempt to ground in applicable law.

60. The AGO also adds a proposed rule which would require a utility to propose in its PBR application its proposed method for revising its cost recovery mechanism for demand-side management and energy efficiency ("DSM/EE") programs to eliminate the recovery of "net loss revenues from residential customers effective when the decoupling mechanism takes effect.[58] The Companies take a more flexible approach in their proposed rule: "If net lost revenues are collected through a demand-side management and energy efficiency ("DSM/EE") rider, [a utility must include in its PBR filing] a plan to ensure that that there is no double collection of net lost revenues through the DSM/EE rider and the Decoupling Rate-making Mechanism."[59] The intent behind both the Companies' proposed rule and the AGO's proposed rule is to eliminate the potential for double-counting of net lost revenues, however, the Companies' rule would allow utilities and the Commission to select how best to accomplish this. It may make more sense, for example, for a utility to

[58] Appendix to AGO Reply Comments at 4.
[59] Duke Energy Proposed Rule R1-17(m)(5)(d.).

propose to maintain a consistent approach in its DSM/EE rider and leave net lost revenues in the rider, and instead make the necessary adjustment in its decoupling mechanism. The Companies' approach is a more reasonable and measured approach to avoid double collection of net lost revenues and should be adopted by the Commission.

E. Criteria for Evaluating PBR Application

61. The AGO adds new mandatory criteria to guide the Commission's evaluation of a PBR application that are inconsistent with N.C. Gen. Stat. § 62-133 and § 62-133.16 and, in some cases, conflict with one another.[60] For instance, the AGO would require a utility to demonstrate that its "proposed alternative regulatory mechanism" "[e]nables electric service options that provide value to customers without imposing

[60] Appendix to AGO Reply Comments at 7:

> On review of a PBR application, the Commission will evaluate for each proposed alternative regulatory mechanism and alternative ratemaking plan, whether the utility has demonstrated that it:
>
> (1) Delivers exceptional electric utility performance across Commission-established policy goals and regulatory outcomes, as measured by attendant metrics;
> (2) Aligns an economically viable utility model with state public policy including reduction of greenhouse gas emissions;
> (3) Provides for just and reasonable rates that are comparable to rates established pursuant to G.S. 62-133;
> (4) Enables electric service options that provide value to customers without imposing incremental net costs to customers;
> (5) Fosters statewide improvements to the economic and operational efficiency of the electrical grid;
> (6) Furthers the public interest, including, without limitation, the promotion of safe, economic, efficient, and reliable electric service to all customers of the electric utility;
> (7) Enhances the resilience and security of the electrical grid while addressing concerns regarding customer privacy;
> (8) Strikes a balance of risk sharing between customers and the electric utility that recognizes the electric utility's enhanced position to manage said risks in a manner aligned with the public interest;
> (9) Facilitates the research and development of innovative electric utility services and options to benefit customers;
> (10) Ensures low income household interest and historically underserved communities' interests are meaningfully considered and that their economic interests are addressed.

incremental net costs to customers" and results in rates "comparable" to those established under N.C. Gen. Stat. § 62-133, while at the same time delivering "exceptional electric utility performance," reducing greenhouse gases, fostering "statewide improvements to the economic and operational efficiency of the electrical grid," enhancing resilience and security of the grid, addressing concerns regarding customer privacy, and developing innovative utility services and options.[61] The Companies do not disagree with many of these goals in principle, but these criteria are simply not in the statute (in fact, it is not clear where these criteria come from, as they are not discussed at any length in the AGO's reply comments). Moreover, hard-coding them into a rule and making each factor essentially a part of a utility's burden of proof, limits the Commission's flexibility and does not recognize the inherent trade-off — many of the AGO's desired outcomes would inevitably lead to increased rates.

62. In addition, while of course, the Commission must establish just and reasonable rates – whether it is operating under NC. Gen. Stat. § 62-133 or § 62-133.16 – rates established under § 62-133.16 are not required to be "comparable to rates established pursuant to G.S. 62-133"[62] nor should they be. As a threshold issue, it is unclear what "comparable" would mean – within x number of cents per kWh? Within a certain percentage? A similar monthly bill? In any case, the purpose of the PBR statute is to provide for an alternative ratemaking framework which involves a number of features that are unavailable under traditional ratemaking, including step-ups in revenue requirements relating to Commission-authorized capital spending projects, a MYRP, an ESM, PIMs, and decoupling. By their very nature, rates established under the PBR Statute will not be

[61] *Id.*
[62] *Id.*

"comparable" to rates established under N.C. Gen. Stat. § 62-133 nor were they intended to be.

IV. Joint Intervenors [63]

A. Technical Conference

63. In their revised proposed rules, the Joint Intervenors propose a two-phase technical conference, wherein the utility makes a presentation at the first phase, and the other parties each have an hour to make their presentations during the second phase.[64] The Companies object to a two-phase technical conference process as proposed by the Joint Intervenors. First, from a practical perspective, the Electric Utilities' resources will be heavily focused on preparing the PBR application and E-1 filings during this time; thus, participating in an unnecessarily drawn-out and lengthy technical conference process is not feasible. In DEP's most recent rate case in Docket No. E-2, Sub 1219, 16 parties[65] intervened and in DEC's most recent rate case in Docket No. E-7, Sub 1214, 15 parties[66]

[63] Several of the new provisions in the Joint Intervenor Proposed Rule are simply a cut-and-paste of several new provisions also recommended by the Public Staff (*e.g.*, the extension of the timeframe for filing a request for a technical conference, the requirement of filing a new depreciation study, and the double-prudence review provision). These provisions were addressed in the Public Staff section of the Companies' Supplemental Reply Comments and will not be addressed again in this section.

[64] Appendix A to Joint Intervenors Reply Comments at R8-__(d)(1):

> (1) No later than 120 days before an electric public utility gives notice that it intends to file a general rate case that includes a PBR application, the electric public utility shall file a request with the Commission to initiate a technical conference process regarding projected transmission and distribution expenditures, pursuant to G.S. 62-133.16(j)(3). The applicable electric public utility will make a presentation during the first phase of the Technical Conference. Interested parties will be allotted at least one (1) hour during part two of the Technical Conference to make related presentations; provided, however, that part two of the Technical Conference shall not be scheduled less than 30 days after the first day of the Technical Conference.

[65] For purposes of this exercise, the Companies are counting the NCJC et al. intervenors as one party.

[66] For purposes of this exercise, the Companies are counting the NCJC et al. intervenors as one party, and the Tech Customers as one party.

intervened. Thus, under the Joint Intervenor's proposal, it is plausible that the second phase of the technical conference could take approximately 15-16 hours.

64. Moreover, the technical conference process is designed to be an opportunity for parties to learn more about a utility's proposed T&D projects and for the utility to hear the parties' and the Commission's reactions to those proposals. The two-phase process suggested by the Joint Intervenors appears to be more of an adversarial process, with a "direct" phase and a "rebuttal" phase in which the intervenors get the last word.

65. The Companies' and the Public Staff's proposed rules provide that the Commission determines the appropriate manner for interested parties to provide comments and feedback during the technical conference.[67] In addition, as noted in their reply comments, the Companies have no objection to the Public Staff's recommendation that they be required to provide interested parties with technical conference materials 10 days in advance of their presentation, so the parties have a chance to digest and prepare prior to the meeting. Finally, the Companies' projected T&D expenses filed in the PBR application will be subject to discovery and review during the rate case discovery period, and parties will have an opportunity to argue their positions and provide evidence in support of those positions during the proceeding in which the PBR application is considered.

B. PBR Filing Requirements

66. The Joint Intervenors also add in their new proposed rule several additional PBR Application filing requirements that the Companies oppose. For example, the Joint Intervenors add a requirement for a utility to provide "granular forecasting data relating to T&D investments," including a requirement that projected investments be "identified by

[67] Duke Energy Proposed Rule R1-17(m)(4); Public Staff Revised Proposed Rule R8-__(d)(4).

specific geographic locations."[68] However, the Companies are not always able to project geographic locations up to four years in advance of when the project will go in service. Therefore, this requirement is burdensome and unnecessary and should be rejected.

67. The Joint Intervenors also include a requirement that the utility include a statement in its PBR application that "inclusion of a project in a MYRP by the Commission does not constitute a prudence determination."[69] The Companies oppose this provision of the Joint Intervenors' proposed rule. First, it seems entirely unnecessary and inappropriate to include a legal conclusion as a filing requirement. Second, the Companies disagree with this legal conclusion. The Commission's initial finding in authorizing the capital spending projects approved in the PBR plan is that those projects are reasonable and prudent for the utility to pursue during the MYRP period -- in other words, during the PBR rate case proceeding, the Commission gives the utility the green light to go forward with specific capital spending projects that it has authorized for the MYRP and approves the associated revenue requirements for each rate year. As explained above, the Companies recognize and agree with the need for a future prudence determination regarding the manner in which the Companies execute the authorized capital investments. However, it is unreasonable to

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[68] *Id.* at (e):

> Forecasts supporting transmission and distribution expenditures should be sufficiently granular (i.e., at the substation or circuit level) to justify the electric public utility's proposed load-related investments at specific geographic locations.

[69] *Id.* at (e)(7):

> (7) The utility's application shall include a statement acknowledging the Commission's authorization to include a set of projects and associated costs in a utility's MYRP does not constitute a prudence determination.

suggest that the exhaustive review and approval process that will have been undertaken by the Commission in the PBR application and the Carbon Plan should be given no weight whatsoever in the future.

C. Annual Review Process

68. The Joint Intervenors also include in their revised proposed rules, a completely revamped annual review process, which includes the filing of testimony and exhibits by the utility and intervenors.[70] The Companies explained above that the PBR Statute is expressly intended to avoid subsequent annual rate cases and how the annual review process should follow the clear parameters set out in N.C. Gen. Stat. § 62-133.16(c)(1)(c). Both Public Staff's proposals and the Joint Intervenors' proposals with respect to the annual review process go far beyond these guideposts and result in a series of rate case-like proceedings. As explained, the annual review is intended to be a verification of the calculations for the decoupling, ESM, and PIMs mechanisms. With respect to capital projects previously authorized by the Commission, an annual review filing with schedules that provide the results and explanations for any major variances is most appropriate for this stage of the PBR plan process. A requirement that the utility file testimony is unnecessary as the Public Staff may interface with the utility during its audit to discuss any concerns or obtain more information concerning data included in the utility's annual review filing.

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[70] *See, e.g., id.* at (j)(2); *see also, id*. at (j)(5)a.:

> (5) Annual Review and Reconciliation Procedure. – The MYRP shall be subject to the following:
>
> a. Upon the utility's filing of its Annual Rate Adjustment testimony, the Commission shall establish a procedural schedule that sets out a timeline or discovery and testimony by intervenors.

69. Along the same lines, the Joint Intervenors propose a provision requiring that "any interested party" be granted "full intervention status and rights" during the annual review process.[71] It is unclear if they intend for this to be different than typical petition to intervene process and standard (*see* Commission Rule R1-19); if so, the Companies would oppose it on that basis. In any case, to the extent that any intervenors wish to participate in the annual review process, such participation would have to be consistent with the scope and purpose of the annual review, which as noted above is a verification and review process to validate adherence to the approved PBR plan and report the electric utilities' earnings under the plan. The Public Staff is the appropriate entity[72] to review and audit the utility's annual review filing and issue its report to the Commission. Just as testimony from the utility is unnecessary given the scope and format of the annual review process, testimony from intervenors should likewise not be permitted — the annual review is not a "mini rate case" and typical features of a rate case such as formal discovery, testimony, cross-examination, etc. are not provided for in N.C. Gen. Stat. § 62-133.16(c)(1)(c). In short, the Commission should set the annual review process consistent with PBR Statute and tailor intervention and participation by intervenors accordingly.[73]

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[71] *Id*. at (j)(5)d: Any interested party may be granted full intervention status and rights.

[72] "The Public Staff of the Utilities Commission is an independent agency which is not subject to the supervision, direction, or control of the [Commission]. The Public Staff represents the interests of the using and consuming public in matters pending before the Commission." https://www.ncuc.net/Consumer/publicstaff.html last visited January 4, 2022; "Our mission… to fairly and efficiently exercise formal and informal audit and advocacy functions to ensure safe and reliable utility service at reasonable rates…To provide customers with effective, independent representation based on technical and professional expertise on all issues before the North Carolina Utilities Commission…" https://publicstaff.nc.gov/ last visited January 4, 2022.

[73] A good model for intervenor participation in the annual review process, perhaps, is the rule governing intervenor participation in the IRP proceeding. *See* Commission Rule R8-60(l) ("Intervenors may request leave from the Commission to file comments. Comments will be received or expert witness hearings held on the update reports only if the Commission deems it necessary. The scope of any comments or expert witness hearing shall be limited to issues identified by the Commission.").

V. Conclusion

Based on the foregoing, the Companies respectfully request that the Commission adopt the Companies' Proposed Rule as filed on November 9, 2021.

This the 5th day of January, 2022.

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CERTIFICATE OF SERVICE

Docket No. E-100, Sub 178

I hereby certify that a copy of the foregoing Supplemental Reply Comments was served electronically or by depositing a copy in the United States Mail, first class postage prepaid, properly addressed to the parties of record.

This the 5th day of January, 2022.

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