

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

INITIAL COMMENTS AND
PARTIAL PROPOSED RULES OF
CIGFUR I, II, AND III

NOW COME the Carolina Industrial Group for Fair Utility Rates I (CIGFUR I), the Carolina Industrial Group for Fair Utility Rates II (CIGFUR II), and the Carolina Industrial Group for Fair Utility Rates III (CIGFUR III) (collectively, CIGFUR), pursuant to the Commission's October 14, 2021 Order Requesting Comments and Proposed Rules (Rulemaking Order), and respectfully submit the following initial comments and partial proposed rules in the above-captioned docket.

BACKGROUND

On October 13, 2021, Governor Cooper signed into law House Bill 951 as Session Law 2021-165 (S.L. 2021-165). Among other things, S.L. 2021-165 enacts uncodified provisions directing the Commission to take all reasonable steps to achieve a 70% reduction in emissions of carbon dioxide (CO₂) emitted in the State from electric generating facilities, in addition to various statutory amendments to the provisions of Chapter 62 of the North Carolina General Statutes. Of the various statutory amendments, Part II, Section 4 of S.L. 2021-165 is relevant to this proceeding. Part II of the Act authorizes the use of performance-based regulation (PBR) of electric public utilities through the addition of N.C. Gen. Stat. § 62-133.16 to Article 7 of Chapter 62 of the General Statutes. Newly-enacted N.C. Gen. Stat. § 62-133.16(j) directs the Commission to adopt

rules to implement N.C. Gen. Stat. § 62-133.16, and Section 4.(b) directs the Commission to adopt those rules no later than 120 days after the effective date of S.L. 2021-165. Session Law 2021-165 having become law on October 13, 2021, the Commission is, therefore, required to adopt rules implementing N.C. Gen. Stat. § 62-133.16 on or before February 10, 2022.

**CIGFUR’S INITIAL COMMENTS AND PARTIAL PROPOSED RULES
IMPLEMENTING N.C. GEN. STAT. § 62-133.16**

In the Rulemaking Order, the Commission requested comments that address the following and any other relevant issues that the Commission should address to implement PBR:

1. The specific procedures and requirements that an electric public utility shall meet when requesting approval of a PBR application;
2. The criteria for Commission evaluation of a PBR application;
3. The parameters for a technical conference process to occur prior to submission of any PBR application consisting of one or more public meetings at which the electric public utility presents information regarding projected transmission and distribution expenditures and interested parties are permitted to provide comment and feedback; and
4. The process by which an electric public utility may address the Commission’s reasons for rejection of a PBR application, which process may include collaboration between stakeholders and the electric public utility to cure any identified deficiency in an electric public utility’s PBR application.

Accordingly, CIGFUR will address each of these issues in turn, among others CIGFUR contends are relevant and material to the Commission’s implementation of PBR, in the initial comments that follow. In these initial comments, CIGFUR has not addressed each aspect of a proposed rule

to implement N.C. Gen. Stat. § 62-133.16 but reserves its right to file responsive reply comments at the appropriate time.

Generally speaking, CIGFUR submits that the Commission should consider lessons learned in other jurisdictions that have implemented PBR and seek to adopt a rule implementing PBR that builds upon the Commission's existing procedural requirements for the filing of a general rate case application by an electric public utility, while also complying with the statutory requirements set forth in N.C. Gen. Stat. § 62-133.16. More broadly, CIGFUR contends that PBR implementation should serve the public interest by ensuring ratepayers are adequately protected, aligning utility incentives with the requirements set forth in N.C. Gen. Stat. § 62-133.16(d)(1) and policy objectives set forth in N.C. Gen. Stat. § 62-133.16(d)(2), and increasing transparency and accountability with regard to the utility's planning, modeling, and forecasting inputs.

1. The specific procedures and requirements that an electric public utility shall meet when requesting approval of a performance-based regulation (PBR) application

The provisions of N.C. Gen. Stat. § 62-133.16 afford the Commission broad discretion to implement performance-based regulation while also preserving the Commission's ability to balance various competing interests in a general rate case toward the ultimate end goal of setting just and reasonable rates. Following are certain specific procedures and requirements CIGFUR recommends the Commission consider when deciding the criteria an electric public utility must meet when requesting approval of a PBR application:

a. Modifications and additions needed to Form E-1 or separate form required altogether

Because applications for PBR may only be filed as part of an applicable electric public utility's application for a general rate case, pursuant to N.C. Gen. Stat. § 62-133.16(d)(3), CIGFUR recommends that the Commission consider whether to modify the existing Form E-1 to comport with the requirements set forth in the newly enacted N.C. Gen. Stat. § 62-133.16, or instead

whether to require submission of a new, separate form altogether. In either case, CIGFUR recommends that the Commission require the applicable electric public utility to provide the following information, in addition to any information suggested by the utilities and the Public Staff, to the Commission and parties to the proceeding at the time of filing:

- A detailed statement, including all supporting data, explaining how the PBR application complies with the requirements set forth in N.C. Gen. Stat. § 62-133.16(d)(1)a. through c.;
- A detailed statement, including all supporting data, explaining how the PBR application furthers the policy objectives set forth in N.C. Gen. Stat. § 62-133.16(d)(2)a. through k.;
- A complete list of all “known and measurable capital investments” the utility is requesting authorization from the Commission to recover through an MYRP, pursuant to N.C. Gen. Stat. § 62-133.16(c)(1)a.; and for each such projected investment, a statement of whether and how the planned expenditure complies with the “least cost” requirements set forth in N.C. Gen. Stat. § 62-2(3a);
- A statement, including all supporting data, explaining whether or not the applicable electric public utility is requesting, or at any point in the future plans to request during the MYRP period or during the proceeding established pursuant to N.C. Gen. Stat. § 62-133.16(c)(1)c. following the conclusion of rate year 3, “permission to establish a regulatory asset and defer to such regulatory asset incremental costs related to” electric generation investments for which “the total plant in service balance exceeds five hundred million dollars (\$500,000,000).” N.C. Gen. Stat. § 62-133.16(c)(1)a.

- A detailed statement, including all supporting data, explaining whether the applicable electric public utility plans to retire any generating plant currently in service during the MYRP period, and for all such plant expected to retire during the MYRP period, an explanation of when and how the utility plans to remove from rate base the costs associated with retired generating plant once no longer used and useful in the provision of electric service to ratepayers;
- A detailed explanation, including all supporting data, of how the applicable electric public utility's proposed multi-year rate plan (MYRP) will minimize interclass subsidization of ratepayers "to the greatest extent practicable by the conclusion of the MYRP period" pursuant to N.C. Gen. Stat. § 62-133.16(b);
- A complete list, including all supporting data, of all state and/or federal funding then available or anticipated to become available at any point during an MYRP period for the purpose of offsetting a portion of any projected capital investment, and a detailed accounting of how any such funding obtained has been, or will be, used for the direct benefit of ratepayers by way of cost savings;
- A detailed statement, including all supporting data, of whether and how the applicable electric public utility has incorporated into its PBR application stakeholder feedback and recommendations stemming from the myriad stakeholder groups and collaboratives currently underway, as applicable to the filing electric public utility.
- For each and every performance incentive mechanism (PIM) proposed by an applicable electric public utility, the utility should tailor it so that it provides demonstrable benefits to all classes of ratepayers and the utility shall provide a detailed statement of such anticipated benefits expected to flow to all classes of ratepayers as a result. For

example, if the policy goal identified by the PIM is to reduce carbon emissions by increasing customer access to carbon-free resources, the utility should tailor the PIM by ratepayer class to ensure that commercial and industrial customers – and not just residential ones – have increased access to carbon-free resources as a result of the PIM. Staying with the same example, some ways that such a PIM could be designed so that it benefits commercial and industrial customers specifically could be through microgrid tariffs, expanding program capacity of existing customer programs like the Green Source Advantage Program, modifying existing net metering policies to allow systems with a nameplate capacity greater than 1 MW to participate, creating new customer programs that allow customers to execute power purchase agreements at virtual power plants, allowing any interested customer to participate in beta testing of industrial-scale battery storage technology, and so on and so forth.

b. Process by which applicable electric public utility obtains pre-approval for list of capital expenditures to be recovered through an MYRP

According to N.C. Gen. Stat. § 62-133.16(c)(1)a., the process for setting rates in year 1 of an MYRP is as follows:

[t]he base rates for the first year of a MYRP shall be fixed in the manner prescribed under G.S. 62-133, including actual changes in costs, revenues, or the costs of the electric public utility's property used and useful, or to be used and useful within a reasonable time after the test period, plus costs associated with a known and measurable set of capital investments, net of operating benefits, associated with a set of discrete and identifiable capital spending projects to be placed in service during the first rate year

(emphasis added).

Then, for rate years 2 and 3, the rates should be based upon the

projected incremental Commission-authorized capital investments that will be used and useful during the rate year and associated

expenses, net of operating benefits, including operation and maintenance savings, and depreciation of rate base associated with the capital investments, that are incurred or realized during each rate year of the MYRP period

Id. (emphasis added).

CIGFUR interprets these provisions to require Commission pre-approval of capital investments before the utility may recover same through a multi-year rate plan (MYRP). CIGFUR believes the nature of these decisions warrants the kind of scrutiny afforded by contested proceedings and evidentiary hearings, specifically discovery and cross-examination. Moreover, because it is highly likely that several issues of fact and law related to the pre-approved capital expenditure list will overlap with, and otherwise be inextricably linked to, the MYRP for which the utility will seek approval as part of a general rate case filed with an application for PBR, CIGFUR recommends that such list of pre-approved capital expenditures be added to the list of contested issues that the Commission will decide in its order deciding a general rate case filed with an application for PBR. If, however, the Commission envisions a capital expenditure pre-approval process that will occur separate and apart from, or before, a proceeding on the applicable electric public utility's application for general rate case that includes a PBR application, CIGFUR recommends that the Commission adopt a rule governing the process by which such pre-approval will be obtained.

c. Reversion back to rates fixed pursuant to N.C. Gen. Stat. § 62-133 upon expiration of an MYRP as the default

Because House Bill 951 does not explicitly state which rate year's rates control in the event an electric public utility allows an MYRP to expire without first having obtained approval for a subsequent MYRP to become effective at the conclusion of the previous 36-month MYRP period, there is some uncertainty regarding what, exactly, happens to rates if a PBR plan expires without a subsequent one approved to take its place. Assuming *arguendo* that an applicable electric public

utility has allowed its PBR plan to expire without first having obtained Commission approval for a subsequent PBR plan to take effect upon expiration of the preceding PBR plan, CIGFUR contends that the express statutory intent is clear and unambiguous: PBR constitutes an exception to the traditional cost of service regulatory paradigm which otherwise would apply in the absence of a Commission-approved PBR plan.

Moreover, the statute expressly provides that “[a]ny PBR application approved pursuant to this section shall remain in effect for a plan period of not more than 36 months.” N.C. Gen. Stat. § 62-133.16(f). It follows then that if a 36-month PBR plan/MYRP period expires without a new Commission-approved PBR plan/MYRP to take its place, the MYRP – and the attendant rates for the third rate year – become null and void, and rates must automatically revert back by default to those fixed pursuant to N.C. Gen. Stat. § 62-133, which are based on traditional cost of service regulation using a historical test year and notably, are different from the rates set for years 1, 2, or 3 of an MYRP. This argument is further supported by the fact that the General Assembly saw fit to specifically require Commission pre-approval of the “projected incremental...capital investments that will be used and useful during the rate year...” as the basis for setting rates during the first, second, and third rate years, respectively, of an MYRP. N.C. Gen. Stat. § 62-133.16(c)(1)a. In fact, it would directly contravene the express legislative intent to limit any PBR plan to 36 months by allowing the third year rates of an MYRP to continue beyond the expiration of a 36-month PBR plan.

d. Staggering the filing of PBR applications by applicable electric public utilities

Much like the California Public Utilities Commission has implemented by way of its “rate case plans” (RCPs) to manage the additional administrative and regulatory burden associated with alternative utility ratemaking paradigms – and as similarly implemented in Hawaii, New York,

and Pennsylvania – CIGFUR recommends that the Commission consider instituting a requirement that the applicable electric public utilities should, to the greatest possible extent, stagger their PBR application filings in order “to ensure that complex and financially significant [general rate case] proceedings follow a predictable schedule that balances the need for timely Commission decisions with procedural fairness for all parties.”¹ Rate Case Plans or their analogues require that rate case filings be staggered so as to reduce the chance that the respective regulatory body has to consider rate cases for multiple large utilities simultaneously. CIGFUR contends that this is an especially important consideration when taking into account that a general rate case with a PBR application will be large (in terms of total revenues at issue, total number of customers affected, and potential ratepayer impact), and is virtually guaranteed to involve a greater number of complex contested issues than a previous rate case heard under the traditional ratemaking paradigm codified at N.C. Gen. Stat. § 62-133.

In addition to the primary objective of ensuring that the Commission, Commission staff, and Public Staff is able to maintain a workload level that is manageable, an RCP or something analogous thereto also would serve as an important check and balance on North Carolina’s investor-owned electric public utilities, each of which has at its disposal vast amounts of human, professional, and financial resources to deploy when litigating “pancaked” rate cases. Intervenors, on the other hand, typically are relatively resource-constrained by contrast. For these reasons, and to avoid what would effectively amount to the rate case litigation equivalent of attrition warfare in the event that all three (or even just two) of North Carolina’s investor-owned electric public utilities elected to file “pancaked” general rate cases with applications for PBR within a

¹ “Decision Modifying the Commission’s Rate Case Plans for Energy Utilities,” Decision 20-01-002, p. 2, Rulemaking Docket 13-11-006 (P.U.C. California, January 16, 2020), located at <https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M325/K471/325471063.PDF> (last accessed Nov. 1, 2021).

compressed timeline, CIGFUR recommends adoption of the following rule subdivision in order to avoid more than one active electric public utility general rate case with a PBR application pending simultaneously or running concurrently with insufficient time elapsed in between filings.

(##/xx) Before filing a notice of intent pursuant to Commission Rule R1-15(1), each applicable electric public utility shall ensure, to the greatest extent practicable, that no other electric general rate cases containing an application for performance-based regulation have been filed by another electric public utility within the 180 days immediately preceding the respective utility's notice of intent; provided, however, that this Rule shall not apply to an electric public utility filing a rate case containing an application for performance-based regulation pursuant to the recourse for underearnings during an MYRP period set forth in N.C. Gen. Stat. § 62-133.16(c)(1)c.1.

CIGFUR respectfully submits that the Commission has the requisite statutory authority to adopt such a rule requiring staggered filings pursuant to the Commission's wide latitude to adopt rules to implement PBR as set forth in N.C. Gen. Stat. § 62-133.16(j)(1) and (2). Moreover, CIGFUR contends that if the Commission were to exercise its statutory authority to require staggered filings, such a requirement also would serve the overarching public interest concerns at the heart of any analysis when considering a PBR application, specifically as set forth in N.C. Gen. Stat. § 133.16(d)(1)a. and c.

CIGFUR points to the following Commission precedent as further support for the argument that the Commission both (1) clearly has the requisite statutory authority to adopt a rule requiring the staggered filing of such rate cases containing a PBR application; and (2) has in the past seen fit to impose staggered dates certain for filing deadlines and the scheduling of hearings as it relates to proceedings that will be universally applicable to each of the State's electric investor-owned utilities, like the annual hearings to review changes in the cost of fuel and fuel-related costs, for example:

- Commission Rule R8-55(b) provides in relevant part that:

The annual cost of fuel and fuel-related cost adjustment hearing for Duke Energy Carolinas, LLC, will be scheduled for the first Tuesday of June each year; for Duke Energy Progress, LLC., the annual hearing will be scheduled for the third Tuesday of September each year; and for Virginia Electric and Power Company, d/b/a Dominion Energy North Carolina, the annual hearing will be scheduled for the third Tuesday of November each year.

- Similarly, Commission Rule R8-55(c) provides in relevant part that:

The test periods for the hearings to be held pursuant to [Commission Rule R8-55(b)] will be uniform over time. The test period for Duke Energy Carolinas, LLC will be the calendar year; for Duke Energy Progress, Inc., the test period will be the 12-month period ending March 31; and for Dominion North Carolina Power, the test period will be the 12-month period ending June 30.

CIGFUR contends that the same compelling reasons that resulted in the Commission adopting Commission Rules R8-55(b) and (c) to ensure that the electric public utilities' respective fuel rider proceedings occur on a staggered schedule likewise apply here, and to an even greater extent considering the anticipated complexity and magnitude of a proceeding on an electric public utility's general rate case with application for PBR. For all these reasons, CIGFUR recommends that the Commission adopt the proposed rule requiring staggered PBR filings by the applicable electric public utilities.

2. Specific criteria for Commission evaluation of a PBR application

The appropriate criteria for Commission evaluation of a PBR application is set forth in N.C. Gen. Stat. § 62-133.16(d). Subdivision (1) sets out the broad standard for the Commission to consider: “[t]he Commission shall approve a PBR application by an electric public utility only upon a finding that a proposed PBR would result in just and reasonable rates, is in the public interest, and is consistent with the criteria established in this section and rules adopted thereunder.”

N.C. Gen. Stat. § 62-133.16(d)(1). Subdivision (1) further provides three additional mandatory considerations:

the Commission shall consider whether the PBR application:

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

N.C. Gen. Stat. § 62-133.16(d)(1). In addition, N.C. Gen. Stat. § 62-133.16(d)(2) sets out 11 other factors and policy objectives that the Commission may consider in deciding whether to approve a PBR application. CIGFUR recommends that, much like the approach Hawaii has taken in its implementation of PBR, North Carolina should adopt a customer-centric approach as an overarching guiding principle.²

At this juncture, CIGFUR emphasizes a few critical aspects of the sound implementation of PBR: first, the utility should not be incentivized through PIMs, MYRPs, residential decoupling, or any other aspect of PBR to undertake efforts that it already is obligated to undertake to provide safe, reliable, and adequate service to customers, or to comply with existing statutory mandates, including but not limited to the Renewable Energy and Energy Portfolio Standard (REPS), demand-side management and energy efficiency measures (DSM/EE), and the Competitive Procurement of Renewable Energy (CPRE) Program. CIGFUR respectfully reiterates that any PIMs submitted as part of a PBR application should be structured to ensure that the utility is not

² Investigation Into Performance Based Regulation in Colorado § 40-3-117, C.R.S., Colorado Public Utilities Commission, p. 37 (Nov. 30, 2020) (referring to “California’s Pilot PIM” initiated in 2016 that specifically targeted DERs), *available at* <https://lpdd.org/wp-content/uploads/2020/04/CO-PBR-Report-to-Legislature-1.pdf> (last accessed Nov. 4, 2021).

incentivized to do what it is already obligated to do under current regulations and industry standards.

Along these same lines, CIGFUR recommends that the Commission consider whether to adopt rules setting forth the process by which the Commission will consider and implement “specific performance metrics and targets against which electric public utility performance is measured” when deciding whether to approve “[t]he policy goal targeted by a PIM.” N.C. Gen. Stat. § 62-133.16(a)(6); (c)(3). CIGFUR recommends adoption of such a rule in part because of what could be read as a potential statutory inconsistency between the definition of “performance incentive mechanism” set forth in N.C. Gen. Stat. § 62-133.16(a)(6) and N.C. Gen. Stat. § 62-133.16(c), which provides in relevant part that “[t]he PBR application may also include proposed tracking metrics with or without targets or benchmarks to measure electric public utility achievement.” If a PBR application must contain “one or more PIMs,” and the statutory definition of PIM “includes specific performance metrics and targets against which electric public utility performance is measured,” it follows then that the utility’s inclusion of such metrics and targets in its PBR application should be mandatory, not permissive. CIGFUR respectfully suggests that the Commission weigh in on the front-end to resolve any uncertainty created by the potential inconsistent reading of these statutory provisions.

As it relates to the benchmarks to be established for PIMs, CIGFUR recommends that the Commission consider establishing at least a few specific across-the-board benchmarks for any and all PIMs that the utility may propose: (1) the extent to which the utility is improving operational and cost efficiency; and (2) the extent to which PIM-related expenses defer or displace capital expenditures such that the utility would ostensibly be “indifferent to whether it meets customer

and grid needs through rate-based traditional infrastructure, or through third-party owned DER.”³

In addition, and based upon the experiences of other PBR jurisdictions, CIGFUR recommends that PIMs should be designed so that they are narrowly tailored to achieve the intended policy goal and result in greater benefits to all classes of ratepayers than what the utility would or could have produced absent the PIM. More broadly, any benchmarks or target metrics utilized in evaluating the utility’s performance should be specific, measurable, achievable, relevant, and time bound.⁴

3. The parameters for a technical process to be conducted by the Commission prior to submission of any PBR application consisting of one or more public meetings at which the electric public utility presents information regarding projected transmission and distribution expenditures and interested parties are permitted to provide comment and feedback

Among the most notable features of N.C. Gen. Stat. § 62-133.16 is the provision directing the Commission to establish parameters for a technical conference process to be conducted by the Commission prior to an electric public utility’s filing of a PBR application. Transparency into the utility’s planning process for transmission and distribution expenditures is a critical part of the successful implementation of PBR.⁵ From CIGFUR’s perspective, the technical conference process is an important opportunity for the Commission to afford interested parties the opportunity to obtain the necessary insight into the utility’s planning process. To give greater meaning and transparency into the technical conference process, CIGFUR recommends that the Commission

³ *Id.* at 36.

⁴ *Id.* at 14.

⁵ *See, e.g.*, Performance-Based Regulation: Aligning utility incentives with policy objectives and customer benefits, p. 5, Advanced Energy Economy, June 5, 2018. Available online at <https://info.aee.net/hubfs/PDF/PBR.pdf> (last accessed Oct. 25, 2021) (“Stakeholder input is crucial to PBR success. To increase transparency and stakeholder involvement, regulatory processes should ensure stakeholders are part of establishing the critical aspects of PBR plans – such as setting performance targets and incentives.”); *see also* Electricity Regulation for a Customer-Centric Future: Survey of Alternative Regulatory Mechanisms, Guidehouse Prepared for EEI, 2Q 2020. Available online at https://www.eei.org/issuesandpolicy/distribution/Documents/Guidehouse_Electricity-Regulation-for-a-Customer-Centric-Future_July-2020%20FINAL.pdf (last accessed Oct. 25, 2021) (“Accordingly, regulators, stakeholders, and customers in a forward test year environment benefit from transparency about where and how the electric company is planning on investing money”).

adopt a rule requiring the applicable electric public utility to file a request to initiate technical conference. CIGFUR envisions that such request would be modeled upon the Commission's current procedure for utilities to provide notice of an impending application for general rate case pursuant to N.C. Gen. Stat. § 62-134. In addition, CIGFUR also makes the following specific recommendations with respect to the procedures governing the technical conference:

- The Commission should clarify that discovery is permitted to begin upon the filing by the applicable electric public utility to initiate such technical conference.
- The Commission should require the applicable electric public utility to provide detailed information and all supporting data showing how its proposed transmission and distribution expenditures are consistent with findings from or feedback received from stakeholders (i.e., during the Integrated Systems Operation Planning (ISOP) process), to the extent applicable to the pertinent electric public utility.
- The Commission should require the applicable electric public utility to provide detailed information as part of its filing to request initiation of the technical conference, including but not limited to: (i) a list of currently available funding from any federal agency or agencies in order to offset costs for such transmission and distribution capital expenditures; (ii) a list of possible or anticipated future funding from any federal agency or agencies in order to offset costs for such transmission and distribution capital expenditures; (iii) a detailed summary of all steps taken by the utility to obtain any and all such available federal funding from any and all possible sources; and (iv) a detailed statement of how any such federal funds obtained were in fact utilized for the benefit of ratepayers by directly offsetting the costs incurred or projected to be incurred.

4. The process by which an electric public utility may address the Commission’s reasons for rejection of a PBR application, which process may include collaboration between stakeholders and the electric public utility to cure any identified deficiency in an electric public utility’s PBR application

Pursuant to N.C. Gen. Stat. § 62-133.16(d)(3), “[i]f the Commission rejects the PBR application, it shall provide an explanation of the deficiency and an opportunity for the electric public utility to refile, or for the electric public utility and the stakeholders to collaborate to cure the identified deficiency and refile.” However, the previous sentence in N.C. Gen. Stat. § 62-133.16(d)(3) provides in relevant part that “[i]n the event that the Commission rejects a PBR application, the Commission shall nevertheless establish the electric public utility’s base rates in accordance with N.C. Gen. Stat. § 62-133 based on the PBR application.”

Taken together, CIGFUR interprets these provisions to mean that if the Commission rejects a PBR application, it shall (1) nevertheless fix rates according to the traditional ratemaking paradigm codified in N.C. Gen. Stat. § 62-133; but also (2) provide the reasons for such rejection and inform the applicable electric public utility regarding the process by which the utility may, in the utility’s sole discretion, attempt to cure and subsequently refile the PBR application, which if approved, would supplement the rates already fixed by the Commission under N.C. Gen. Stat. § 62-133. CIGFUR further interprets these provisions to give wide latitude to the Commission in determining, on a case-by-case basis, what constitutes a deficiency and how all such deficiencies may be cured. To preserve such latitude consistent with legislative intent, CIGFUR recommends that any rule adopted to implement procedures governing the curing process in the event that the Commission rejects a PBR application not be overly prescriptive, in order to afford the Commission the greatest amount of flexibility to address the curing process on a case-by-case basis and ability to tailor the curing process to the unique set of facts and circumstances at issue in the deficiency or deficiencies identified.

Although CIGFUR maintains that flexibility and preservation of Commission discretion are key to implementing the provisions N.C. Gen. Stat. § 62-133.16, CIGFUR nevertheless recommends that the Rule adopted to govern the curing process in the event of a rejected PBR application should institute a temporal limit on the utility's opportunity to cure and subsequently refile a PBR application. A temporal limit is necessary for the utility and all other parties to the proceeding to have certainty regarding the posture of the case and the effects and finality of the Commission's decision. To that end, CIGFUR recommends that any curing process, which may or may not include a directive for the utility to collaborate with stakeholders, not exceed 60 days following the date the Commission issues an order rejecting a PBR application. CIGFUR further recommends that the time limit for the utility to otherwise cure and refile a rejected PBR application not exceed 30 days, meaning a 90-day total curing process and opportunity for refiling if the Commission directs collaboration with stakeholders and a 30-day total curing process and opportunity for refiling if not.

In addition to the recommendation for temporal limits on the curing and refiling of a rejected or modified PBR application, CIGFUR also contends that in the event that an electric public utility elects to attempt the curing process and then subsequently refile the PBR application previously rejected or directed to be modified by the Commission, the time frame for implementation of the utility's proposed base rates restarts anew, with another 300-day clock beginning to run as of the date when the utility re-files an application for PBR following rejection or modification by the Commission.

Finally, CIGFUR offers some suggestions with respect to the facilitation of any stakeholder process the Commission may direct should a PBR application need to be cured. Because such stakeholder process will be taking place in the context of a contested, adversarial rate case

proceeding, CIGFUR suggests that the impartiality and independence of the person or entity charged with facilitating such stakeholder process is critically important to the likelihood of a successful stakeholder process and ensuring that the outcomes and any recommendations or reports that may result from such stakeholder collaborative are balanced, fair, and transparent. To that end, CIGFUR recommends that the facilitator of any such stakeholder collaborative be empowered to exercise its independent professional judgment at all times, and that no advocate – be it the applicable electric public utility or any intervenor – be allowed special access to, or influence and control of, the third-party facilitator. When stakeholders perceive that the facilitator is beholden to one or more parties, it creates the appearance of a conflict of interest and serves to inject bias into the process, thereby undermining the credibility of the process and tainting any results that may stem therefrom. To avoid this, CIGFUR respectfully recommends that any third-party facilitator be selected, retained, and directed by the Commission, and report directly to the Commission.

5. Issues pertaining only to Duke Energy Carolinas, LLC and Duke Energy Progress, LLC

Because Part I of S.L. 2021-165 applies only to Duke Energy Progress, LLC (DEP) and Duke Energy Carolinas, LLC (DEC) (collectively, Duke),⁶ CIGFUR II and III offers some comments as customers of the DEP and DEC, respectively, that apply exclusively to Duke. CIGFUR recommends that the Commission adopt rules imposing additional requirements when either DEP or DEC files a general rate case containing a PBR application, including but not limited to:

⁶ “For purposes of this section, (i) ‘electric public utility’ means any electric public utility as defined in G.S. 62-3(23) serving at least 150,000 North Carolina retail jurisdictional customers as of January 1, 2021...” S.L. 2021-165, Part I, Section 1.

- An explanation, including all supporting data, of how each and every proposed capital expenditure for which the applicable utility intends to recover costs through an MYRP complies with the “least cost” standard set forth in the “least cost” requirements set forth in N.C. Gen. Stat. § 62-2(3a), and reiterated repeatedly in the recently-enacted House Bill 951, specifically in subsections (1), (2), (2)b., and (4) of Part I, Section 1. S.L. 2021-165;
- A detailed statement, including all supporting data, explaining how the PBR application will facilitate the utility’s compliance with its Carbon Plan and most recently approved Integrated Resource Plan, particularly in light of the overarching policy objective enacted in House Bill 951 generally, and as specifically set forth in N.C. Gen. Stat. § 62-133.16(d)(2)f.;
- In light of the extraordinary amount of time, resources, and effort already expended by numerous stakeholders during the course of Duke’s Comprehensive Rate Design Study, which is ongoing, each utility should be required to provide a detailed statement of how any PBR application it may file is responsive to feedback received from stakeholders as part of Duke’s Comprehensive Rate Design Study. Many of the rate design policy positions advocated for by stakeholders as part of the Rate Design Study would further the overarching policy goals of House Bill 951 generally, in addition to furthering several specific policy objectives set forth in N.C. Gen. Stat. §§ 62-133.16(a)(8) & (d)(2). As two of many such examples, CIGFUR has advocated as part of Duke’s Rate Design Study for (1) modification and expansion of Duke’s current interruptible demand response programs for commercial and industrial customers; and (2) modification and expansion of Duke’s current net metering offerings for commercial and industrial customers. Each of these recommendations would further policy objectives identified in House Bill 951. As it relates

to the demand response program recommendation, House Bill 951 specifically identifies policy objectives such as promoting rate designs that yield peak load reduction and beneficial load-shaping pursuant to N.C. Gen. Stat. §§ 62-133.16(d)(2)a. and k. For net metering, House Bill 951 not only directs the Commission to “revise net metering rates,” but it also specifically identifies policy objectives such as encouraging distributed energy resources, encouraging peak load reduction and efficient use of the system, encouraging utility-scale renewable energy and storage, and encouraging carbon reductions, and encouraging rate designs that yield peak load reduction or beneficial load-shaping. N.C. Gen. Stat. §§ 62-133.16(d)(2)a., b., c., f., and k. Because there are countless examples of stakeholder feedback provided as part of Duke’s ongoing Comprehensive Rate Study – and various other ongoing stakeholder processes and collaboratives – that overlap or otherwise dovetail with numerous overarching policy objectives set forth in House Bill 951, CIGFUR recommends that the Commission’s rules implementing PBR/MYRP require DEP and DEC specifically to describe all of the ways it has incorporated stakeholder feedback directly into its PBR application; and

- Duke’s Comprehensive Rate Design Study is not the only stakeholder process unique to Duke that is happening as of the time of this filing. To the contrary, there are numerous such stakeholder processes and collaboratives underway or recently concluded. As a result, CIGFUR recommends that Duke also be required to submit a statement of how its PBR application is responsive to the feedback received from stakeholders through all of the currently ongoing stakeholder processes, in addition to the Comprehensive Rate Design Study.

CONCLUSION

CIGFUR appreciates the opportunity to file these initial comments and partial proposed rule provisions to implement PBR in North Carolina.

WHEREFORE, CIGFUR respectfully requests that the Commission consider the foregoing comments and partial proposed rules in the implementation of performance-based regulation as authorized in House Bill 951 (S.L. 2021-165), which enacted N.C. Gen. Stat. § 62-133.16.

Respectfully submitted, this the 9th day of November, 2021.

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CERTIFICATE OF SERVICE

The undersigned attorney for CIGFUR certifies that she served by electronic mail the foregoing Initial Comments and Partial Proposed Rules of CIGFUR I, II & III upon the parties of record in this proceeding, as set forth in the service list for this docket maintained by the Chief Clerk of the North Carolina Utilities Commission.

This the 9th day of November, 2021.

By: /s/ Christina D. Cress
Christina D. Cress