STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-100, SUB 178

In the Matter of Rulemaking Proceeding to Implement Performance-Based Regulation of Electric Utilities	))))	JOINT REPLY COMMENTS OF CIGFUR AND CUCA REGARDING CPCN ISSUES

The Carolina Industrial Group for Fair Utility Rates I, II, and III ("CIGFUR") and the Carolina Utility Customers Association, Inc. ("CUCA"), by and through the undersigned counsel, respectfully submit these joint reply comments pursuant to the Commission's Order Adopting Commission Rule R1-17B issued on February 10, 2022, in the above-referenced proceeding (the "PBR Order"). Specifically, these comments are responsive to the initial comments filed by other parties in response to the Commission's request for comments relating to "the impact of the PBR process on the certificate of public convenience and necessity (CPCN) for any capital project that is approved as part of a PBR Application."

REPLY COMMENTS

In the PBR Order, the Commission posed three questions regarding the interplay of the CPCN process with the approval of capital projects as part of the PBR process. CUCA and CIGFUR respond to the initial comments offered by Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (together, "Duke") and Virginia Electric Power Company, d/b/a Dominion Energy North Carolina ("DENC") (together with Duke, the "Utilities"), as well as the intervening parties, in response to each of these questions in turn.

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

First, CUCA and CIGFUR briefly summarize each party's position in response to this question, as set forth in their respective initial comments.

Party	Answer	Quote
Public Staff	No.	"The Public Staff is in agreement with the comments filed by CUCA and CIGFUR, and is therefore filing this letter in lieu of comments."[1]
CUCA & CIGFUR	No.	"CUCA and CIGFUR read Section 62-133.16 as precluding the approval of cost recovery of a CPCN-dependent capital project in the absence of the applicable utility already holding a CPCN for the project."[2]
NCSEA	No.	"Given the realities of the timeframes to interconnect new generation to the grid . . . it is unlikely that a capital project that has not yet obtained a CPCN 'will be used and useful during the rate year' as required by N.C. Gen. Stat. § 62-133.16(c)(1)a."[3]
CCEBA	No.	"CCEBA shares the concerns of CUCA, CIGFUR and NCSEA that such approval would be based on speculative assessments and not on projects which 'will be used and useful during the rate year' as required by N.C. Gen. Stat. § 62-133.16(c)."[4]
Utilities	Yes.	"Yes, the Commission may approve cost recovery for capital projects approved for inclusion in a MYRP and for which a CPCN is required but has not been granted as of the date the PBR Application is approved. HB 951 does not directly address the Commission's question. However, an interpretation of N.C. Gen. Stat. § 62-133.16 that prohibits the Commission from approving capital projects that, where applicable, have not yet obtained a CPCN injects unnecessary inefficiency into the PBR and overall regulatory process, which contravenes the goals of HB 951 and the PBR Rule."[5]

[1] Public Staff's Letter in lieu of Initial Comments, p. 1.

[2] Initial Joint Comments of CUCA and CIGFUR, p. 1.

[3] NCSEA's Initial Comments, p. 1.

[4] CCEBA's Letter in lieu of Initial Comments, pp. 1-2.

[5] Utilities' Joint Initial Comments, p. 5.

CUCA and CIGFUR reiterate the positions they provided in their Joint Initial Comments, and echo the sentiments offered by the other intervening parties. The Utilities' position—in stark contrast to the opinions of all other parties—is that the PBR application processes established by S.L. 2021-165 and the PBR Rule are somehow an acceptable or legally defensible substitute for CPCN proceedings. The Utilities rest their proposition on two arguments.

First, the Utilities assert that the "key consideration in the enactment of HB 951" was "regulatory efficiency."[6] A careful read of HB 951 shows that term "regulatory efficiency" (or any similar term) is nowhere to be found in the statute. Indeed, because the statute and its legislative history do not support the Utilities' interpretative gloss, the Utilities resort to citing the Final Report of the North Carolina Energy Regulatory Process as evidence of their assertion.[7] Yet, the NERP report was a *non-legislative* report—authored, in part, by the Utilities themselves—that merely states PBR would align incentives and reduce regulatory lag, interests which are fundamentally different from the Utilities' argument for short-circuiting or dispensing with the statutory CPCN process. In short, the Utilities have no authority for their claim that the General Assembly established the PBR process with a goal of bypassing the established mechanisms for determining whether the public convenience and necessity requires the construction of assets subject to a CPCN requirement.

Second, the Utilities assert that there is "no fundamental difference" between the PBR process's inquiry into capital projects and the CPCN process. That is not true. As

[6] Utilities' Joint Initial Comments, p. 2.

[7] Utilities' Joint Initial Comments, p. 10 n.10.

noted in CUCA and CIGFUR's Joint Initial Comment, the inquiry regarding "need" in the PBR context is separate and distinct from that in the CPCN context. The PBR application requires a utility to provide only a project's "reason," "scope," "timing," "depreciation life," and impact on the utility's financial statements (*see* Commission Rule R1-17B(d)(2)(j)), not the requisite standalone assessment or demonstration of "need" as that term has been interpreted and applied in the CPCN context.[8] More specifically, the Commission's evaluation of "need" in a CPCN proceeding includes analyzing factors such as "the long-term energy and capacity needs in the State and region, as well as system reliability concerns."[9] The Commission has in the past found <u>no</u> demonstration of need in cases where the energy and capacity provided by the proposed facility are "not otherwise needed to support any immediate or future load growth in the [applicable utility's] Balancing Area or the [region of the State in which the applicable utility's service territory is located]."[10] The PBR process was not intended or designed to circumvent this more robust "need" inquiry in a CPCN proceeding.

Rather than accept the Utilities mischaracterization of HB 951 and the PBR process, CUCA and CIGFUR note that S.L. 2021-165 neither explicitly nor implicitly repeals or amends the existing statutory provisions governing the regulatory approval processes for

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[8] *See State ex rel. Utils. Comm'n v. Casey*, 245 N.C. 297, 302, 96 S.E.2d 8, 12 (1957) ("The doctrine of convenience and necessity has been the subject of much judicial consideration. No set rule can be used as a yardstick and applied in all cases alike. This doctrine is a relative or elastic theory rather than an abstract or absolute rule. *The facts in each case must be separately considered and from those facts it must be determined whether or not public convenience and necessity require [the project]*." (citation and quotation marks omitted) (emphasis added)).

[9] *Order Denying Certificate of Public Convenience and Necessity for Merchant Generating Facility*, Docket No. EMP-105, Sub 0, p. 6, ¶ 6.

[10] *Id.* at ¶ 7.

new electric production plant and transmission projects. Likewise, S.L 2021-165 neither explicitly nor implicitly modifies or lowers the standard an applicant must satisfy in order to be granted a CPCN. As referenced in CUCA and CIGFUR's Joint Initial Comments filed on this issue, the legislative history of House Bill 951 refutes the Utilities' assertions about the irrelevance or redundancy of CPCN proceedings. A prior version of House Bill 951 acknowledged, for example, that certain[11] new generation plant needed to replace retiring coal-fired electric generation resources still would "require a certificate of public convenience and necessity under G.S. 62-110.1, or otherwise[.]"[12] The same prior version of House Bill 951 also would have expressly modified the CPCN requirements and processes in the following ways, had it been enacted into law: (1) deeming certain designated coal-fired generation replacement resources to be "consistent with the public convenience and necessity and public interest for purposes of G.S. 62-110.1 so long as the applicable electric public utility reasonably and prudently procures such replacement generation[;]"[13] (2) expressly authorizing the Commission to dispense with certain elements of the CPCN process which otherwise would be required;[14] (3) expressly modifying certain regulatory processes and requirements otherwise required by law before a CPCN may be granted;[15] and (4) directing the Commission to "provide an expedited decision on an application for a certificate of public convenience for all such resources."[16]

[11] "[C]ertain" meaning any new electric generating facility except that which are explicitly exempted from the requirement to obtain a CPCN pursuant to G.S. 62-110.1(g).

[12] H.B. 951, 3d ed., N.C.G.A. (2021 Session), at p. 7, lines 3-5.

[13] *Id.* at p. 7, lines 5-9.

[14] *Id.* at p. 5, lines 24-34.

[15] *Id.* at p. 7, lines 10-34.

[16] *Id.*

Instead, the version of House Bill 951 actually ratified and signed into law did not eliminate, reduce, or in any way otherwise modify the existing regulatory process, burden of proof, or standards by which the decision whether to grant a CPCN is made. For these reasons, CUCA and CIGFUR reiterate that the existing provisions of Chapter 62 of the North Carolina General Statutes not repealed or amended by the enactment of S.L. 2021-165 remain in full force and effect and must be followed, including the requirements governing the issuance of CPCNs for new electric utility generation and transmission plant.

The Utilities go so far as to claim that requiring a CPCN before cost recovery is an "unnecessary inefficiency" with which the Commission can dispense.[17] That is not what the General Statutes say. The General Statutes mandate a CPCN process: Section 62-133.16 did nothing to amend, *much less abrogate*, Sections 62-110 and 62-110.1. What the Utilities dismiss as an "unnecessary inefficiency," CUCA and CIGFUR view as North Carolina law.

To further underscore the Utilities' misplaced interpretation of legislative intent, CIGFUR and CUCA note that in the past when the Legislature has sought fit to modify or reduce the substantive and procedural requirements for a CPCN to be issued, it expressly provided codified such modifications in statute.[18] Here, the Legislature did not see fit to do so, and for good reason—the scope of new generating capacity at issue and the magnitude of potential ratepayer impacts under House Bill 951 are substantial relative to past statutorily-authorized modifications to the CPCN process; namely, the generation procured

[17] Utilities' Joint Initial Comments, p. 2.

[18] *See, e.g.,* G.S. 62-110.8(h)(3), Commission Rule R8-71(k); *see also* Section 1.(b), S.L. 2009-390; Section 2.(c), S.L. 2015-110.

through the Competitive Procurement of Renewable Energy Program created by the enactment of House Bill 589 in 2017.

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

First, CUCA and CIGFUR briefly summarize each party's position in response to this question, as set forth in their respective initial comments.

Party	Answer	Quote
Public Staff	No.	"The Public Staff is in agreement with the comments filed by CUCA and CIGFUR, and is therefore filing this letter in lieu of comments."[19]
CUCA & CIGFUR	No.	"Because a CPCN-dependent capital project should only be included in a MYRP after the utility has received the CPCN, CUCA and CIGFUR hope that the Commission never finds itself reviewing a CPCN request for which the recovery of costs has already been approved. However, should the Commission find itself in such a position, the prior approval of a capital project for purposes of its inclusion in base rates of a MYRP rate year should not be a factor in the Commission's consideration of a CPCN. For this reason, CUCA and CIGFUR believe that this specific issue need not be resolved now, in a context divorced from specific facts and other context."[20]
NCSEA	No.	"NCSEA does not believe that a capital project's inclusion in an approved PBR Application should be considered in the CPCN approval process. The fact that a capital project is approved for cost recovery in an approved PBR Application does not mean that the capital project will be needed . . . [P]roposed capital projects should still need to independently demonstrate the need for their facility in order to obtain a CPCN."[21]
CCEBA	No.	"CCEBA shares the perspective of CIGFUR, CUCA and NCSEA that the CPCN process and the analysis of cost-recovery

[19] Public Staff's Letter in lieu of Initial Comments, p. 1.

[20] Initial Joint Comments of CUCA and CIGFUR, p. 4.

[21] NCSEA's Initial Comments, p. 2.

		in a PBR application are separate and distinct processes which should not be conflated."[22]
Utilities	Yes.	"Yes, if a capital project is approved for cost recovery in an approved PBR Application and a CPCN has not been granted for that project, the approval of the project in the PBR Application should be considered in the CPCN approval process . . . since the determination of need will have already been made in a PBR Application, in the absence of any material changes in facts or circumstances, there is no reason to require a complete reassessment of essentially the same determination."[23]

The factors appropriate for consideration in determining whether to issue a CPCN for a proposed electric generating facility are set forth in statute, as have been interpreted and applied numerous times by the Commission and occasionally reviewed by our State's appellate courts. Our State's Court of Appeals found that the Legislature enacted the CPCN regulatory requirements and processes into law in order "to help curb overexpansion of generating facilities beyond the needs of the service area."[24] With this overarching purpose and intent in mind, our State's Court of Appeals further noted that "the General Assembly used the term 'public convenience and necessity' to define the standard to be applied by the Utilities Commission to proposed facilities. In reviewing the Commission's application of the standard in other regulatory actions, the Court has held that public convenience and necessity is based on an 'element of public need for the proposed service.'"[25] The Court

[22] CCEBA's Letter in lieu of Initial Comments, p. 2

[23] Utilities' Joint Initial Comments, p. 12.

[24] *State ex rel. Utilities Commission v. High Rock Lake Association*, 37 N.C. App. 138, 140, 245 S.E.2d 787, 790 (1978).

[25] *Id.* (citations omitted).

went on to discuss the factors appropriate for Commission consideration in determining whether a CPCN should be granted:

> This act, codified as G.S. 62-110(c)-(f), directs the Utilities Commission to consider the present and future needs for power in the area, the extent, size, mix and location of the utility's plants, arrangements for pooling or purchasing power, and the construction costs of the project before granting a certificate of public convenience and necessity for a new facility. From these statutes and the case law, *it is clear that the purpose of requiring a certificate of public convenience and necessity before a generating facility can be built is to prevent costly overbuilding*. Environmental concerns were generally left to other regulatory agencies, except as they affect the cost and efficiency of the proposed generating facility.[26]

The Utilities, however, assert that the CPCN process's inquiry into overbuilding is no longer really necessary. They claim that the Carbon Plan will address the need for future resources, such as solar generation, making the CPCN process redundant.[27] A surface-level problem with this argument is that the Carbon Plan is only for the Duke Utilities; it does not address Dominion. More fundamentally, the Carbon Plan's high-level resource planning is certainly not a substitute for the CPCN process, otherwise Integrated Resource Planning proceedings would have long-since eliminated the need for subsequent CPCN proceedings. Just as IRP proceedings did not supplant—but rather supplemented[28]—CPCN

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[26] *Id.* at 140-141, 790 (emphasis added).

[27] Utilities' Joint Initial Comments, p. 8.

[28] *See, e.g.*, *Order Approving Integrated Resource Plans and REPS Compliance Plans*, Docket No. E-100, Sub 141, p. 55 (June 26, 2015) (finding, for example, "[t]hat the Cliffside Unit 6 Carbon Neutrality Plan filed by DEC is approved as a reasonable path for DEC's compliance with the carbon emission reduction standards of the air quality permit; provided, however, this approval does not constitute Commission approval of individual specific activities or expenditures for any activities shown in the Plan."); *Order Approving Integrated Resource Plans*, Docket No. E-100, Sub 88, p. 8 (April 4, 2001) ("As indicated in earlier IRP dockets, the Commission is of the opinion that the IRP review is intended to ensure that each utility is generally including all of the

(continued …)

proceedings, the Carbon Plan, even when coupled with a prior PBR process, cannot supplant the Commission's inquiry into whether a proposed transmission or generation capital project meets the standards required by North Carolina law for issuance of a CPCN.

Although CUCA and CIGFUR acknowledge that while the case can be made for the carbon emissions reduction standards prescribed in House Bill 951 to be a factor relevant for consideration in CPCN proceedings related to new electric generating facilities proposed consistent with a Commission-approved Carbon Plan, there exists no enabling statute, Commission practice, or Court precedent authorizing the consideration of a project's approval in the context of a PBR Application when deciding whether a proposed electric generating facility meets the standards required for issuance of a CPCN.

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

First, CUCA and CIGFUR briefly summarize each party's position in response to this question, as set forth in their respective initial comments.

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considerations in its planning as required by the Commission's Rules; that each utility is generally utilizing state-of-the-art techniques for its forecasting and planning activities; and that each utility has developed a reasonable analysis of its long-range needs for expansion of generation capacity. Also, the Commission is of the opinion that evaluations of individual DSM programs, certificates to construct new generating plants or transmission lines, and individual purchased power contracts should be handled in separate dockets from the IRP proceeding. Consistent with this view, *it should be emphasized that inclusion of a DSM program, proposed new generating station, proposed new transmission line or purchased power contract in the IRP does not constitute approval of such individual elements even if the IRP itself is approved*." (emphasis added); *Order Approving Integrated Resource Plans and REPS Compliance Plans*, Docket No. E-100, Subs 118 & 124, p. 20 (Aug. 10, 2010) ("While it should be clear at this point, the Commission reiterates that inclusion of a DSM or EE program, a proposed new generating station, a proposed new transmission line, or a purchased power contract in a utility's IRP filing does not constitute approval of any of those aspects of the plan even if the IRP as a whole is approved.").

Party	Answer	Quote
Public Staff	No.	"The Public Staff is in agreement with the comments filed by CUCA and CIGFUR, and is therefore filing this letter in lieu of comments."[29]
CUCA & CIGFUR	No.	"Both statutory and practical concerns mandate that a CPCN-dependent capital project can only be included in a MYRP after *the utility* has received the CPCN. Until the CPCN is transferred to the utility, the utility's ownership of the project is speculative, and costs of speculative capital projects should not be included in a MYRP. Therefore, the Commission should not approve cost recovery for a project that the utility does not yet own and, consequently, for which it does not yet hold the CPCN."[30]
NCSEA	Not ripe.	"NCSEA believes that the issue of whether a PBR Application could request cost recovery for capital projects for which a party other than the utility would be applying for a CPCN is not ripe yet."[31]
CCEBA	Not ripe	"CCEBA in particular agrees with NCSEA that … [this issue] is not ripe yet, for the reasons set forth in NCSEA's comments."[32]
Duke	Yes.	"Yes . . . [a] similar but alternative scenario could occur where the utility purchases an existing asset that does already have a North Carolina CPCN." Also, "[t]his approach would provide the Utilities the flexibility to plan for and manage their systems in the manner most beneficial to customers and, with respect to projects contemplated in the Duke Utilities' Carbon Plan and/or 2022 solar procurement, in the way most appropriate to meet the state's [sic] carbon reduction goals. This approach would also avoid forcing the utility to put off filing a PBR Application until it obtains CPCNs for all such projects, or file traditional rate cases in the interim between three-year PBR plans, both of which

[29] Public Staff's Letter in lieu of Initial Comments, p. 1.

[30] Initial Joint Comments of CUCA and CIGFUR, p. 7.

[31] NCSEA's Initial Comments, p. 3.

[32] CCEBA's Letter in lieu of Initial Comments, p. 2

		would frustrate the administrative efficiency goal of the statute to minimize rate case frequency."[33]

CUCA and CIGFUR respectfully reiterate the position set forth in their Joint Initial Comments that to allow cost recovery for a project for which the utility does not yet own would be far too speculative, particularly given that there currently is no ratepayer protection mechanism in place—either in law or Commission rule—to claw back costs recovered for projects that are never used and useful in the provision of electric service to customers, or for which costs were not reasonably or prudently incurred. The CPCN requirements currently in place will serve as an important procedural and substantive safeguard against the utility recovering costs it is not legally entitled to recover and/or overearning.

CONCLUSION

CUCA and CIGFUR respectfully request that the Commission consider the foregoing Reply Comments.

[33] Utilities' Joint Initial Comments, p. 15

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

/s/ Christina D. Cress
Christina D. Cress
N.C. State Bar No. 45963
BAILEY & DIXON, LLP
434 Fayetteville Street, Suite 2500
P.O. Box 1351 (zip 27602)
Raleigh, NC 27601
(919) 607-6055
ccress@bdixon.com

Attorneys for CIGFUR

/s/ Craig D. Schauer
Marcus W. Trathen
Craig D. Schauer
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, LLP
Suite 1700, Wells Fargo Capitol Center
150 Fayetteville Street
P.O. Box 1800 (zip 27602)
Raleigh, NC 27601
(919) 839-0300

mtrathen@brookspierce.com
cshauer@brookspierce.com

Attorneys for Carolina Utility Customers Association, Inc.

Certificate of Service

I hereby certify that a copy of the foregoing *Joint Reply Comments of CIGFUR and CUCA* has been served this day upon the parties of record in this proceeding by electronic mail.

This the 13th day of April, 2022.

BAILEY & DIXON, LLP

/s/ Christina D. Cress