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	))))	INITIAL JOINT COMMENTS OF CUCA AND CIGFUR REGARDING CPCN ISSUES

The Carolina Utility Customers Association, Inc. ("CUCA") and the Carolina Industrial Group for Fair Utility Rates I, II, and III ("CIGFUR"), by and through the undersigned counsel, respectfully submit these initial 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 respond 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."

INITIAL 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 address 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?

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.

Section 62-133.16(c)(1)(a) states that a MYRP shall include "costs associated with a *known* and measurable set of capital investments . . . associated with a set of discrete and identifiable capital spending projects *to be placed in service during the first rate year*." N.C. Gen. Stat. § 62-133.16(c)(1)(a) (emphasis added). Thus, the approval of any capital projects for the first year of a MYRP is conditioned on the project being "known" and being "placed in service during the first rate year." This language requires certainty—not speculation—concerning the identified capital project. Absent the utility already possessing a CPCN for a CPCN-dependent project, the project exists in the realm of speculation.[1] Projects that are aspirational—as opposed to "known"—do not qualify for inclusion in the MYRP.

Similarly, for years two and three of a MYRP, Section 62-133.16 allows rates to be increased only for "Commission-authorized capital investments that *will be* used and useful during the rate year[.]" N.C. Gen. Stat. § 62-133.16(c)(1)(a) (emphasis added). The General Assembly did not say the capital project "might be" or "could be" used and useful; it required the Commission to determine that the project "*will be*" used and useful. Again,

[1] "[T]he decision of whether to grant or deny a CPCN must rest upon substantive evidence; it cannot rest on speculation or sentiment." *Order Denying Certificate of Public Convenience and Necessity for Merchant Generating Facility*, Docket No. EMP-105, Sub 0, N.C.U.C. (June 11, 2020) (citing *Howard v. City of Kinston*, 148 N.C. App. 238, 246, 558 S.E.2d 221, 227 (2002)). Notably, this particular Commission Order was recently affirmed by the North Carolina Court of Appeals in *State ex rel. Utils. Comm'n v. Friesian Holdings, LLC*, 2022-NCCOA-32, ¶ 21-22 (2022) ("[T]he record reflects that the Commission did, in fact, carefully consider and weigh the potential for additional energy generation. Rather than disregard that consideration outright, *the Commission determined it was too speculative to support the approval of Friesian's CPCN* … In its discretion, the Commission concluded that the potential additional generation was subject to many variables and 'there is nothing in the record to conclude that any of the proposed generating facilities, much less all of them, *will actually be constructed and placed into service*.'" (emphasis added)).

this language requires certainty of the capital project. A proposed capital project that requires a CPCN is mere conjecture until the issuance of a CPCN.

Aside from the restrictive statutory language, the approval of recovery of a CPCN-dependent capital project before the issuance of a CPCN risks imposing unfair rates on consumers. The PBR rules, as approved by the Commission in the PBR Order, do not provide a means by which collected revenues may be refunded to ratepayers for rate-based generation projects that either are not ever built or are not placed in service during the applicable rate year. Indeed, the only recourse for ratepayers would be to the extent that the utility is overearning in the aggregate.[2] Thus, once a project is approved, the associated revenue will be collected, and there is no mechanism for refunds to ratepayers based on failure to obtain a CPCN to construct the project or obtaining a CPCN but failing to have it placed in service during the applicable rate year.[3] It would contradict both the PBR statute and legislative intent of House Bill 951 if ratepayers were charged for generation projects that do not result in property which is "used and useful during the [applicable MYRP] rate year" as required by Section 62-133.16(c)(1)a. and any such charges would not be "just and reasonable" as required by Chapter 62. *See* N.C. Gen. Stat. § 62-131 ("Every rate made,

[2] Under Section 62-133.16(c)1., a utility is subject to a refund obligation on excess earnings if its weather-normalized earnings exceed its authorized rate of return on equity plus 50 basis points. This calculation, of course, only applies to the extent that earnings exceed the 50 basis points allowance and is not dependent on spending associated with any particular project, even as to projects authorized in a MYRP.

[3] In the Joint Intervenor Supplemental Reply Comments filed in this docket, CUCA, CIGFUR and others advocated for adoption of a prudency requirement, which would have protected ratepayers from paying for prospective projects that were subsequently determined to be unneeded. *See* Joint Intervenor Suppl. Reply Cmt., at 11–13; *see also* CUCA Initial Comments, attachment titled "Implementing PBR with Customer Protections in North Carolina" by Synapse Energy Economics, at 12 (recommending a requirement, based on examples from other states, that MYRP include a proposal for returning any under-spend to customers through a rider or other mechanism).

demanded or received by any public utility . . . shall be just and reasonable."). Indeed, the PBR statute is clear that the authorization of alternative ratemaking structures does not override the Commission's existing statutory ratemaking functions and authority:

> Nothing in this section shall be construed to (i) limit or abrogate the existing rate-making authority of the Commission or (ii) invalidate or void any rates approved by the Commission prior to the effective date of this section. 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).

To avoid the legal and practical problems created by approving a CPCN-dependent capital project before the issuance a CPCN, the Commission should adopt a bright line rule: In order for a utility to recover the costs associated with any CPCN-dependent capital project, the utility must first obtain a CPCN before such costs may be included in base rates for an applicable MYRP rate year.

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?

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.

Regardless, there is no indication in the language of the PBR statute that the General Assembly intended the PBR process to be a substitute for the CPCN process, which, importantly, was not amended or modified by the enactment of House Bill 951 and therefore continues in effect according to its own terms. Unlike the ratified version enacted as Session Law 2021-165, earlier editions of House Bill 951 would have modified the applicability, in whole or in part, of the CPCN requirements set forth in Section 62-110.1. That these modifications did not make it into the codified version of this legislation is evidence of legislative intent for CPCN requirements to remain fully preserved and intact.[4] While there may be some relevance to a showing of "need" in the CPCN context to the utility's desire to recover costs associated with the investment under a MYRP, the extent of any such relevance and the weight, if any, that should be placed on such a circumstance should be resolved in the context of a specific proceeding. At a minimum, it is clear that the inquiry regarding "need" in the PBR context differs 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)), and not a standalone assessment or demonstration of "need" as that term has been interpreted and applied in the CPCN context.[5] While a utility's

[4] For example, the Third Edition of House Bill 951, had it been enacted into law, would have exempted Duke from the requirement set forth in Section 62-110.1(d) to provide information regarding its "arrangements with other electric utilities for interchange of power, pooling of plant, purchase of power and other methods for providing reliable, efficient, and economical electric service," at least to the extent the CPCN sought would be for replacement resources necessary as a result of the early retirement of Duke's coal fleet. H.B. 951, 3d ed., N.C.G.A. (2021 Session), at p. 4, ls. 38-39; p. 7, ls. 29-30. Moreover, the Third Edition of House Bill 951, had it been enacted into law, would have required the Commission to "provide an expedited decision on an application for a certificate of public convenience [for coal replacement] resources." *Id.* at 7, ls. 10-12.

[5] *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

desire to recover costs under a MYRP is some evidence that the asset is "needed" as part of the utility's own internal planning, it is not dispositive in determining whether the project satisfies the public convenience and necessity standard, nor whether the resource could be provided through some other means.

In contrast, the CPCN process is intended to scrutinize whether a project is needed to accomplish reliable and economic utility service. *See State ex rel. Utilities Comm'n v. Empire Power Co.*, 112 N.C. App. 265, 278, 435 S.E.2d 553, 560 (1993) (addressing CPCNs for generation projects). To this end, Commission Rules R8-61 and R8-62 require a CPCN application to include detailed site information, justifications for the project, agency approvals, construction dates, the utility's most-recent IRP, environmental concerns, and alternatives considered—among other various pieces of information. *See* Commission Rules R8-61(a), (b); R8-62(c). All of these are absent in the PBR context.

A prior determination on ratemaking should not significantly color the Commission's later, detailed assessment of whether a particular project satisfies the public convenience and necessity standard. Otherwise, the prior approval of cost recovery for a project could foreordain the Commission's subsequent issuance of a CPCN—rendering the CPCN process perfunctory. The General Assembly never intended the PBR process—with its cursory review of a proposed project for purposes of ratemaking—to supplant the Commission's obligation under Sections 62-110 and 62-110.1 to scrutinize separately, and in detail, the need of a proposed project.

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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)).

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?

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.

CONCLUSION

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

Respectfully submitted, this 16th day of March, 2022.

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Certificate of Service

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

This the 16th day of March, 2022.

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/s/ Craig D. Schauer