BEFORE THE NORTH CAROLINA UTILITIES COMMISSION
DOCKET NO. E-100, SUB 178

In the Matter of: Rulemaking Proceeding to Implement Performance-Based Regulation of Electric Utilities	))))))	**Reply Comments of North Carolina Justice Center, North Carolina Housing Coalition, Sierra Club, and Southern Alliance for Clean Energy Regarding CPCN Issues**

North Carolina Justice Center ("NC Justice Center"), North Carolina Housing Coalition ("NCHC"), Sierra Club, and Southern Alliance for Clean Energy ("SACE"), ("NC Justice Center *et al.*") respectfully submit the following reply comments pursuant to the Commission's Order Adopting Commission Rule R1-17B issued on February 10, 2022 (the "PBR Order"). NC Justice Center *et al.* have reviewed the joint comments filed by Carolina Utility Customers Association, Inc. ("CUCA") and the Carolina Industrial Group for Fair Utility Rates I, II, and III ("CIGFUR"), the North Carolina Sustainable Energy Association ("NCSEA"), and Duke Energy Carolinas, Duke Energy Progress, and Dominion Energy North Carolina (the "Utilities") regarding the three questions about certificates of public convenience and necessity ("CPCN") that the Commission raised in its PBR Order.

I. Whether the Commission may approve cost recovery within a multi-year rate plan ("MYRP") for capital projects for which a CPCN is required but has not been granted as of the date the performance-based regulation ("PBR") application is approved.

NC Justice Center *et al.* endorse the comments of CUCA, CIGFUR and NCSEA on this first question. In brief, N.C. Gen. Stat. § 62-133.16 from HB 951 allows the Commission to include in multiyear rate plan ("MYRP") rates only those utility plant and expenses that are "known and measurable." If a CPCN-dependent facility is merely proposed, without an approved CPCN, it cannot be said to be "known" or "measurable." Consequently, rates based on a such speculative investment cannot be just and reasonable. The Commission's adopted PBR rule does not provide for customer refunds, so customers would be at risk of paying for utility plant that is never built.

Importantly, HB 951 did not amend the CPCN section of the North Carolina Public Utilities Act. Consider how the Commission would handle the following scenario: a public utility builds a major transmission line that is otherwise subject to the requirements to obtain a CPCN under N.C. Gen. Stat. § 62-101 and Rule R8-62. This utility does not obtain a CPCN for that project. Could that utility reasonably expect to nevertheless obtain cost recovery for that asset in rates? We believe that it could not, and agree with the conclusions reached by CUCA, CIGFUR and NCSEA on this foundational issue.

NC Justice Center *et al.* disagree with the comments of the Utilities on this first Commission question. The Utilities posit that "the fundamental assessment of need and cost required under a PBR Application is coterminous with the fundamental assessment of need and costs required under a CPCN application." Utilities Comments at 4. Further, the Utilities argue that because there is no fundamental difference between the need and cost determination required under the PBR Application process and that required under the CPCN process, the Commission may approve cost recovery with a MYRP for a capital project that has not yet obtained a CPCN. *Id* at 6.

But an MYRP is not a substitute for the CPCN process. The focus in the CPCN is on the need for a project and its impact on the public. NC Justice Center *et al.* note that CPCN proceedings often involve the participation of parties directly affected by the construction of a transmission line or a power plant. It is not reasonable to expect such parties to participate in an MYRP proceeding, especially since the investment is less than "known and measurable." While it might be more convenient to delay the customary notice to these and all affected customers, this shortcut would not serve the public interest. In contrast, the central focus in an MYRP proceeding is the cost of the project and its effects on rates.

The Utilities also argue that "HB 951's policy goals promoting improved administrative efficiency and flexibility and minimizing regulatory lag support the Commission's ability to approve MYRP projects prior to receipt of CPCNs." Again, NC Justice Center *et al.* disagree. The Utilities seem to imply that the legislature

might support modification of the CPCN requirement in the name of reducing regulatory lag. But the legislature did not do that, even when given the chance to do so, as noted in the comments of CUCA and CIGFUR at page 8. As against the Utilities' argument, it is significant that the CPCN requirements in law were not modified in HB 951.

Finally, administrative efficiency is served in HB 951 by establishing a multiyear rate schedule. For a utility with a solid planning process, maintaining the requirement that a CPCN be granted before cost recovery begins does not increase regulatory lag. It is not necessary to demote the importance of certification, one of the original pillars of economic regulation of utilities.

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

On this question, NC Justice Center *et al.* endorse the comments of CUCA and CIGFUR and the comments of NCSEA. As discussed in response to Question 1 above, NC Justice Center *et al.* do not believe the Commission should ever find itself in this situation. The MYRP should be seen as the proceeding in which rates are set for certain projects that are "known and measurable." N.C. Gen. Stat. § 62-133.16(c)(1)(a). Projects get to be known and measurable as the product of utility planning and the determination of need by the Commission in a CPCN proceeding.

Putting the MYRP cart before the CPCN horse would warp this process. The CPCN process should be a determination of public need, developed without the overhang of premature rate recovery decisions. Reversing the order of events would be akin to allowing the utility to throw itself a forward pass. Thus, NC Justice Center *et al.* agree with CUCA, CIGFUR and NCSEA that the rate recovery status of a project should not be considered in a CPCN determination. That said, it is difficult to imagine how the Commission could ignore that customers are already paying rates for the subject of the CPCN application. There would be an added incentive or even pressure to grant the CPCN in view of what has gone before. This difficult situation illustrates why, from a regulatory policy perspective, cost

recovery should follow the grant of a Certificate of Public Convenience and Necessity and not the other way around.

III. Whether the parties anticipate that a PBR application could 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.

NC Justice Center *et al.* agree with the comments of CUCA and CIGFUR on this question: "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.*"* Comments of CUCA and CIGFUR at page 7. Thus, the issue is like the question posed in Commission Question 1 regarding whether such a future acquisition is "known and measurable." Because this is the standard for inclusion in rates that is required by HB 951, there is no reason to deviate from that practice for a PBR application. To reiterate, rates based on speculative investment will be permanent rates, not subject to refund, regardless of whether the investment is ever made.

For the same reason, NC Justice Center *et al.* disagree with the comments of the Utilities that argue the response to Question 3 should be yes. The Utilities justify this position as follows:

> HB 951 does not limit a MYRP to capital projects that the electric utility already owns; thus, the electric utility can include capital projects that it <u>anticipates</u> acquiring later in time during the MYRP, as long as the project would go in service during the MYRP period.

Comments of the Utilities at page 13. Emphasis added. Similarly, the Utilities argued that:

> Allowing a utility to request cost recovery approval through a PBR Application for such projects is also appropriate for the same policy reasons of efficiency and flexibility articulated in response to Question 1.

Comments of the Utilities at page 14.

Notably, the Utilities do not use the term "known and measurable" in their response to any of the Commission's three questions. Instead, the Utilities fall back on the "efficiency" argument referenced earlier. But Duke Energy's "efficiency" position collides directly with the long-standing principle in law and regulation, retained in HB 951, that just and reasonable rates require that future costs included in rates be "known and measurable." This bedrock principle should not be jettisoned in favor of alleged increased efficiency.

IV. Conclusion

NC Justice Center *et al.* respectfully request that the Commission consider these Reply Comments as it considers the answers to the Commission Questions relating to CPCNs raised in the PBR Order.

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

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CERTIFICATE OF SERVICE

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

This 13th day of April, 2022.

/s/ David L. Neal