STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 931
DOCKET NO. E-7, SUB 1032
DOCKET NO. E-100, SUB 179

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-2, SUB 931 Application by Carolina Power & Light Company, d/b/a Progress Energy Carolinas, Inc., for Approval of Demand-Side Management and Energy Efficiency Cost Recovery Rider Pursuant to G.S. 62-133.9 and Commission Rule R8-69 DOCKET NO. E-7, SUB 1032 Application of Duke Energy Carolinas, LLC, for Approval of New Cost Recovery Mechanism and Portfolio of Demand-Side Management and Energy Efficiency Programs DOCKET NO. E-100, SUB 179 Duke Energy Progress, LLC, and Duke Energy Carolinas, LLC, 2022 Biennial Integrated Resource Plans and Carbon Plan	)	INITIAL COMMENTS OF THE ATTORNEY GENERAL'S OFFICE

The North Carolina Attorney General's Office (AGO) respectfully submits these initial comments regarding the comprehensive review ordered by the Commission of Duke Energy Progress, LLC's (DEP) and Duke Energy Carolinas, LLC's (DEC and collectively, Duke or the Companies) demand-side management

(DSM) and energy efficiency (EE and collectively, DSM/EE) programs and the Companies' respective cost recovery mechanisms (Mechanism(s)).

BACKGROUND

On October 20, 2020, in Docket Nos. E-2, Sub 931, and E-7, Sub 1032, the Commission issued the Order Approving Revisions to Demand-Side Management and Energy Efficiency Cost Recovery Mechanisms (Order Approving Mechanisms), which approved the current versions of Mechanisms. The Commission directed the Public Staff to initiate a comprehensive review of the Mechanisms not later than May 1, 2024, unless requested to do so earlier by the Commission, DEC or DEP, or another interested party.

On May 16, 2022, Duke filed its proposed Carbon Plan in Docket No. E-100, Sub 179, which included a request that the Commission adopt measures that Duke stated would allow it to implement new DSM/EE programs more quickly and that would broaden the potential reach and, therefore, the energy savings of these programs. These proposed measures, which Duke labeled "enablers," included: (1) updating the inputs underlying the cost benefit test in the Mechanisms; (2) using an as-found baseline for EE measures; (3) broadening the definition of low-income customer; and (4) developing guidelines for expedited regulatory approval of DSM/EE programs (collectively, the Proposed Enablers).

After receiving testimony on the Proposed Enablers at the Carbon Plan expert witness hearing, the Commission stated in its Order Adopting Initial Carbon Plan and Providing Direction for Future Planning issued on December 30, 2022, in Docket No. E-100 Sub 179 (Initial Carbon Plan Order) that it was "persuaded by the Public Staff that all enablers related to the DSM/EE mechanism should be discussed within the context of a full DSM/EE mechanism review" and that it was "persuaded by the Public Staff's assertion that 'any modifications to individual components of the Mechanisms must take place in the context of a full, formal review of the entire Mechanisms, so that any impacts of other components of the Mechanisms can be analyzed at the same time.'" Initial Carbon Plan Order at 109-10. As a result, the Commission directed Duke to initiate a review of the Mechanisms within 120 days of the issuance of the Initial Carbon Plan Order.

On April 27, 2023, Duke filed a letter initiating the Commission-directed review of the Mechanisms.

On May 11, 2023, the Public Staff filed a letter reiterating its position that there should be a full, formal review of the Mechanisms.

On June 29, 2023, Duke hosted the first of many stakeholder meetings concerning its Proposed Enablers and review of the Mechanisms.

On September 7, 2023, in advance of the second planned stakeholder meeting, the Public Staff filed a Motion for Procedural Relief (Motion). In the Motion, the Public Staff expressed concern, based on discussions with Duke and other stakeholders, that Duke envisioned a time frame for stakeholder engagement and comments that did not provide sufficient time for intervenors to fully investigate, research, and analyze the Proposed Enablers, nor to conduct a full review of the Mechanisms. The Public Staff made two requests: (1) a schedule for comments to be due on January 26, 2024, and reply comments to be due by March

29, 2024, and (2) a requirement that the comments address, at a minimum, several topics, including but not exclusive of:

(a) the appropriateness of continuing to allow the Companies to collect net lost revenues in light of HB 951 and the Carbon Plan Order;
(b) what actions, if any, justify a utility incentive, as well as whether there should be limits imposed upon utility incentives, whether there should be a required savings threshold that must be met before incentives are earned;
(c) how savings and benefits should be calculated and valued, including whether non-energy benefits should be included in particular cost-effectiveness tests;
(d) definitional changes, including how to define “low income” customers, different program types, cost-effectiveness, and measure baselines;
(e) how to most effectively encourage industrial and commercial participation in DSM/EE programs;
(f) cost recovery issues such as the splitting of vintage years, whether vintage years should be considered complete after a certain period of time; and
(g) identify mechanism changes that would prioritize persistent, cumulative savings measures and reduce reliance on the achievement of short-lived behavioral measures.

Motion at 5-7.

On September 14 and 20, 2023, the Companies filed a Response and Request for Further Relief, respectively (collectively, Duke’s Response). The Companies sought two amendments to the relief requested: (1) that the Commission issue an order on the proposed revisions no later than the second quarter of 2024 so that the Companies could make the revisions effective for Vintage Year 2025; and (2) approval of a one-time reconciliation procedure that would allow the Companies to file Vintage Year 2025 projections in the 2025 DSM/EE rider proceedings but then true-up those projections for actual participation, costs, and results during the 2026 annual DSM/EE cost recovery proceedings.

On September 15, 2023, the Carolina Industrial Group for Fair Utility Rates II and III (CIGFUR) filed its own response to the Motion.

On September 26, 2023, the Public Staff filed a response to Duke's Response.

On October 30, 2023, the Commission issued an Order Granting Public Staff's Motion for Procedural Relief and Scheduling Technical Conference (Scheduling Order), which among other things agreed a comprehensive review of the Mechanisms was appropriate and scheduled a technical conference to be held on December 18, 2023. The Scheduling Order also ordered initial comments be filed by January 26, 2024, and reply comments be filed by March 29, 2024.

On December 18, 2023, the technical conference was held as scheduled. Both prior to and following the technical conference, various parties filed presentations and other related materials. Following the technical conference, the stakeholder process resumed, with the final planned stakeholder meeting held on January 11, 2024.

DISCUSSION AND RECOMMENDATION

Duke is statutorily required to "establish the least cost mix of demand reduction and generation measures that meet the electricity needs of its customers."[1] Accordingly, least cost demand-side management and energy efficiency measures are part of the mix. In turn, the Commission is required to approve "an annual rider . . . to rates to recover all reasonable and prudent costs" for demand-side management and energy efficiency (DSM/EE) measures, and to

[1] N.C.G.S. § 62-133.9(b); *see also* N.C.G.S. § 62-110.9.

allow the capitalization of all or part of the costs where such costs are intended to produce future benefits.[2] The Commission may also approve other incentives to reward utilities for adopting new DSM/EE measures, including: (1) "appropriate rewards based on the sharing of savings achieved by the demand-side management and energy efficiency measures," (2) "appropriate rewards based on capitalization of a percentage of avoided costs achieved by demand-side management and energy efficiency measures," and (3) any other incentives the Commission determines to be appropriate."[3]

The Commission's Scheduling Order directed initial comments be filed on or before January 26, 2024, and allowed comments to address, in relevant part but not exclusive of, the following:

> b. The appropriateness of continuing to allow the Companies to collect net lost revenues in light of HB 951 and the Initial Carbon Plan Order;
>
> c. What actions, if any, justify a utility incentive, as well as whether there should be limits imposed upon utility incentives, whether there should be a required savings threshold that must be met before incentives are earned, what metrics should be utilized in awarding incentives, whether the Mechanisms should contain both incentives and penalties like Performance Incentive Mechanisms, and the efficacy of incentive mechanisms in other jurisdictions;
>
> . . . .
>
> m. A one-time, non-precedential reconciliation procedure to allow Vintage 2025 projections to be filed in the 2025 DSM/EE rider proceedings and then trued-up to reflect actual costs and results during the 2026 annual DSM/EE cost recovery proceedings[.]

Scheduling Order at 6-7.

---

[2] N.C.G.S. § 62-133.9(d).
[3] *Id.*

At the outset, the AGO would note its appreciation of the extensive and robust stakeholder process engaged in this matter; the Companies repeatedly met with, and genuinely considered the feedback of, the AGO, the Public Staff, and the several other stakeholder groups in proposing and discussing numerous changes to be made to the current Mechanisms. As a result, there has been broad consensus, or at least lack of opposition, involving a variety of noncontroversial changes—including certain proposed revisions to language, definitions, and reporting requirements. The AGO believes the process has been constructive and productive.

In addition, the AGO submits the following comments for the Commission's consideration:

Net Lost Revenues

Net lost revenues (NLRs) are the revenue losses, net of marginal costs avoided at the time of lost kilowatt-hour (kWh) sales, that the Companies do not recover due to the implementation of new DSM/EE programs. Commission Rule R8-69 (c)(1) permits, but does not require, the recovery of NLRs in order to keep the Companies "whole" by making up for the revenue reduction due to DSM/EE programs. The Commission has long held that "net lost revenues are not a cost but, instead, a type of utility incentive that may be recovered in an annual rider pursuant to [N.C.G.S. §] 62-133.8(d)(2), assuming that recovery is found to be appropriate by the Commission."[4]

[4] Order Adopting Final Rules, *Rulemaking Proceeding to Implement Session Law 2007-397*, No. E-100, Sub 113, 95 (N.C.U.C. Feb. 29, 2008).

The AGO has reviewed and agrees with the position and proposed language put forth by the Public Staff related to the connection between NLRs and the residential decoupling rider. The Public Staff's proposal seeks to eliminate recovery of NLRs for residential programs through the DSM/EE mechanism when a decoupling rider is in place and is already performing this function. Said another way, because the decoupling rider already, and more accurately, makes Duke "whole," there is no need to apply another mechanism to attempt to do the same. This position echoes the recommendations advanced by the AGO in the Companies' last general rate cases. It also represents the position of the Performance Based Ratemaking (PBR) Study Group, which specifically recommended that:

> If North Carolina enacts revenue decoupling for electricity, the lost revenue adjustment mechanism (LRAM) associated with the existing EE/DSM incentive will no longer be needed and will need to be removed by the NCUC for the classes included in decoupling.[5]

For the reasons described below, recovery of NLRs for residential DSM/EE programs is no longer appropriate whenever a decoupling rider is in place.

First, eliminating recovery of NLRs when a decoupling rider is in place ensures accuracy. The decoupling rider is calculated using known and easily measurable values: target revenues per customer and actual revenues per customer. Under the Company's approach, the NLR impact would be calculated via Evaluation, Measurement and Verification (EM&V) and any NLRs recovered via the DSM/EE mechanism would later be removed from the decoupling rider on

[5] *Bateman, Laura, et al.*, PBR Regulatory Guidance: Implementation Suggestions for the NCUC from the North Carolina Regulatory Process (PBR Regulatory Guidance) at 24 (available at https://deq.nc.gov/media/17684/download).

a "dollar-for-dollar" basis with carrying costs to be calculated and included. In theory, these two approaches should lead to the same total revenues being collected, albeit via differing mechanisms.

However, the Companies' proposed approach relies on the EM&V calculations being completely accurate, as well as calculation and application of the exact—not presumed—carrying costs incurred over a precise time frame, when this is hardly assured.[6] The EM&V process has been referred to as "a labor-intensive exercise that can be contentious and litigious[.]"[7] And despite everyone's best efforts, "[u]ltimately, evaluation procedures do rely on some level of sampling, statistical analysis, and estimation."[8] There is simply no convincing reason to rely on these estimations.

The AGO does not recommend ceasing EM&V efforts, which may be useful for other purposes. However, at best, the Companies' approach might achieve what is already and always achievable under the decoupling rider but, even so, adds another layer of needless complexity. When there is already an accurate measure in place (at least for residential customers), there is no reason to risk

[6] Migden-Ostrander, J., and Sedano, R., *Decoupling Design: Customizing Revenue Regulation to Your State's Priorities*, Regulatory Assistance Project at 39 (2016) ("LRAM requires an accurate accounting of the net lost revenues associated with each utility program or measure through an evaluation, measurement, and verification (EM&V) process.").

[7] *Id.*

[8] Gilleo, Annie, et al., *Valuing Efficiency: A Review of Lost Revenue Adjustment Mechanisms*, American Council for an Energy-Efficient Economy at 19 (June 2015) (*Valuing Efficiency*) ("Allowing utilities to recover the revenues lost due to implementation of efficiency programs necessitates the need for accurate evaluation of programs . . . . Though evaluation procedures were already in place for efficiency programs in many states, when lost revenues were at stake the scrutiny became far greater.").

using a less accurate measure or to work from estimated calculations and, by lowering the stakes involved, EM&V results will be less likely to be a litigated issue.

Indeed, decoupling was contemplated, and recommended by certain parties, as a substitute during the very last DSM/EE review proceeding.[9] There, the Commission in its order recognized the same and "note[d] that HB 624 on multi-year rate plans for electric utilities, presently pending in the General Assembly, has received considerable debate[,]" and "conclude[d] that if the legislature is inclined to do so it could include consideration of decoupling in its deliberations on major changes in electric rate structures."[10] It has now done so, obviating the need to impose a duplicative, and more fallible, mechanism upon residential customers.

The Companies' approach also causes additional complexity due to the delay in the timing between the decoupling rider and the vintage years used to calculate DSM/EE NLRs, requiring and increasing—unnecessarily—regulatory lag as revenue calculations must be trued-up between future rider proceedings. The Companies, each as recently as their last general rate case, have lauded the benefits of using new tools to help eliminate regulatory lag and in implementing a decoupling mechanism, despite what had otherwise been a workable traditional ratemaking paradigm. As such, it is not clear why here the Commission would undo these benefits on the basis of inertia. Moreover, the Companies have not finalized precisely how they intend to true-up estimated and actual costs so both the

---

[9] Order Approving Revisions to Demand-Side Management and Energy Efficiency Cost Recovery Mechanisms, Nos. E-2, Sub 931, and E-7, Sub 1032, 13 (N.C.U.C. Oct. 20, 2020) (2020 DSM/EE Order).
[10] *Id.*

potential, recurring impacts they seek to minimize and their ability to do so are, at present, unknown. Such a practice also risks implicating concerns of cost-shifting where otherwise under decoupling those residential lost sales might well be made whole on an annual basis, and with less delay, by those very customers benefitting from the programs.

Second, the Companies' proposed approach essentially gives "two bites at the apple" to recover NLRs related to DSM/EE programs, thus making those revenues preferable to lost revenues that may be due to other types of conservation. By allowing recovery of NLRs only via decoupling, it ensures that the "utility is indifferent to changes in sales due to any factor, including efficiency programs or weather patterns."[11] The NERP PBR Study group recognized this potential friction and link between recovering net lost revenues under the DSM/EE mechanism or only under decoupling, noting that "[d]ecoupling goes a step further by removing the incentive/disincentive to increase or reduce sales in all situations."[12]

Finally, disallowing recovery of NLRs for residential DSM/EE programs whenever a decoupling rider is in place not only ensures accuracy but more timely accuracy. Eliminating the recovery of NLRs via the DSM/EE mechanism would ultimately enhance regulatory economy. The Commission would not need to address the Companies' lost revenues in both the DSM/EE mechanism and a subsequent decoupling proceeding but could instead utilize a single proceeding to accomplish the same result. Regulatory economy would also be served by

[11] *Valuing Efficiency* at 19.
[12] PBR Regulatory Guidance at 11.

lessening the probability of future litigation that might involve challenges related to the EM&V calculations used as well as to the process—and inherent lag—that must necessarily be created in order to properly and accurately reconcile differences between estimates and actuals.

During stakeholder discussions, the Companies opined that their method is preferable for a couple reasons. First, the Companies offered that their proposed approach is transparent and allows stakeholders to easily identify NLRs attributable to its DSM/EE programs and the financial impacts of the utility energy efficiency programs. This justification is not sufficient. Nothing about Duke's move to decoupling prevents the Companies from continuing to offer this transparency; nor is the actual collection of net lost revenues from DSM/EE programs necessary for the Companies to estimate and report the same to the Commission. Indeed, the consensus language put forward in this proceeding maintains robust EM&V and reporting requirements.

The Companies also argued that the recovery of NLRs through the DSM/EE mechanism is necessary because the decoupling mechanism is limited to the residential class. The Public Staff's and AGO's approach would, in the Company's opinion, create a discrepancy between how nonresidential and residential DSM/EE riders are reported and implemented—leading to confusion for less sophisticated nonresidential customers who, for whatever reason, would look to residential customers' bills and wonder why there are differences. But this justification ignores that there are already discrepancies between customer classes' bills and how each class's costs are assessed—there is no apples-to-apples comparison to be made in the first instance. This justification also ignores that under the Companies' preferred approach, more confusion will be injected into the decoupling rider in order to avoid the potential for confusion in the DSM/EE rider. Regardless, speculative confusion amongst classes of customers does not justify maintaining a—now unnecessarily complex—method of calculating costs that has no apparent benefit to the ratepayers actually bearing those costs.

The Commission should disallow recovery of NLRs for residential DSM/EE programs whenever a decoupling rider is in place.

Portfolio Performance Incentive (PPI)

Portfolio Performance Incentive (PPI) is currently defined as a utility incentive payment to the Companies that is a bonus or reward for adopting and implementing new DSM/EE measures or programs. The PPI is based on the sharing of avoided cost savings, net of program costs, achieved by those DSM/EE programs in the aggregate. PPI excludes net lost revenues. When authorized, Duke is allowed to collect a PPI for each vintage year, separable into residential, nonresidential DSM, and nonresidential EE categories. In general, and beginning in Vintage Year 2022, the amount of the preincome-tax PPI initially to be recovered for the entire DSM/EE portfolio for a vintage year is currently equal to 10.60% multiplied by the present value of the estimated net dollar savings associated with the DSM/EE portfolio installed in that vintage year.

The AGO has reviewed and agrees with the language recommended by the Public Staff regarding PPI. Under the Public Staff's proposed approach, the Companies would be able to earn a PPI only when they achieve savings above

1% of prior year eligible retail sales. The amount of the PPI would be based on the weighted average cost of capital and would increase to the weighted average cost of capital plus 25 basis points if the Companies achieve 1.5% or more of prior year eligible retail sales.

There are two key elements of the approach put forward by the Public Staff that should be incorporated into any PPI approved by the Commission. First, no PPI should be awarded if the Companies achieve fewer savings than the savings used for Carbon Plan modeling purposes. N.C.G.S. § 62-110.9 requires the Commission to develop a Carbon Plan "to achieve the least cost path consistent with this section to achieve compliance with the authorized carbon reduction goals." The Commission determined in its initial Carbon Plan that savings of 1% of prior year eligible retail sales was an appropriate starting point; the Commission was further "persuaded that Duke can achieve greater load savings than what the Market Potential Savings Studies identify and encourages Duke to continue to improve its efforts and aim higher than the current 1% of eligible load forecast."[13] As part of the Commission's Carbon Plan, the 1% of prior year retail sales represents the "least cost path" to achieving N.C.G.S. § 62-110.9. As such, the Companies should not be entitled to receive PPI when they fall short of that target.

The second key element of the Public Staff's approach is a move to a tiered approach. The current PPI rewards a flat percentage multiplied by the present value of the estimated net dollar savings associated with the DSM/EE portfolio installed in a given year. In contrast, the proposal put forward by the Public Staff

[13] Initial Carbon Plan Order at 106.

would award a set percentage that is increased if the Companies reduce the prior year retail sales by 1.5% or more. The Commission may wish to adopt additional tiers, but it is important to recognize that higher levels of savings are increasingly difficult once "low hanging fruit" is addressed.

The Public Staff's proposal finds further support in the Commission's 2020 DSM/EE Order previously revising the Mechanisms. There, the Commission noted that for future proceedings the parties were encouraged "to consider a step approach which could incrementally increase the incentive for additional energy savings and increased penalties for non-attainment of certain milestones . . . [,]" going so far as to "direct[] the Collaborative to study ways to implement a step approach to this type of incentive/penalty structure to potentially achieve even greater annual energy savings."[14] The Public Staff's proposal strikes the appropriate balance by only rewarding savings achievements beyond what the Companies are already required to achieve by law under the Carbon Plan, and also by incorporating a tiered approach into the incentive structure.

The Commission should adopt a tiered approach to PPI with the lowest level of reward being set at the level used for Carbon Plan modeling.

One-time reconciliation of Vintage Year 2025

Lastly, Duke proposes that the Commission approve the Companies' performing a one-time, nonprecedential reconciliation of Vintage Year 2025 to reflect all Commission-approved modifications to the Mechanism resulting from the

[14] 2020 DSM/EE Order at 12.

instant review. Without more information, the Commission should not order this extraordinary step.

In response to the Public Staff's Motion for Procedural Relief, the Companies filed their Response and Request for Further Relief, requesting that the Commission issue an order on the proposed revisions no later than the second quarter of 2024 so that the Companies could make the revisions effective for Vintage Year 2025, and that the Commission approve a one-time reconciliation during the 2026 annual DSM/EE cost recovery proceedings. The Companies explained that if their request is approved, this would mean that the current Mechanism(s) would remain in effect through the end of next year, and the Companies would file DEC Vintage Year 2025 and DEP Vintage Year 2025 projections for recovery of program costs, net lost revenues, and utility incentives in the upcoming 2024 annual rider proceedings under the existing Mechanism, N.C.G.S. § 62-133.9, and R8-69(f)(1)(ii)(a)-(e). Then, in the 2026 annual DSM/EE cost recovery proceedings under Commission Rule R8-69, the Companies would true up Vintage Year 2025's projections not only for actual participation, program costs and EM&V results through the Experience Modification Factor (EMF) rider, as is typically done under Commission Rule R8-69(f)(1)(iii)–(viii), but also for all modifications to the Mechanism approved by the Commission by the end of 2024.

The AGO agrees with the Public Staff that this request is premature and that there is not enough information to make an informed decision as to the appropriateness of this request. While the AGO is not per se opposed to a future reconciliation, it does not believe that it is in the public interest to agree in advance to impacts that are, at this time, unknown. Although the stakeholder process has been informative and beneficial, the cost savings and behavioral impacts of any revisions that will be ordered by the Commission remain unclear. Accordingly, the AGO cannot determine whether—let alone agree that—it is appropriate that the changes contemplated to be imposed in this proceeding should be applied retroactively or only prospectively. Further, the rationale for initiating the present proceeding was to identify changes that would enable additional savings from DSM/EE programs. It is not clear that the retroactive application of the mechanism changes would enable additional savings prior to those changes taking effect.

Without more, the Commission should not approve the Companies' performing a one-time, nonprecedential reconciliation.

Respectfully submitted this the 26th of January, 2024.

JOSHUA H. STEIN
ATTORNEY GENERAL

/s/ Derrick C. Mertz
Special Deputy Attorney General
dmertz@ncdoj.gov

/s/ Tirrill Moore
Assistant Attorney General
temoore@ncdoj.gov

N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602
Telephone: (919) 716-6000
Facsimile: (919) 716-6050

CERTIFICATE OF SERVICE

The undersigned certifies that he has served a copy of the foregoing INITIAL COMMENTS OF THE ATTORNEY GENERAL'S OFFICE upon the parties of record in this proceeding by email, this the 26th day of January, 2024.

/s/ Derrick C. Mertz
Special Deputy Attorney General