

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. E-100, SUB 178

In the Matter of		
Rulemaking Proceeding to Implement)	REPLY COMMENTS OF
Performance-Based Regulation of)	OF TECH CUSTOMERS
Electric Utilities)	

Intervenors Apple Inc., Meta Platforms, Inc., and Google LLC (collectively, “Tech Customers”), by and through counsel, respectfully submit these reply comments pursuant to the Commission’s Order Requesting Comments and Proposed Rules issued on October 14, 2021, as amended on November 24, 2021, regarding the adoption of rules to implement the Performance-Based Regulation (“PBR”) provisions of House Bill 951 (S.L. 2021-165).

OVERVIEW OF INITIAL COMMENTS

The Tech Customers find the initial comments in this docket to be thoughtful, helpful, and informative. Tech Customers agree with the comments, in particular those filed by the North Carolina Justice Center et al. and the Carolina Utility Customers Association, that the PBR process created by House Bill 951 differs significantly from the multiyear rate plans recommended by the North Carolina Energy Regulatory Process (“NERP”) and typically found in other jurisdictions—specifically, Section 62-133.16 does not mandate many of the ratepayer safeguards that normally accompany multiyear rate plans. Thankfully, and appropriately, Section 62-133.16 grants the Commission substantial discretion in crafting North Carolina’s final PBR rules and in considering and approving PBR plans. In writing the rules, the Tech Customers ask the Commission to vigilantly guard the indispensable role of stakeholders and exercise its discretion to create a PBR process protects and enhances this participation.

REPLY COMMENTS

In creating the process for a PBR application, two priorities should instruct each aspect of the resulting rule: stakeholder participation and utility transparency. In this regard, it is notable that, in contrast to the comments of other commenting parties, the comments and proposed rule of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (collectively, “Duke Energy”) seem designed to diminish these dual imperatives. Having reviewed the comments and proposed rules filed in the docket, the Tech Customers provide the following reply comments to highlight several key issues.

I. Tech Customers support the joint proposed rules by CUCA, CIGFUR, NCSEA, the N.C. Justice Center, the N.C. Housing Coalition, the Sierra Club, and SACE.

Prior to this submission, the Tech Customers were able to review a draft of the proposed PBR rules written by CUCA, CIGFUR, NCSEA, the N.C. Justice Center, the N.C. Housing Coalition, the Sierra Club, and SACE, using the Public Staff’s draft rules as the starting point (the “Joint Proposed Rule”). Although the Tech Customers did not have time to fully review and join in the filing of Joint Proposed Rule, the Tech Customers support the key principles reflected in the Joint Proposed Rule: protection of meaningful stakeholder participation in the PBR process and utility transparency in planning and expenditures. The Tech Customers note the contrast between the Joint Proposed Rule and the Public Staff’s proposed rule, on one hand, and Duke Energy’s vision of a “streamlined” process, on the other hand, an approach that limits the critical elements of participation and transparency.

II. Duke Energy wrongly prioritizes expediency over transparency.

One of the most striking aspects of the initial comments is the difference of approaches proposed by Duke Energy versus all of the other commentators. Duke Energy proposes an expedient process for securing multiyear rate plans with minimal public intrusion. Stakeholders of all backgrounds, in contrast, are in harmony in wanting a process that is efficient without sacrificing transparency and public involvement.

In this regard, the Tech Customers disagree with Duke Energy's assertion that one of the primary objectives of the PBR process is to reduce the administrative burden on a utility.¹ Duke Energy implies that stakeholder input is a mere inefficiency that must be eliminated; but, on the contrary, stakeholder involvement is required by any notion of administrative and regulatory fairness. Duke Energy's characterization of the purpose of the PBR process as intended to "reduc[e] the rate case burden" in the current regulatory approach² is supported nowhere in the enacting legislation.³ The phrase "rate case burden" is absent from the legislation. There are no statements of public policy supporting Duke Energy's reading of the statute. Indeed, contrary to Duke Energy's interpretation that the statute was intended to create a "streamlined regulatory process,"⁴ the statute contains numerous, specific regulatory requirements that create a burden on a utility seeking to propose adoption of a PBR plan.⁵ The statute also requires the Commission to perform its

¹ See DEC & DEP Initial Comments, at 6.

² See DEC & DEP Initial Comments, at 8.

³ See S.L. 2021-165, § 4(a).

⁴ See DEC & DEP Initial Comments, at 7.

⁵ See, e.g., N.C. Gen. Stat. §§ 62-133.16(d)(1), (2).

customary, thorough review of a utility’s request to increase rates, and even articulates a new, non-exclusive list of factors to consider in reviewing the utility’s request.⁶

Duke Energy also opposes stakeholder involvement in the annual review process, characterizing such involvement as creating a “mini rate case.”⁷ Duke Energy claims “the PBR process is not intended to layer on top of the existing base rate case process an ongoing audit of a utility’s activity throughout the three year-period.”⁸ Again, Duke Energy’s prioritization of efficiency over transparency was not shared by the General Assembly. Nowhere does the statute address the annual review process, much less reveal an intent to foreclose stakeholders from participating in an audit of Duke Energy’s annual activity. The Tech Customers support the Public Staff’s proposed PBR rules (and the Joint Proposed Rule) that provide for appropriate stakeholder involvement in the annual review process.

Duke Energy’s vision of a “streamlined” process could lighten the workload of PBR participants,⁹ but it would come at an unacceptable cost to North Carolinians: less transparency of a utility’s expenditures and scrutiny of its desired rate increases. House Bill 951 did not sacrifice ratepayer’s paramount interests for the utility’s goal of regulatory expediency.

⁶ *See id.* § 62-133.16(d)(1), (2).

⁷ DEC & DEP Initial Comments, at 6.

⁸ DEC & DEP Initial Comments, at 6.

⁹ *See* DEC & DEP Initial Comments, at 6.

III. The Tech Customers agree with rules that promote stakeholder participation and utility transparency.

Duke Energy seems to stand alone in advocating for a truncated PBR process. The Tech Customers join with other intervenors in asking the Commission to adopt rules that foster participation and transparency.

The Tech Customers support the Public Staff's proposal concerning the contents of an electric public utility's PBR application. The Public Staff's list of application materials is sufficiently thorough to allow the Commission, the Public Staff, and stakeholders to review and analyze the utility's plans, yet it is not overly burdensome on the utility. It presents a balanced approach.

The proposal of the Public Staff and CIGFUR to stagger the filing of PBR applications by utilities should be adopted.¹⁰ Pancaking PBR applications would strain the limited resources of the Commission, the Public Staff, and intervenors, which would undermine the ability to conduct a thorough review of the application. The Commission already requires staggering of applications in other contexts,¹¹ and the robust process stemming a PBR application should receive the same protections.

The Tech Customers also support the Public Staff's proposals that specifically enable meaningful participation in the PBR process, such as allowing stakeholder intervention in the technical conference¹² and the process for revising a rejected application.¹³ Tech Customers join in calling for the right to engage in discovery at the

¹⁰ Public Staff Initial Comments, at ¶ 6; CIGFUR I, II & III Initial Comments, at 10–11.

¹¹ See N.C.U.C. Rule R8-55(b), (c).

¹² Public Staff Proposed Rule, Subsection (d)(2).

¹³ Public Staff Proposed Rule, Subsection (g).

critical stages of a PBR application to facilitate meaningful stakeholder participation.¹⁴ These important elements were also included in the draft of the Joint Proposed Rule reviewed by Tech Customers.

Finally, the Tech Customers support the Public Staff's proposal (also found in the Joint Proposed Rule) to create a separate policy docket for stakeholders to investigate and advocate for policy goals that should be incorporated into Performance Incentive Mechanisms.¹⁵ A separate policy docket will accomplish two important objectives: it will allow sufficient time for discovery and consideration of suggested policy goals; and it will create an opportunity for the Commission to approve policy goals that Duke Energy must incorporate into proposed PIMs. In contrast, Duke Energy's proposal is that a utility has discretion over how many (and which) PIMs to include in its PBR application¹⁶—which gives the utility heavy influence over the policy goals to which it will be held accountable.

IV. Section 62-133.16 forecloses the proposal that a utility's MYRP rates can continue beyond the three-year approval period.

Duke Energy proposes that, at the conclusion of a three-year multiyear-rate plan period ("MYRP"), the utility's rates would continue forever at the level set in the third year of the MYRP.¹⁷ Such a proposal conflicts with the language of Section 62-133.16. The Tech Customers agree with the observations of CIGFUR and NCSEA as stated in their

¹⁴ Public Staff Proposed Rule, Subsection (g); CIGFUR I, II & III Initial Comments, at 15; NCSEA Initial Comments, at 16.

¹⁵ Public Staff Proposed Rule, Subsection (c).

¹⁶ Duke Energy Proposed Rule, Subsection (m)(5)(b).

¹⁷ Duke Energy Proposed Rule, Subsection (m)(10)(g); Public Staff Proposed Rule, Subsection (n).

initial comments that the PBR rules should make clear that upon the expiration of a MYRP, the utility's rates revert to the last rates approved through a general rate case.¹⁸

First, the statute limits a utility's PBR application to proposing "revenue requirements and base rates *for each of the years that a MYRP is in effect* or a method for calculating the same."¹⁹ The statute goes on to explicitly state that "[a]ny PBR application approved . . . shall remain in effect for a plan period of not more than 36 months."²⁰ This explicit restriction is buttressed by the requirement that the application address a "first rate year," and a "second rate year," and a "third rate year."²¹ Thus, the utility can propose rates only for the three years covered by the MYRP. The statute does not allow the utility to continue rates after the end of the third rate year.

Second, a utility cannot isolate one aspect of an approved PBR application to continue beyond the three-year period. A PBR application includes three components: (1) a decoupling rate-making mechanism, (2) one or more PIMS, and (3) a MYRP.²² These three components must all be included within the application and must all terminate at the end of the three-year period: "Any PBR application approved . . . shall remain in effect for a plan period *of not more than 36 months*."²³ Thus, the statute makes these three components inseparable: decoupling, PIMS, and a MYRP come into existence together, *and they expire together*. The statute does not empower the Commission to allow a utility

¹⁸ NCSEA Initial Comments, at 25; CIGFUR I, II & III Initial Comments, at 7–8.

¹⁹ N.C. Gen. Stat. § 62-133.16(c) (emphasis added).

²⁰ *Id.* § 62-133.16(f).

²¹ *Id.* § 62-133.16(c)(1)(a).

²² *See id.* § 62-133.16(c).

²³ *Id.* § 62-133.16(f) (emphasis added).

to perpetuate a PIM beyond the three-year period; nor can a utility continue a decoupling mechanism beyond the three-year period. Likewise, the Commission cannot authorize a utility to continue the rates in the approved MYRP beyond the three-year period.

Third, a reading of the statute that would separate a MYRP from an earnings-sharing mechanism is inconsistent with the statutory definition of a MYRP as

*a rate-making mechanism under which the Commission sets base rates for a multiyear period that includes authorized periodic changes in base rates without the need for the electric public utility to file a subsequent general rate application pursuant to G.S. 62-133, along with an earnings sharing mechanism.*²⁴

Likewise, in defining “performance-based regulation,” the statute makes clear that a MYRP necessarily includes an earnings-sharing mechanism.²⁵ In other words, the statute created an MYRP with two indivisible elements: a mechanism for base rates and a mechanism for earnings sharing. The statute does not contemplate the situation where MYRP rate increases continue in perpetuity in the absence of an accompanying earnings-sharing mechanism to protect ratepayers against overearning. Much less does the statute condone a utility charging its PBR rates after the three-year period without an obligation to share excessive earnings.²⁶

The General Assembly made clear that the approval of a PBR application is a packaged three-year deal. Section 62-133.16 does not authorize a utility to extract a favored

²⁴ *Id.* § 62-133.16(a)(5) (emphasis added).

²⁵ *See id.* § 62-133.16(a)(7) (“a multiyear rate plan, including an earnings sharing mechanism”).

²⁶ Based on the proposal of Duke and the Public Staff, a utility could finish its third year of an MYRP with an obligation to share an overage of earnings due to excessive rates, yet continue those excessive rates into a fourth year (and beyond) while escaping its obligation to share the undeserved earnings.

component of its PBR application and continue that component beyond the statutory period. Duke Energy cannot continue in perpetuity the rates from the third rate year of an approved MYRP.

V. The Commission should reject Duke Energy’s proposal to automatically approve deferred accounting in the absence of a prompt ruling.

Duke asks the Commission to make it an unyielding rule that, if the Commission fails to rule on a PBR application within 300 days, then the Commission will authorize “deferred accounting or such other mechanisms” that would allow the utility to recover revenue shortfalls from the delay.²⁷ The Commission should not adopt such a rule. First, there is no basis for this request in the statute. Section 62-133.16 states only that the Commission cannot suspend the implementation of proposed rates for longer than 300 days.²⁸ Second, the utility has the option of implementing temporary rates under bond; deferred accounting is not necessary.²⁹ Third, granting deferred accounting does more than merely compensate the utility for a delay in collecting revenues, it rewards the utility by providing an additional return on top of the delayed revenues. There is no statutory basis or practical need to automatically grant Duke Energy deferred accounting if a PBR process runs long.

CONCLUSION

The Tech Customers ask the Commission to adopt rules that allow for meaningful stakeholder participation and utility transparency in the PBR process.

²⁷ Duke Energy Proposed Rule, Subsection (m)(6)(d).

²⁸ N.C. Gen. Stat. § 62-133.16(d)(3).

²⁹ *See id.* § 62-135.

Respectfully submitted, this 17th day of December, 2021.

TECH CUSTOMERS



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Certificate of Service

I hereby certify that a copy of the foregoing *Reply Comments of Tech Customers* has been served this day upon all parties of record in this proceeding, or their legal counsel, by electronic mail or by delivery to the United States Post Office, first-class postage pre-paid.

This the 17th day of December, 2021.

BROOKS, PIERCE, MCLENDON,
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/s/ Marcus Trathen
